C.J.

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

Cause No. 225 of 1992

22-01-93

In the Matter of the Trusts Law (Revised)
In the Matter of the S. Trust

Mr. Robert Walker, Q.C. and Mr. Angus Foster for the Plaintiff
Mr. Ramon Alberga, Q.C. and Mrs. Maierhofer for the Guardian ad litem
Mr. McDonnell and Mr. Jones for the Trustee

JUDGMENT

The drafting of the "S Trust" (as I shall call it in an attempt to preserve the anonymity of the Settlor and the beneficiaries) has given rise to a number of difficulties of construction. I have already made orders on one summons issued by a beneficiary and a cross-summons issued by the trustee. I am now asked by the same beneficiary to make further orders restricted to one portion of an originating summons filed on the 24th June, 1992, and amended on the 15th October, 1992. The defendants to this summons are the trustee and the infant beneficiaries who appear through their guardian ad litem.

The trust deed is dated the 18th January, 1989, and on the same day the Settlor entered into a fee agreement with Cititrust (Cayman) Ltd. which is named in the trust deed as the original trustee. The Settlor was a 59 year old man in business in a substantial way. He had a wife who was over twenty years his junior and three children. All drafts of the trust deed were prepared by officers of Cititrust, its Swiss affiliate called Confidas or, in the case of the trust deed, by their Cayman attorneys. They were the subject of prolonged negotiation between the Settlor and a Mr. Whitehouse of Confidas. Both men were accountants. The Settlor was advised throughout by his London solicitors, but it is uncertain whether he received any advice in respect of the fee agreement. The Settlor was to his

knowledge seriously ill when negotiations on the trust began and was terminally ill by the date the trust deed and fee agreement were executed. The officers of Cititrust and Confidas were not aware of his illness. The Settlor died on the 28th February, 1989. All these facts have been agreed between the parties for the purposes of this hearing, but the relevance or admissibility of some of the facts recited is disputed in relation to the construction of the documents. My views in that regard will become apparent as I examine the arguments.

The purpose of this hearing is to determine on a true construction of the trust deed and the fee agreement and in the events which have happened (i) whether the fee agreement terminated on the Settlor's death or remains in force, and (ii) what remuneration Cititrust is entitled to charge since the Settlor's death.

That part of the trust deed which is relevant to this summons is paragraph (1) of Schedule IV to the deed. It reads:

"

SCHEDULE IV

REMUNERATION, INDEMNITY AND PROTECTION OF TRUSTEES

1. a) Any Trustee being a corporation shall be entitled to charge and be paid out of the Trust Fund and the income thereof, remuneration in accordance with a scale of fees agreed with the Settlor failing which in accordance with the Trustee's scale of fees from time to time in force and any such Trustee or its parents or any subsidiary or affiliate thereof may without accounting for any resultant profit act as banker and perform any services on behalf of the Trust Estate (including without limitation any company, partnership or other entity whose shares or ownership interests are comprised directly or indirectly in the Trust Fund) and on the same terms as would be made with a customer;

b) Any Trustee being a lawyer, chartered accountant or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional and other charges for business transacted, time spent and acts done by him or any partner of his in connection with the trusts hereof including acts which a Trustee not being in any profession or business could have done personally."

The fee agreement, as I have said, was executed on the same day as the trust deed. With appropriate amendments to avoid

identifying the Settlor it reads:

" THE (S) TRUST

Fee Agreement

(1) Cititrust (Cayman) Limited is prepared to act as Trustees to and administer the subject Trust and maintain the registered office facilities for its underlying subsidiaries for a flat annual fee of US$18,000 per annum. The initial fee for setting up the trust will be US$9,000 to include setting up on its computer details of the underlying companies.

(2) By way of memorandum it is noted that the companies to be added to the trust currently comprise 6 Liberian ship owning companies owning four Cyprus boat-owning companies, two Liberian cash holding companies one of which also participates in the shares of the Cyprus companies, one yacht owning company and one Liberian property owning company all of which are managed by (the Settlor) or his appointees.

(3) The initial fee covers Cititrust's fees for preliminary drafting, discussions with the client and consultations with the client's lawyers.

(4) Cititrust will prepare annual unconsolidated accounts for the Trust and generally deal with the circumstances of the Trusts affairs for the flat fee mentioned above. However this fee will only cover the following routines

a. Preparation of the aforementioned accounts

b. Settlement of the annual corporate taxes against reimbursement from the trust funds

c. Annual review of the relationship to include obtaining from the client both the latest financial statements and a confirmation of the Company's essential coordinates such as names of directors, officers etc.

d. Maintaining the registered office facility for each of the underlying subsidiaries. The financial statements for each company will be prepared by the client.

(5) This fee agreement will remain in force for a period of three years, and will be automatically renewed thereafter on a year by year basis taking into account of any inflation in costs by reference to the consumer price index. The agreement may also be adapted in the event that the circumstances of the trust materially change through for example the addition of further companies to be owned by the trust although no reduction of fees will take place below the presently agreed flat fee. Further companies added to the Trust over and above the present level will charged at a rate of US$2,000 per company based on 1988 fee rates adjusted for inflation. The trustees may also charge fees for work performed over and above the tasks set out in the preceding paragraph.

(6) The same basis for agreeing and charging fees will continue during the duration of the Trust."

The document was signed by the Settlor and Mr. Whitehouse and was dated. In the original document the paragraphs were not

numbered but for ease of reference I have adopted the numbers as they were referred to in argument.

Cititrust maintains that on a true construction of the trust deed and fee agreement the fee agreement terminated on the death of the Settlor and that since his death it may charge fees according to its ordinary scale. These fees would be considerably higher than those which may be charged under the fee agreement even though on the Settlor's death there is a much greater amount work to be done by the trustee for which under the agreement it falls to be paid on a quantum meruit basis.

The beneficiaries say that the fee agreement remains in force after the Settlor's death and they accept that the trustee is to be paid for all the extra work involved, but, they say, according to the terms of the fee agreement.

The trust deed was quaintly drafted; I said as much before in my judgment of the 7th October, 1991, on the earlier summonses. The fee agreement is likewise badly drafted; it contains glaring examples of bad drafting. In the first paragraph there is reference to "underlying subsidiaries" and thereafter, in the same context, to "underlying companies". This would send shudders up the spine of a Chancery draftsman. In paragraph (5) there is reference to "tasks set out in the preceding paragraph" whereas there is no reference in paragraph (4) to "tasks", only to "routines". But on this summons I am asked to construe the trust deed and fee agreement as they relate to the duration of the fee agreement. In construing the documents to ascertain whether they were intended to terminate on the settler's death I must take a common-sense approach. As Lord Upjohn said in Re Gulbenkian's Settlements [1970] A.C. 508, 522:-

> "The court starts by applying the usual canons of construction: words must be given their usual meaning, the clause should be read literally and in accordance with the ordinary rules of grammar. But very

> frequently, whether it be in wills, settlements or commercial agreements, the application of such fundamental canons leads nowhere, the draftsman has used words wrongly, his sentences border on the illiterate and his grammar may be appalling. It is then the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the Settlor's or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it. The fact that the court has to see whether the clause is "certain" for a particular purpose does not disentitle the court from doing otherwise than, in first place, try to make sense of it. "

Paragraphs (5) and (6) of the fee agreement contain no provision which could be construed as limiting the agreement to the duration of the Settlor's life. Paragraph (5) states expressly that the fee agreement will remain in force for three years and will be automatically "renewed thereafter on a year by year basis" with account to be taken of inflation. Paragraph (6) provides that the same basis for agreeing and charging fees will continue "during the duration of the Trust". "The same basis" can only mean the basis as referred to in the earlier paragraphs of the agreement.

There is provision in paragraph (5) for a review of the fees after three years to take account of inflation, and on an ongoing basis to take account of a material change in the amount of work to be undertaken by the trustee. There is nothing express or implied in these provisions to suggest that the fee agreement terminates on the death of the Settlor. Rather the express provisions in paragraphs (5) and (6) are to the contrary.

There is nothing in the preceding paragraphs of the fee agreement from which can be implied that the express provisions in paragraphs (5) and (6) fall on the Settlor's death. The reference to the Settlor by name in paragraph (2) is merely to

identify the companies which at the date of the fee agreement were managed by the Settlor or his appointees. It is not part of the operative provisions of the agreement. There is a reference in paragraphs (3) and (4) to "the client" which may well be a reference to the Settlor. On the other hand if "the client" was the Settlor why did the agreement not use his name as it did in paragraph (2)? Could not the word "client" mean one thing in paragraph (3), and another in paragraph (4)? After all paragraph (3) must relate to previous discussions whereas paragraph (4) relates to actions to be taken after the trust is in place. As soon as the trust deed was executed relationships between all various interested parties changed.

In paragraph 4(c) it is stated that the flat fee covers various routines one of which is the annual review of the relationship to include obtaining certain information from "the client". The "relationship" referred to is clearly the relationship of trustee and beneficiary which did not terminate on the Settlor's death. That the review was to include obtaining information from the Settlor does not mean that all other matters of review, not thereby included, were terminated on the Settlor's death. On his death the review ceased to include that information to be obtained from the client, but the review continued.

Paragraph 4 (d) lays down one of the "routines" to be covered by the flat fee, namely the maintenance of a registered office facility for each of the underlying subsidiaries. The paragraph then states that the financial statements for each company will be prepared by "the client". If "the client" referred to is the Settlor then on his death he clearly cannot prepare the financial statements for each company but that does not affect the "routine" of the trustee in maintaining the registered office facilities. If "the client" cannot prepare financial statements then someone else can, even if this may involve extra work for the trustee, which he can charge for under paragraph (5).

In my judgment nothing in these or any other of the provisions of the fee agreement implies a termination of the fee agreement on the Settlor's death.

Cititrust asks me to look at the trust deed and fee agreement together and would have me find that there are two phases of the trust, phase 1 commencing on the 18th January, 1989 to continue until the Settlor died or revoked or amended the trust and phase 2 commencing on the Settlor's death or on revocation or amendment of the trust. Cititrust urges me to construe that fee agreement as being effective during phase 1 and terminating on the commencement of phase 2. It is true that the dispositive provisions of the trust deed leave much power in the hands of the Settlor and pass greater duties to the trustee on the Settlor's death or serious incapacity. But there is nothing to suggest in the wording of the two documents that any distinction between the two "phases", if such there be, is transported to the fee agreement. The fee agreement makes provision for a flat fee to cover various basic duties and provides for an increase in fees for the trustee if the trustee's work increases. Undoubtedly the trustee's work would increase on the Settlor's death, but the fee agreement makes provision for fees to be paid on such an increase of work. It cannot be argued that during phase 1 the trustee's duties were restricted to those "routines" or "tasks" set out in the fees agreement. If this deed creates a trust as all parties agree it does, then the trustee undertook all the duties of a trustee on agreeing so to act. A flat fee was laid down for the trustee's performance of certain "routines" or "tasks" but any extra work undertaken by it in its capacity of trustee either in phase 1 or in phase 2, would be chargeable on a quantum meruit basis.

In short, a reading of the two documents does not demonstrate that the fee agreement is to terminate on the Settlor's death. Furthermore I am unable to imply any such limitation on the duration of the fee agreement. I find no

ambiguity in the two documents on the question of the duration of the fee agreement.

Could evidence of the circumstances surrounding the execution of the documents lead me to a different conclusion? First let me deal with the point raised as to what circumstances may be admitted in the construction of the documents. The plaintiff would have me apply the "armchair principle" to the construction of the documents and restrict the admissibility of surrounding circumstances to those which were viewed from the Settlor's armchair. I have been referred to a passage in Hawkins and Ryder on the Construction of Wills at p. 12 and the authorities therein recited to the effect that in construing a will the Court is entitled to put itself in the position of the testator and to consider facts and material circumstances known to him when he made the will. I have been invited to apply it to the present test of construction and to restrict my consideration to that of facts known to the Settlor alone. The argument goes that I cannot apply the test appropriate to a commercial contract because the trustee's right to remuneration is not based on contract; it springs from the Settlor's power to direct the terms on which his property is to be settled. I was, in this regard, referred to the following passage from the judgment of Fox LJ. in the English Court of Appeal decision of In re Duke of Norfolk's Settlement Trust [1982] 1 Ch. 61, 76-7:-

> "First, it is said that a trustee's right to remuneration under an express provision of the settlement is based upon a contract between the Settlor and the trustee which the trustee is not entitled to avoid; the benefit of that contract is to be regarded as settled by the trust instrument for the benefit of the beneficiaries. I find that analysis artificial. It may have some appearance of reality in relation to a trustee who, at the request of the Settlor, agrees to act before the settlement is executed and approves the terms of the settlement. But very frequently executors and trustees of wills know nothing of the terms of the will until the testator is dead; sometimes in the

> case of corporate trustees such as banks, they have not even been asked by the testator whether they will act. It is difficult to see with whom, in such cases, the trustees are to be taken as contracting. The appointment of a trustee by the court also gives rise to problems as to the identity of the contracting party."
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> "The position, it seems to me, is this. Trust property is held by the trustees upon the trusts and subject to the powers conferred by the trust to charge remuneration. That gives the trustee certain rights which equity will enforce in administering the trust. How far those rights can properly be regarded as beneficial interests I will consider later. But it seems to me to be quite unreal to regard them as contractual. So far as they derive from any order of the court they simply arise from the court's jurisdiction and so far as they derive from the trust instrument itself they derive from the Settlor's power to direct how his property should be dealt with."

That case did not concern the construction of the trust deed; it concerned the inherent jurisdiction of the Court to order an increase in the remuneration of trustees. It seems to me to be unrealistic to construe a document executed by two parties from the armchair of one of them. The fee agreement, albeit that it was made on the same day as the trust deed , and no doubt after negotiations which involved discussions on both documents, does not form part of the trust deed. The trust deed, in schedule VI para 1(a), gives power to the Settlor to agree a scale of fees with the trustee. The fee agreement is made in accordance with that power; but it is made as a separate agreement and does not form part of the trust instrument. In the construction of the fee agreement it is my view that the evidence of surrounding circumstances cannot be restricted to circumstances known only to the Settlor. It is more realistic and helpful if the Court looks at all the evidence of surrounding circumstances which are relevant to the transaction. Evidence is admissible of the factual background known to both parties at or before the date of the agreement, including evidence of the "genesis" and objectively the "aims" of the transaction (see

Prenn v. Simmonds [1971] 3 All ER 237). One must look at the aim of the transaction objectively from the point of view of both parties. Lord Wilberforce had this to say in the case of Reardon Smith Line Ltd. v. Hansen-Tangen [1976] 3 All ER 570, 574-5:-

> "It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively-the parties cannot themselves give direct evidence of what their intention was-and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. It is in this sense and not in the sense of constructive notice or of estopping fact that judges are found using words like 'knew' or 'must be taken to have known' (see, for example, the well known judgment of Brett LJ in Lewis v Great Western Railway Co."

Let us look at the circumstances surrounding the making of the fee agreement. The parties agree that the trust was intended to tie up the assets of the Settlor after his death in a way which was not possible under the law of his own domicile. The trust was settled in contemplation of his future death. Seasoned professionals, such as both parties to the fee agreement were, must, objectively, have contemplated a possible early death of the Settlor. Certainly both parties would hope for a delay in his departure from this life; but any reasonable party to such a transaction would have in his contemplation the possibility of an early expiry of the Settlor. It would have been so easy an exercise for the trustee to have insisted upon the insertion of a clause that the fee agreement terminate on the death of the Settlor that, speaking objectively, such cannot have been its

intention. Furthermore, viewed objectively, it is extremely unlikely that the Settlor would have gone to such great lengths to protect his assets for his family only to leave them to negotiate fees with the trustee on his death. Counsel for Cititrust manfully argued that on an objective view of the knowledge common to both parties I drew the opposite conclusion. With the respect to his arguments I cannot do so.

That I look at the circumstances known to both parties to the agreement does not mean I regard the fee agreement as a commercial contract; it does not detract from the other rules regarding the construction of trustee charging clauses. As was said by Vinelott J. in Re Orwell's Will Trusts [1982] 3 All ER 177, 179:

> "It is trite law that an executor or trustee is in general entitled to no allowance for his care and trouble. The rule applies to fees charged by a professional man for work done in his professional capacity. The harshness of the rule is normally if not invariably tempered in any well-drawn will or trust instrument by including an express charging clause. Such clauses are strictly construed. For instance, it has been held that a clause authorising a solicitor trustee to charge for his professional services will not authorise him to charge for matters which a layman is able to do personally (see Chapple, Newton v. Chapman (1884) 27 Ch D 584)."

This Court will be careful to protect the interests of beneficiaries against claims by trustees (see In re Duke of Norfolk Settlement Trusts (supra) per Fox L.J at p. 79)

A further rule of construction which operates to the prejudice of Cititrust's interpretation is to be applied only in cases of ambiguity and where other rules of construction fail. That is the contra proferentum rule: an instrument shall be construed more strongly against the maker thereof (see Chitty on Contracts 26th Edition at paras. 836 and 949).

For all these reasons I am unable to adopt the construction of the trust deed and fee agreement urged upon me by Cititrust: I would have to strain to do so. It is my judgment that the fee agreement did not terminate on the Settlor's death.

I have been invited to consider draft alternative forms of order pending my determination but it is as well to hear further argument from counsel before I formally adopt any given form. I shall also hear counsel on the question of costs.

At the request of counsel I adjourn the matter to a date to be fixed in the Registry.

Judge

GRAND COURT - CAYMAN ISLANDS

Dated this 22nd day of January, 1993