IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS

Consolidated Cause No: 458 of 1998

BETWEEN:

(1) PANDELIS CHRISTOS LEMOS
(2) MARIKA CHRISTOS LEMOS
(3) PANDELIS GEORGIOS LEMOS (formerly a minor but now of full age)
(4) ASPASIA GEORGIOS (A minor) (by David E. Long her next friend)
(5) AIKATERINI GEORGIOS LEMOS (A minor) (by David E. Long her next friend)

Plaintiffs

AND:

(1) COUTTS (CAYMAN) LIMITED
(2) COUTTS (JERSEY) LIMITED
(3) SEATON TRUSTEES INC. (a company incorporated in the Turks & Caicos Islands)
(4) PARTHENON TRUSTEES INC. (a company incorporated in the Turks & Caicos Islands)

Defendants

BEFORE: The Honourable Madam Justice Levers

APPEARANCES:
Counsel for the Plaintiffs: Mr. Francis Tregear QC and Mr. John Stephens instructed by Mr. Timothy Cooke and Mr. Angus Foster of Walkers
Counsel for the 1st & 2nd Defendants: Mr. David Blayney
Counsel for the Defendants: Ms. Ziva Robertson of Maples and Calder

HEARD: 2nd – 4th May, 2006

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

Levers, J.

By a Deed of Trust executed in 1984 Captain Pandelis Christos Lemos settled his Great Bay Shipping on professional trustees in the Cayman Islands for the benefit at their discretion of family members and charities. He dictated the terms which enabled him to direct its affairs during his lifetime.

Following the death of Captain Lemos in 1989, disagreement developed and in 1994 by a Settlement involving important amendments to the Trust Deed, consented to by the Grand Court on behalf of minor and ascertained unborn beneficiaries, a resolution was reached.

Four years later however, the present action was started by certain of the beneficiaries against these Trustees alleging loss of many millions of dollars through alleged mismanagement of the shipping business.

Two questions were determined in a pretrial ruling by the Chief Justice of the Grand Court who was upheld by the Court of Appeal of

the Cayman Islands. Both the Chief Justice and the Court of Appeal ruling on the implications and meaning of a section in the investment policy guidelines which was interpreted by the ruling. Details of this will be gone into later in the judgment.

Background

Suffice to say, it was the true construction of the Revised Deed of the Settlement of the Trofos Foundation and paragraph 3.1 of the Statement of Investment Policy and Guidelines that the Court was dealing with. Subsequently, the Plaintiffs applied to the Grand Court to amend the Amended Statement of Claim. This came against the background of information gathered as a result of discovery. The Grand Court permitted the re-amendment of the Statement of Claim in April 2005.

By Summons dated the 16th January, 2006 the Defendants ask for the following reliefs:

(1) The Defendants have leave to make all the re-amendments contained in the Re-Amended Defence which the Court determines are not consequential on the re-amendments of the Statement of Claim.

(2) The Court determine the date for filing of the Re-amended Reply

(3) Whether any revisions to the directions timetable are required consequent on the above;

(4) Such further or other directions this Court thinks fit; and

(5) The costs of this application shall be costs in the cause.

Prior to the hearing of the Defendants' Summons, the Plaintiffs alleged that the proposed re-amendment of the Defence was so vastly different to the original Defence and that they filed a Summons which sought the following relief:

1. The Defendants or each of them do by one or more proper officers or authorized persons having appropriate knowledge swear file and serve within 14 days one or more Affidavits setting out and explaining with full particularity the following:

    (1) Why the conventional meaning of paragraph 3.1 of the Statement of Investment Principles and Guidelines ("SIPG") now sought to be averred *inter alia* by paragraphs 1A, 3.1(1D), 3.3(6), 3.7 and 7.16 (a) of the

draft Re-Amended Defence dated 2 December 2005 ("the draft RAD") and said to have been agreed between and to have represented the mutual understanding of the parties at the time –

(a) was not set out in the Affidavit of Peter ap G. Stradling sworn on 8 March 1994 which exhibited the draft SIPG,

(b) was not explained to the Grand Court at the hearing before that Court on 8 and 9 March 1994 in Cause No. 479 of 1993, and

(c) was not expressly included in the draft of paragraph 3.1 of the draft SIPG presented to the Grand Court for its approval in place of the words actually used.

(2) Why the existence of the estoppel by convention and consequent conventional meaning of paragraph 3.1 of the SIPG sought to be pleaded at paragraphs 1A, 3.1(1D), 3.3(6), 3.7 and 7.16 (a) of the draft RAD was not explained to the Grand Court in the evidence placed before that Court for the hearing of the Plaintiffs' Originating Summons dated 27 October 1998 (Cause No. 731 of 1998).

(3) Why the existence of the said estoppel by convention and consequent conventional meaning of paragraph 3.1 of the SIPG was explained neither to the Grand Court nor to the Court of Appeal on the hearing and subsequent appeal of

the Preliminary Issues directed by the Grand Court on 2 January 2002.

(4) The basis on which the Defendants should be permitted now to plead the inconsistencies between the Defendants' case as previously pleaded and as now sought to be pleaded as identified in the Plaintiffs' skeleton argument dated 14 March 2006.

(5) The basis on which, and the reason why, the claim to the said estoppel comes to be made only in the draft RAD and was not made in either the Defence dated 30 October 1998 or the Amended Defence dated 8 March 2001.

2. The Plaintiffs may if so advised give notice in writing to the Defendants' attorneys within 14 days of service on them of such Affidavit(s) ordered by paragraph 1 above requiring the attendance for cross examination of the deponent to any such Affidavit.

3. As soon as possible after the expiry of 14 days after service of the aforesaid Affidavit(s) the parties shall endeavour to agree a date not earlier than [ ] days from the date of this Order but otherwise so soon as possible (but without taking into account the convenience of counsel) for the further consideration of the Defendants' summons dated 16 January 2006 on which the Court will hear any cross examination which may be required

by the Plaintiffs and give such further directions as may be appropriate on the Defendants' said summons.

4. If the Defendants fail to swear such Affidavit(s) as are ordered by paragraph 1 above, or the deponent to any such Affidavit fails to attend for cross examination when required to do so, the Defendants' summons dated 16 January 2006 shall be struck out.

5. The Defendants' summons dated 16 January 2006 shall be adjourned to a date to be fixed in accordance with paragraph 3 above.

After a hearing, the Court ruled that the Defendants were to file affidavit evidence as to the reason for the fundamental difference in the defence. The specific Order was as follows:

1. On or before 4pm 25 April 2006 the Defendants do by one or more proper officers or authorized persons having appropriate knowledge swear file and serve one or more Affidavits setting out and explaining with full particularity the following:

   (1) Why the conventional meaning of paragraph 3.1 of the Statement of Investment Principles and Guidelines ("SIPG") now sought to be averred *inter alia* by paragraphs 1A, 3.1(1D), 3.3(6), 3.7 and 7.16(a) of the draft Re-Amended

Defence dated 2 December 2005 ("the draft RAD") and said to have been agreed between and to have represented the mutual understanding of the parties at the time –

(a) was not set out in the Affidavit of Peter ap G. Stradling sworn on 8 March 1994 which exhibited the draft SIPG,

(b) was not explained to the Grand Court at the hearing before that Court on 8 and 9 March 1994 in Cause No. 479 of 1993, and

(c) was not expressly included in the draft of paragraph 3.1 of the draft SIPG presented to the Grand Court for its approval in place of the words actually used.

(2) Why the existence of the estoppel by convention and consequent conventional meaning of paragraph 3.1 of the SIPG sought to be pleaded at paragraphs 1A, 3.1(1D), 3.3(6), 3.7 and 7.16 (a) of the draft RAD was not explained to the Grand Court in the evidence placed before that Court for the hearing of the Plaintiffs' Originating Summons dated 27 October 1998 (Cause No. 731 of 1998).

(3) Why the existence of the said estoppel by convention and consequent conventional meaning of paragraph 3.1 of the SIPG was explained neither to the Grand Court nor to the Court of Appeal on the hearing and subsequent appeal of

the Preliminary Issues directed by the Grand Court on 2 January 2002.

(4) The basis on which the Defendants should be permitted now to plead the inconsistencies between the Defendants' case as previously pleaded and as now sought to be pleaded as identified in the Plaintiffs' skeleton argument dated 14 March 2006.

(5) The basis on which, and the reasons why, the claim to the said estoppel comes to be made only in the draft RAD and was not made in either the Defence dated 30 October 1998 or the Amended Defence dated 8 March 2001.

2. Further consideration of the Defendants' Summons be adjourned to Monday, 1st May, 2006 or so soon therefore as may be convenient to the Court, to be heard by Mrs. Justice Levers.

3. There be liberty to the Plaintiffs to apply on short notice for a direction (such application to be heard if made at the commencement of the adjourned hearing of the Defendants' Summons) that all deponents to the Affidavit(s) ordered to be sworn and filed by paragraph 1 above be tendered for cross examination (including if so advised Mr. Andrew Jones QC and Mr. Andrew Hughes).

4. The Defendants are to take all reasonable steps to ensure that all such deponents as aforesaid are available for cross

examination at the adjourned hearing of the Defendants' Summons unless previously informed in writing by the Plaintiffs' attorneys that such attendance is not required.

5. The Defendants' application (1) for leave to appeal this Order and (2) that this Order be stayed, are each refused.

6. The costs of the Plaintiffs' Summons and today's hearing are reserved to the further consideration of the Defendants' Summons.

7. There be general liberty to apply.

In response to this the Defendants filed the affidavit of the attorney of record of Mr. Andrew Jones, QC. Details of this evidence shall be discussed at a later stage, but for purposes of the Order, the Court was of the opinion that this did not suffice, not being deposed to by the Defendants as ordered and required the Defendants themselves to comply with the Order.

The Defendants subsequently filed affidavits. The sufficiency of the response is a question that the Court must rule on. In any event, the matter proceeded for hearing as the Plaintiffs based on the affidavit

evidence found there was no need for cross-examination. To understand this case it is important to review the background to it.

This action was commenced by Writ on the 29 July 1998, the First and Second Plaintiffs and their father had concerns about the poor and rapidly worsening performances of the Foundation's Shipping Investment.

By July 1998, the First to Fifth Defendants commenced an action by issuing a Writ at the end of that month.

In November 1998, an Originating Summons was issued in the Grand Court seeking the Court's directions as to whether the ships by now six in number being three from 1987 fleet and three ships from the 1997 fleet should be sold and the Defendants be removed as Trustees.

In November 1999, when the Originating Summons finally came up for hearing, a resolution was reached dividing the Foundation into four parts. One for the family of each of Captain Lemos' four

children. Two documents play an important role in this dispute. One is the Statement of Investment Policy and Guidelines in particular section 3.1 and the other is the Revised Settlement. It is I think worthy of quoting both fully. The Statement of Investment Policy and Guidelines in particular section 3.1 reads:

> "The Trustees shall operate a fleet of bulk carriers so long as they duly consider that such operations are capable of generating an adequate long term return on capital employed. The Trustees are not to engage in the trade of buying and selling vessels for profit."

The Revised Settlement stated:

> "Provided that the Trustee shall have complied with its stated investment policy and guidelines in relation to the Shipping Capital Fund, the Trustee shall not be liable or accountable in any manner etc. "

The Settlement therefore was understood and reached on the basis of section 3.1 and the Revised Settlement.

The Trustees now seek to introduce another document, which they have had for the last 7 ½ years, but have now pleaded it for the first time, known as the CARD Memorandum. CARD because it was

drafted by Charles Adams Ritchie & Duckworth on behalf of two of the minor beneficiaries. That Memorandum reads thus:

Paragraph 8:

> "Continuing the shipping business: It is agreed that the shipping business should not be continued if unprofitable, so long as an appropriately long view is taken. We understand that market conditions from time to time require ships to be laid up, sometimes for several years. There should be no question of the new rules forcing the trustees to sell ships in an unfavourable market. If the shipping business is profitable, the trustees should not be constrained by the new rules to close it down on the grounds that alternative investments hold out higher returns and/or lower risks. It seems to us that the Investment Policy, in its latest form, is consistent with the approach we advocate but we would like to know whether others construe it differently."

I shall leave those documents without comment at this stage. The issue between the parties is a relatively simple one, in that, the Plaintiffs' claim that what the Defendants wish to do now is plead a fundamentally different case - that the CARD Memorandum has been a document since 1994, recording a meaning of paragraph 3.1 of the SIPG in terms, which was very different to the actual words of section 3.1. Section 3.1 of the Investment Policy and Guidelines is an agreement reached by the parties with the approval of this Grand Court and the Plaintiffs claim that the Trustees now wish to

fundamentally change their Defence. They submit that it is an abuse of process and should not be allowed.

The Trustees on the other hand submit that they should not be shut out and that all the outstanding questions of construction should go to trial.

The Plaintiffs' Case

At the very heart of this complex litigation are the Trustees' decisions in 1994 to continue to operate the fleet of ships purchased by the Foundation in 1987 and to commit the Foundation to purchase 3 new bulk carriers for delivery in 1997. The issue is whether these decisions on the part of the Trustees constituted breaches of the Statement of Investment Policy and Guidelines and breach of a trust. The Plaintiffs allege wilfull neglect under the terms of the Revised Settlement Deed in accordance with paragraph 3.1 of the Statement of Investment Policy and Guidelines.

In response to the allegations of neglect in 1998, the Trustees pleaded a clear and detailed factual defence. Paragraph 7.8 of the Defence in 1998 stated that:

> "When deciding on 18th November, 1994 to order three new Panamax bulk carriers, the Trustees took into account and were entitled to take into account the following factors-
>
> (a) during the period from 1987 to 1994:
>
> i. the average return generated on the shareholder's investment in the 1987 fleet was approximately 9% per annum assuming accumulated depreciation of approximately US$22 million (as reflected in the audited financial statements of Triarchos which were annexed to the Seaton Report in summary form); and
>
> ii. the average return generated on the shareholder's investment in the 1987 fleet was in fact approximately 20% per annum given that the actual value of the 1987 Fleet as at 30th April, 1994 was approximately US$50.25 million (as reflected in the C.W. Kellock & Co. Ltd.'s valuation dated 26th April, 1994),
>
> particulars of which are contained in Schedule 4;
>
> (b) during the period from 1990 to 1994, the General Capital Fund had generated an average return on the shareholder's investment of approximately 6.8% per annum, particulars of which are contained in Schedule 5;
>
> (c) the Seaton Report projected an average return on the shareholder's investment in the 1997 fleet of approximately 16% per annum over the first five years of its operation, particulars of which are contained in Schedule 6;
>
> (d) the Seaton Report projected an average return on the shareholder's investment in the 1987 fleet over the first fourteen years of its operation of approximately 20%, assuming that the vessels have retained their capital value or approximately 8.6% assuming straight line depreciation of their

capital value over 15 years, particulars of which are contained in Schedule 7;

(e) freight rates had risen from approximately US$10,500 per day net in July 1994 to approximately US$11,500 per day net in November 1994, and the anticipated purchase price of new vessels had correspondingly increased from US$26 million in July 1994 to US$28 million in November 1994, with the result that the cash surplus would be no worse than that projected by the Seaton Report;

(f) the Trustees considered that the return on the shareholder's investment in the 1987 fleet to have been adequate and they anticipated that the 1997 fleet would generate a similar return, not the 8% erroneously stated in their letter of 7th July 1998;

(g) the facts and matters pleaded in paragraph 7.6 above;

(h) by reason of the facts and matters pleaded in paragraph 3.1 above, the addition of three vessels would not give rise to any material increase in the cost of managing the fleet; and

(i) Christos and George Lemos concurred with the Trustees' decision."

In this context paragraph 7.36 of the Amended Defence also pleaded as follows:

"When deciding on 18th November 1994 to order three new Panamax bulk carriers, the Trustees took into account and were entitled to take into account the following factors:

(a) during the period from 1987 to 1994:

i. the average return generated on the shareholder's investment in the 1987 fleet was approximately 9% per annum assuming accumulated depreciation of approximately US$22 million (as

reflected in the audited financial statement of Triarchos which were annexed to the Seaton Report in summary form); and

ii. the average return generated on the shareholder's investment in the 1987 fleet was in fact approximately 20% per annum given that the actual value of the 1987 fleet as at 30 April, 1994 was approximately US$50.25 million (as reflected in the C.W. Kellock & Co. Ltd.'s valuation dated 26th April, 1994),

particulars of which are contained in Schedule 4;

(b) during the period from 1990 to 1994, the General Capital Fund had generated an average return on the shareholder's investment of approximately 6.8% per annum, particulars of which are contained in Schedule 5;

(c) the Seaton Report projected an average return on the shareholder's investment in the 1997 fleet of approximately 16% per annum over the first five years of its operation, particulars of which are contained in Schedule 6;

(d) the Seaton Report projected an average return on the shareholder's investment in the 1987 fleet over the first fourteen years of its operation of approximately 20%, assuming that the vessels have retained their capital value or approximately 8.6% assuming straight line depreciation of their capital value over 15 years, particulars of which are contained in Schedule 7;

(e) freight rates had risen from approximately US$10,500 per day net in July 1994 to approximately US$11,500 per day net in November 1994, and the anticipated purchase price of new vessels had correspondingly increased from US$26 million in July 1994 to US$28 million in November 1994, with the result that the cash surplus would be no worse than that projected by the Seaton Report;

(f) the Trustees considered that the return on the shareholder's investment in the 1987 fleet to have been adequate and they anticipated that the 1997 fleet would generate a similar return, not the 8% erroneously stated in their letter of 7th July 1998;

(g) the facts and matters pleaded in paragraph 7.34 above;

(h) by reason of the facts and matters pleaded in paragraph 5.1 above, the addition of three vessels would not give rise to any material increase in the cost of managing the fleet; and

(i) the Family, including Christos and George Lemos concurred with the Trustees' decision."

The Re-Amended Defence that the Trustees now wish to file, as far as that paragraph is concerned reads as follows:

"When deciding ~~on 18th November 1994~~ to order three new Panamax bulk carriers, the Trustees acted properly into taking into account the matters which they did in fact take into account, and would have found their decision to be further reinforced if they had taken additional expert advice.~~took into account and were entitled to take into account the following factors:~~

~~(a) during the period from 1987 to 1994 –~~

~~(i) the average return generated on the shareholder's investment in the 1987 fleet was approximately 9% per annum assuming accumulated depreciation of approximately US$22 million (as reflected in the audited financial statement of Triarchos which were annexed to the Seaton Report in summary form); and~~

~~(ii) the average return generated on the shareholder's investment in the 1987 fleet was in fact approximately 20% per annum given that the actual value of the 1987 fleet as at 30th April, 1994 was approximately US$50.25 million (as reflected in the C.W. Kellock & Co. Ltd.'s valuation dated 26th April, 1994),~~

~~particulars of which are contained in Schedule 4;~~

~~(b) during the period from 1990 to 1994, the General Capital Fund had generated an average return on the shareholder's investment of approximately 6.8% per annum, particulars of which are contained in Schedule 5;~~

~~(c) the Seaton Report projected an average return on the shareholder's investment in the 1997 fleet of approximately 16% per annum over the first five years of its operation, particulars of which are contained in Schedule 6;~~

(d) the Seaton Report projected an average return on the shareholder's investment in the 1987 fleet over the first fourteen years of its operation of approximately 20%, assuming that the vessels have retained their capital value or approximately 8.6% assuming straight line depreciation of their capital value over 15 years, particulars of which are contained in Schedule 7;

(e) freight rates had risen from approximately US$10,500 per day net in July 1994 to approximately US$11,500 per day net in November 1994, and the anticipated purchase price of new vessels had correspondingly increased from US$26 million in July 1994 to US$28 million in November 1994, with the result that the cash surplus would be no worse than that projected by the Seaton Report;

(f) the Trustees considered that the return on the shareholder's investment in the 1987 fleet to have been adequate and they anticipated that the 1997 fleet would generate a similar return, not the 8% erroneously stated in their letter of 7th July 1998;

(g) the facts and matters pleaded in paragraphs 7.34 above;

(h) by reason of the facts and matters pleaded in paragraph 5.1 above, the addition of three vessels would not give rise to any material increase in the cost of managing the fleet; and

(i) the Family, including Christos and George Lemos concurred with the Trustee's decision. "

The Re-Amended Defence comes after the amendment by the Plaintiffs alleging wilfull neglect. As part of the case on construction, the Trustees now seek to make the positive case that they were not required to consider any comparative returns and indeed, they were not even permitted to do so. They were required to continue the shipping operations so long as such operations were duly considered

to be capable of generating an adequate long term return on the capital employed.

The Trustees' case is that all that meant was that the operation of the fleet had to be profitable. The Trustees now say that the true meaning of paragraph 3.1 varies from its apparent meaning, in seven ways:

(1) The Trustees' "obligation" to operate ships.
(2) An expanded fleet being within the expression "a" fleet.
(3) Adequate return on capital employed.
(4) The most favourable of reasonable hypotheses as to future conditions.
(5) Making a commercial appraisal.
(6) Acting as reasonable and prudent men of business was "not material" and of no application.
(7) Trustees positively not to consider risk or alternative available returns.

They now say this against the background that the preliminary points heard by the Court of Appeal and the Grand Court were based on a strict interpretation of paragraph 3.1 and 3.1 alone and also based on their specific defence as pleaded in the Defence and Amended Defence. In short the Trustees now say that the core averment on construction is that the fleet should be profitable rather than it should

be capable of generating an adequate long-term return on capital employed. It is against this background that the affidavits were filed by the Trustees in an attempt to explain the variance. However, none of the Trustees saw the CARD Memorandum, but miraculously seem to agree with the interpretation of the legally drafted memorandum. That for purposes of this application is irrelevant. Their agreement now is not relevant. What is important is that this memorandum did not play a role in the decision making by the Trustees at the relevant time. According to the affidavit evidence all save one of the decision makers had not seen this memorandum. It is not for me at this stage to decide on the merits of the issues. It is however for me to decide whether the variance is such that it is tantamount to an abuse of process. Is there a difference between a commercial decision and the decision making process, as specified in the Statement of Investment Policy paragraph 3.1? Was there an obligation to carry on with the shipping business and if so, does the word "obligation" fit in with the terms of paragraph 3.1? What steps were needed to be taken to make an adequate return on capital employed? Is it now being said that they did not do what was said in the previous Amended Defence and that it was a general commercial decision that

was taken? The Plaintiffs therefore submit that the only conclusion that can be drawn is that the Trustees are not prepared to come clean and disclose what the mistakes in the pleadings were and how they came about. They submit that the affidavit evidence is lacking an explanation. The Trustees also have pleaded estoppel by convention. They submit briefly that the CARD Memorandum was seen by all parties and in particular by the two attorneys on behalf of two of the Plaintiffs and that since they did not object to it, there was tacit consent. They have also produced a telephone record note of what was allegedly discussed on the telephone as proof of tacit consent. The Plaintiffs submit that that record is inadequate as nothing is said about consent by either party and the Plaintiffs also submit that the fact that the attorneys did not comment on the document, may be for several reasons:

(1) They may have thought the document irrelevant.

(2) It was not the crux of the litigation.

(3) The memorandum was circulated but as it was not discussed in any detail, the attorneys may not have wished to incur further costs by going into the matter, as it was clear that paragraph 3.1 of the Statement of

Investment Policy and Guidelines was the only guideline that was being utilized for purposes of any interpretation of the Trustees' duties.

(4) Therefore they submit that on that limb alone it is useless to plead estoppel by convention. Further, they say that the evidence shows clearly that none of the Trustees whose minds were the directing minds of the decisions, saw the memorandum and that that cannot be estoppel by convention. There was no common understanding, they say.

The Defendants' Submission

Mr. Blayney on behalf of the Defendants submits that the non-consequential re-amendments provide further particulars of some of the points in the Amended Defence and reflect the Defendants' desire to set out with greater detail an answer to the claim on the merits. Following the failure of their attempt to establish a knockout answer to the claim at the preliminary issue stage, he submits that the re-amendments explain and amplify the Defendants' case as to the true construction of the Revised Settlement and Statement of Investment Policy and Guidelines, the relevant factual chronology, the conclusions which would have been drawn from additional shipping and other financial expert advice if sought and the way in which

compensation is to be calculated if liability is established. He submits that they are not abandoning the Statement of Investment Policy and Guidelines as stated by the Plaintiffs. The Plaintiffs say that the Trustees from the 1994 Compromise were required to invest all the Foundation's assets including the assets comprised in the shipping fund so as to achieve the best return. Thus, they say that it was not enough for the shipping to be profitable.

The Defendants say that the Plaintiffs' construction of the document is fundamentally at odds with its true meaning and effect, particularly when read in the light of the admissible evidence regarding the context and purpose of the 1994 Compromise.

The Defendants say that the Plaintiffs' arguments is inconsistent with Clause 16.5 of the Revised Settlement which reads:

> "Provided that the Trustee shall have complied with its stated investment policy and guidelines in relation to the Shipping Capital Fund, the Trustee shall not be liable etc."

The Defendants do not accept that the Defendants' construction is inconsistent with what the Court was told in 1994 regarding the purpose and effect of the Statement of Investment Policy and Guidelines and the Revised Settlement or in connection with the Originating Summonses in 1999 or in 2000 or with the case advanced by the Defendants or with the conclusion reached by this court and the Court of Appeal on the preliminary issues.

On the contrary, the Defendants submit that it is the Plaintiffs who are guilty of an attempt to re-write history. Mr. Blayney submits that business of shipping which was contained in within new limits, was not removed altogether and that the expectations of the parties and the Court are that within those limits the shipping business would continue. He also says that the Plaintiffs are estopped from advancing the construction of the Revised Settlement and the SIPG which they now seek to advance because the construction is so fundamentally at odds with the common intention and understanding of the parties' representatives at the time as reflected in the CARD Memorandum.

At the instigation of the Defendants, previously a direction was made for the determination of two preliminary issues of construction with the Revised Settlement and the Statement of Investment Policy and Guidelines. The issues were as follows:

> (1) Whether, on the true construction of the Revised Deed of Settlement of the Trofos Foundation and paragraph 3.1 of the [SIPG], the Trustees were under an obligation to diversify the assets of the Shipping Capital Fund such as would deny them the protection of the exculpatory provisions of the Revised Deed of Settlement if they failed to do so, once they no longer held the belief or were in doubt whether those assets could generate an adequate long term return on the capital employed.
>
> (2) Whether, on the true construction of the Revised Settlement and the Statement of Investment Policy and Guidelines, a failure by the Trustees to comply with paragraph 2.11 of the Statement of Investment Policy and Guidelines disentitles the Trustees from relying on sub-clauses (1), (11) and (v) of Clause 16 of the Revised Settlement, rather than clause 16 (111) (c) thereof only.

At no stage of this preliminary hearing was the CARD Memorandum mentioned nor indeed was "a commercial decision" relied on as sufficient under section 3.1.

As stated previously, the Trustees feel that this matter should go to trial and that the estoppel by convention argument should also proceed to trial. The explanation given by the Trustees is that the difference in the Defence is caused by 'defective expression' /or a bad choice of words. Mr. Andrew Jones, QC who had conduct of the matter expresses his omissions or commissions in that way and says that it was a bad choice of words. Mr. Blayney however, says that it was a defect in expression. None of the evidence submitted on behalf of the Trustees waives privilege, but it would appear that some of the allegations in the Defence and averments in the defence are made without instructions. It is perhaps a useful exercise to look at the evidence filed by the Trustees. Paragraph 7.8 of the Defence is really the landscape of the case and Mr. Hall's affidavit was the principal one in support of the Trustees' summons. Looking at the affidavit of Mr. Fish, another of the Trustees' representatives, paragraph 22 states:

> "Provided that over the long term the SCF was anticipated to generate an adequate return, we did not feel constrained to sell the shipping assets merely because alternative investments might offer higher returns or lower risks. I did not consider that the Trustees were obliged to take into account the performance of the GCF when considering whether

> the shipping operations satisfied the test in paragraph 3.1 of the Statement of Investment Policy. I did not consider it that the Trustees were obliged to ensure that the SCF performed as well or better than the GCF either in the short or long term. The SPF and the GCF were distinct investments. Comparing the performance of one with the other would have been like comparing chalk and cheese."

At paragraph 37, he says clearly that:

> "After the Triarchos meeting, Mr. Cunningham left and the other attendees reconvened as the board of Trustees. The minutes of this meeting are at page 321 to 322. The Trustees agreed that Mr. Samonas should be authorized to negotiate with the shipyards to ascertain the best price and specification of vessel that could be obtained. Mr. Samonas and Mr. Jon Firth were authorized to negotiate with lending banks to determine the most advantageous financing arrangements that were available."

There Mr. Fish makes it quite clear that the decision was made in July 1994 to expand the fleet. The Re-amended Defence however, is effectively vague as to the date when the decision was made.

In paragraph 49 of this affidavit, he submits that the word "adequate" did not mean "the best available", as the meaning "adequate" as used in paragraph 3.1. of the Statement of Investment Policy and Guidelines. The adequacy of returns is something to be considered

in absolute terms he said, not in terms relative to the risk involved or other returns, which might be available from alternative forms of investment.

The concept of "adequate" therefore as known to all for 7 ½ years was being effectively eroded or altered. The other affidavits that have been filed find that there is an inconsistency, but decline to explain the inconsistencies. That is the evidence. I must now decide whether they have explained the difference. On a review of the evidence and the pleadings, is it evident that there is a change of case?

In summary the Defendants say as follows:

1. That paragraph 7.8 of the original defence was not well worded. Literal meaning not accurate.
2. That it was not intended to convey that meaning. It was not based on instructions when the pleading says calculations were contemporaneous. Explanation given by the defence the draftsman chose the wrong words.
3. 1998 Defence read as a whole they say, conveyed the same substance as the Re-Amended Defence conveys now.

4. That the Plaintiffs have not prosecuted the case under false basis; and

5. That the consequences which the Plaintiffs seek are inappropriate and wrong in law.

The Court is asked to agree that it was the wrong choice of words and that all the Re-Amended Defence is doing was to expand on the original defence. The Defence also says that it did not act in bad faith and that there is no prejudice to the Plaintiffs nor will there be any occasioned by the Re-Amended Defence. Before, I go into the law, it is I think of some relevance that the attorney who had conduct in this case, Mr. Andrew Jones has filed an affidavit. It is the Court's view that it is inappropriate for attorneys who have conduct of matters to file affidavits. In this case not only has he filed an affidavit but he has apparently chosen to take the blame on issues as to fact. He also says that it was a wrong choice of words, which caused the misunderstanding or a wrong understanding of the pleading. This surely must have severe consequences, especially in circumstances where he does not say whether or not he got instructions or what these instructions were. He claims privilege. In my view, Mr. Jones' affidavit is purely an attempt to bolster the defence. The Court finds

it a most unhelpful document. If, in fact, he pleaded without instructions, it is a serious admission of negligence and if he pleaded with instructions then the Trustees have misled the Court. It is hoped that the pattern of attorneys filing affidavits will no longer be followed in this jurisdiction.

The Law

Changes in the parties' knowledge of a case as it progresses in straightforward drafting errors makes it necessary on occasions to make amendments to the formal documents used in a case, such as the originating process, pleading, summonses, notices etc.

The underlying principle is that all amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined provided such amendments can be made without causing injustice to any other party. As the party seeking leave to amend needs the exercise of the Court's discretion, the Court is obviously competent to refuse to exercise its powers if the proposed amendment will serve no useful purpose.

An amendment will be useless if it is unarguable on the merits.

In *Ketteman v Hansel Properties Ltd.* [1987] AC 189, HL, one of the defendants, who had previously been defending the action on its merits, applied at trial during the closing speeches to amend its Defence to plead that the action was time-barred under the Limitation Act, Lord Griffiths, commenting on the decision in *Clarapede & Co v. Commercial Union Association* (1883) 32 WR 262 cited at 263 said:

> "Whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time."

A very late amendment may be allowed with an appropriately onerous order as to costs. The usual rule is that where an amendment is allowed, the party seeking to amend must pay the other side's costs of and occasioned by the amendment.

The Plaintiffs in this case object to the amendments sought in two broad categories. The construction amendments and the estoppel amendments. As far as the construction amendments are concerned they fall into seven categories as I previously highlighted. As far as the estoppel agreement is concerned, the Plaintiffs contend that it is without foundation. Issue estoppel may arise where one of the essential ingredients or causes of action in the present proceedings was also an essential ingredient of one of the causes of action in previous proceedings between the parties in those previous proceedings. Wigram V-C recognized that there may be special circumstances in an individual case to justify a departure from the usual rules. Lord Upjohn in *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd.* (No.2) [1967] 1 AC 853 said:

> "All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

In this case, the Defendants allege that the CARD Memorandum was known to all the parties and that the attorneys for two of the beneficiaries saw the memorandum and did not object. They did not

consent in writing but the Defendants submit that tacit consent can be inferred and give rise to issue estoppel by convention. Mr. Blayney on behalf of the Defendants submits that it is sufficient for the attorneys to have known about the memorandum, despite the fact that his own clients have filed affidavits (save and except for one person), that they had not seen the CARD Memorandum but by some incredibly coincidental thought process, they all now agree that the decision they took previously falls into the category of the CARD Memorandum.

Halsbury's Laws (4th Edition) is quite clear. In order for an estoppel by convention to arise, the relevant assumption or agreement must be communicated by one party to the other, either by words or conduct. The parties in this case have admitted they did not see the CARD Memorandum and at the material time, the parties could not have agreed to the contents of the CARD Memorandum. Two of the attorneys representing the parties may have ignored the CARD Memorandum but at the material time they did not agree to it. Agreement is what gives rise to estoppel by convention. There can be no estoppel by convention where although both parties are

labouring under a common mistake and misapprehension, it cannot be said that they have acted on the basis of that apprehension.

Findings

I will initially deal with issue estoppel by convention. For reasons set out above and also because there is no evidence at all of the mutual assent of the common understanding and because the CARD Memorandum was not mentioned in Court at all in any of the hearings when the major decisions were taken especially as far as the unborn beneficiaries are concerned, I hold issue estoppel does not arise. To attribute by the introduction of the CARD Memorandum, a different meaning to the words of paragraph 3.1 of the Statement of Investment Policy is in my view an abuse of process. Mr. Blayney endeavored to convince the Court that they were not abandoning the meaning of paragraph 3.1 of the SIPG but what they were in fact doing is expanding on the meaning of that word. It cannot be said that the two can sit happily together. I therefore find that the introduction of the memorandum, the Re-Amended Defence is an abuse of process and do not allow the amendment as far as CARD

Memorandum is concerned. I should mention that in this exercise and in this judgment, I do not intend to go into every detail of the amendments being sought. It is my view that I should rule on the general areas in question and the parties should then be able to agree on the editing of the present Re-Amended Defence. Perhaps a more difficult area for the Court is the pure construction amendments and the Re-Amended paragraph 7.8 of the Original Defence. The original Defence and the Amended Defence set out in detail the steps taken by the Trustees. The Plaintiffs filed and got leave to amend a Statement of Claim, adding an allegation of wilful default. It is obviously important for trustees to inform the court in their pleadings as to what steps were taken and the process by which the deliberations were undertaken to come to a decision to buy three new ships in this case in face of such a serious allegation.

The Defence now comes along and deletes the entire process of the decision making averments and wishes to say it was purely a commercial decision. By any stretch of the imagination and however hard Mr. Blayney works at the submissions to convince this Court otherwise, it must be a different defence. It is the crux of this case

that the Trustees were negligent in the decision making processes and did not comply with certain paragraphs of this Statement of Investment Policy and Guidelines. Now after 7 ½ years, having led the Plaintiffs to believe that they took specific steps, and specific returns were considered they abandon that defence and come with an allegation of making a "commercial decision". They also lead the Court to believe in their original pleadings that it is with the family's consent that these decisions were taken. There is absolutely no evidence whatsoever that that is the case and they have now abandoned that averment. The explanation given for this is that it was a defect of expression by Mr. Andrew Jones QC. A sad indictment on the manner in which this matter has been conducted. The defence is a document which should have been showed to the Trustees, who it is assumed, agreed to the defence. There is no explanation despite the Court asking for it, as to why the process making, and the steps taken in coming to the decision which was always maintained in the defence, is now being abandoned. A word such as "commercial decision" being used is importing generality and vagueness into the defence. The Court is left to wonder whether it is because the original defence could not be supported by the evidence

or Mr. Andrew Jones, Q.C. drafted the defence on his own without consulting the Trustees or the Court was intentionally misled. I will however, not hold that it was bad faith and strike it out. The Court is most unhappy at the manner in which the amendment to that paragraph has been undertaken and although that particular amendment will be permitted, as it is now their defence, it must be reflected in the order for costs at the end of the day.

I now turn to the question of the pure construction. As stated previously there are seven areas where the Trustees say that the meaning of paragraph 3.1 varies from its apparent meaning. The first one is the Trustees' obligation to operate ships. This matter has been litigated and there is a Court of Appeal ruling on it. Mr. Blayney submits that the Court of Appeal was focused not on the question of whether paragraph 3.1 of the SIPG imposed an obligation on the Trustees to carry on shipping operations if they held the required opinion, but on the question of whether it imposed an obligation on them to discontinue the shipping operations if they did not hold the required opinion. He says it was in that context that the Court of

Appeal considered the ordinary and natural meaning of paragraph 3.1.

He submits that the Court of Appeal thereby expressed themselves in terms which like the judgment of the Chief Justice left undecided the question whether in circumstances in which Trustees held the qualifying belief, they were obliged to carry on a shipping business. I disagree. The word obliged was canvassed and ruled on by the Court of Appeal and the Chief Justice. The Trustees say they have a discretion in the Revised Settlement, thus allowing them to rely on the exoneration clause. This is clearly a matter that the Court of Appeal considered and the arguments set out in paragraph 51, should have been addressed to the Court of Appeal if the Trustees' representative felt it was worthy of some merit. In the circumstances I hold that that aspect of the objection is upheld and that it is res judicata.

The next objection is as to the expanded fleet being within the expression 'a fleet'. I have listened to submissions from both sides on this point and having carefully read the submissions I am of the view that permitting this amendment will not cause undue prejudice to

the Plaintiffs. The next objection is to the use of the words 'adequate return on capital employed'. I agree entirely with Mr. Stephens that if words pleaded are not intended to mean anything different from adequate return then the word 'adequate return' should be used and nothing else. There is absolutely no prejudice to any party and indeed it should be the rule, that the words of a document should be pleaded. Therefore I uphold the objection to any words but those. The next pleading is as to the words commercial decision. I will not deny the Trustees the right to plead it.

The next area of objection is the pleading as to acting as reasonable and prudent men of business were not material and of no application. This I find is a basic duty of the Trustees and only the very clearest possible words could exempt trustees from their basic duties as such. I do not find that in the evidence, and I will not permit this amendment, as I will not allow the Trustees' amendment alleging that they were positively not to consider risk or available returns. Having all along alleged that they considered the risk as to the profit sharing, the quantum of profit etc, they now wish to amend the pleading that they made this investment of millions of dollars continuing a fleet

worth 52 million dollars on the basis that they are exonerated from making a decision considering the risk or alternative available returns. I find this is an abuse of process and I will not allow this amendment.

I now turn to the question of costs. It is submitted on behalf of Plaintiffs that their entire costs should be paid on an indemnity basis. This is a unique case. The discarded defence has been at the heart of extremely heavy and expensive litigation. It is unlikely that a case of this nature will come before the courts again. The Trustees concede that they should pay the costs thrown away by the amendment. They do not accept however, that there are substantial changes and that the costs should be on an indemnity basis. It is sufficient that the Court disapproves of the way this litigation has been conducted by the Trustees and on that basis I order an immediate inquiry into wasted costs on an indemnity basis and I also further order an interim payment to be made forthwith the quantum of which is to be decided by the parties. If no agreement can be reached, to be submitted to the Court for a ruling.

Dated this 23rd day of May, 2006

Judge of the Grand Court