COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2019/CLE/gen/00000

IN THE MATTER of the trusts of the Deed of Settlement dated 5th November, 1990 establishing the "X Foundation Trust"

AND IN THE MATTER of the Trustee Act, 1998

AND IN THE MATTER of an application by Cititrust (Bahamas) Limited as trustee of the said trusts pursuant to Section 77(1) of the Trustee Act, 1998

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Mr. N. Leroy Smith for the Trustee Mr. Brian Simms KC, Mr. Wilfred Ferguson, Ms. Aquelle Tuletta for A Limited Mr. Jonathan Adkin KC, Mr. Edward Marshall and Ms. Morgan Adams for the Son and B Limited.
Hearing Date:	7 May 2024

RULING

KLEIN J.

Trustee Act—Application pursuant to s. 77 for the Court's directions—Principles—Trust governed by Bahamian Law—Rival claims to office of Appointor of Trust by son and daughter of Settlor—Settlor executing conflicting documents in 2003-2004 and 2019 as to plan of succession of Appointor—Settlor declared incapacitated by Trustee on 3 July 2019, and daughter recognized as Appointor by Trustee—Court giving directions on application by Trustee in 2021 affirming recognition of daughter as Appointor pending determination of proceedings in domicile of Settlor (Foreign Country) to determine Settlor's mental state and capacity to execute 2019 documents—New application for Directions following death of Settlor and falling away of Foreign Court proceedings—Payment of expenses and costs out of Trust fund—Trustee's expenses and costs—Beneficiaries—Entitlement to be reimbursed for litigation commenced in the interest of the Trust

INTRODUCTION AND BACKGROUND

1. The applicant Cititrust (Bahamas) Ltd. ("Cititrust") is the Trustee of a Bahamian trust called the "X Foundation Trust" ("The Trust"). By Statement dated 16 December 2022 it sought the Court's "*opinion, advice and/or directions*" ("directions") pursuant to section 77(1) of the Trustee Act 1998 ("the Act") on certain questions arising in the administration of the Trust. It is the second such application by the Trustee and it was instituted following developments since Charles J. (as she then was) gave directions in a Ruling dated 29 October 2021 ("the 2021 Ruling").

2. Underlying these proceedings is a dispute between two of the children of the Settlor of the Trust about who should occupy the important role of "Appointor" (or protector) of the Trust. This is because the Settlor purportedly executed two sets of contradictory documents regarding the chain of succession for the Appointor, firstly in 2003-2004 and then in 2019—the latter done in circumstances where it is alleged he lacked mental capacity.

Background

3. The background to the first application is set out in the 2021 Ruling. To avoid unnecessarily extending the length of this Decision, it is to be read alongside the 2021 Ruling, to which further reference will be made. For present purposes, this section of this Decision is only intended to provide a summary of the background facts and the developments that have made a further application to this Court necessary.

4. In setting out the background, the Court is only stating the 'facts' as they have been asserted by the parties. The Court's s. 77 jurisdiction does not extend to resolving factual disputes, and such applications usually proceed on the basis of agreed facts. While the basic facts relating to this application (as set out in the Trustee's Statements) are not in dispute, some of the background facts are highly contentious, and they must be read subject to the caveat that the evidence is untested at this stage.

The Trust

5. The Trust at the center of this application was created by Deed of Settlement dated 5 November 1990 (the "Trust Deed"). It was executed by the Settlor and Cititrust (a company incorporated in The Bahamas) as the Trustee. The Trust Deed is expressed to be governed by the laws of The Bahamas, and it provides for the courts of The Bahamas to have exclusive jurisdiction over all matters pertaining to the Trust (cl. 30).

6. The Settlor (now deceased) was an extremely successful industrialist and philanthropist in his jurisdiction of residence. He established the Trust mainly as a charitable trust to improve the social condition of his countrymen. Its major asset is its 63.38% (indirect) shareholding in E Limited, a company established by the Settlor, which is a large industrial business.

7. The Trust Fund is held for a class of discretionary beneficiaries ("the Eligible Beneficiaries") (cl. 6), which are mainly companies or trusts linked to those companies. The Trustee has discretionary powers of appointment and advancement of income and capital, which they can exercise in favour of all or one or more of the beneficiaries as they may determine. Historically, the Trust has implemented the Settlor's philanthropic mission by making distributions mainly to two corporate beneficiaries, Corporate Beneficiary One and Corporate Beneficiary Two, which in turn have provided scholarship and training opportunities to the Settlor's countrymen to pursue technological research and development activities.

8. The Settlor's family members, including his children, are also (indirectly) beneficiaries of the Trust, through various single-shareholder companies of which they are directors. As mentioned, it is the competing claims of two of his seven children to occupy the role of Appointor that gives rise to the issues before the Court.

The Appointor (Protector) of the Trust

9. By Deed of Appointment dated 30 November 1990, the Settlor appointed "*the person for the time being holding the office of Chairman of the Board of Directors of [Corporate Beneficiary Two]*" to be the initial Appointor of the Trust. This was a position he occupied at that date and, therefore, the Settlor himself was constituted the initial Appointor.

10. By Deed of Appointment dated 6 October 2003, the Settlor appointed Daughter A, the sixth of his six daughters, to be Successor Appointor of the Trust, with such appointment to take effect "*upon the Settlor's resignation, disability or death*". Daughter A is also the Chairman and CEO of E Limited, the main shareholder company of the Trust. By a further Deed of Appointment dated 1 March 2004, the Settlor appointed the Son, his last child and only son, second Successor Appointor, to hold office after Daughter A. The Son is the sole director and shareholder of B Limited, another of the shareholder companies.

11. This scheme for the succession of the Appointor stood for nearly 16 years. However, things changed in 2019. According to the evidence, on 3 May 2019, apparently concerned about her father's mental state, Daughter A obtained a short letter from Dr. V, a neurologist who had been the Settlor's family doctor since 2013, stating that the Settlor had lost mental capacity and was unable to make any legal or important personal decisions. On 3 July 2019, acting mainly on Dr. V's letter (and, it appears, a report by a Citi wealth planner about a meeting with Dr. V in May 2019), the Trustee declared the Settlor incapacitated, and recognized Daughter A as the current Appointor (formalized by her Deed of Acceptance of Appointment as Successor Appointor on 30 July 2019).

12. The Son disputed the recognition of Daughter A as Appointor. He alleged that by a series of documents allegedly signed between April and July 2019 by the Settlor ("the Appointor Documents"), Daughter A was replaced by him (the Son) as Appointor with immediate effect. As will be explained in greater detail below, this set off a round of litigation in the Settlor's jurisdiction of residence concerning the Settlor's capacity. Consequently, in December 2019, the Trustee approached the Bahamian Court for directions. The outcome was that Daughter A was confirmed by the Court as the sole Appointor of the Trust pending the determination of the legal challenges.

13. The Appointor-Trustee of the Trust has very important powers and functions, which are summarized in the Third Trustee Statement and are set out in some detail in the 2021 Ruling (para. 6). These include the power to change the perpetuity date, the dispositive powers, the

power to vary the terms of the Trust, the power to add or remove beneficiaries to or from the classes of Eligible Beneficiaries and Excluded Persons and the power to release powers.

14. Importantly, under cl. 29 of the Trust Deed, before the Trustee can exercise any of its 'Restricted Powers' (which include *all* of its dispositive powers) the Trustee must first give notice to the Appointor. The giving of notice under cl.29 is a condition precedent to the exercise of those powers, and the failure to do so will result in the exercise of the power being void. Further, the Appointor also has the power to remove and appoint trustees of the Trust under cl. 18 and powers in relation to fees charged by the trustee under cl. 16.

15. Cl. 29 provides in material part as follows:

> "Cl. 29: Notice to Appointor
>
> (1) The Trustee shall not exercise any power (hereinafter called 'Restricted Powers') pursuant to Clauses 1(p) (iii), 4, 5(1), 6, 7, 8, 24, 26, 27, 28 and 31 hereof or referred to in Clause 9(2) hereof except after having given notice to the Appointor and then only in accordance with the provisions of this Clause."
> (2) Subject to the proviso in Clause 9(2) hereof, three months prior to the exercise of any Restricted Power the Trustee shall serve written notice on the Appointor of its intention to exercise such power setting out the manner in which it proposes to exercising such power and no Restricted Power shall be exercised by the Trustee otherwise than in the manner specified in such a notice and shall not be exercised prior to the expiry of the said period of three (3) months unless the Appointor shall otherwise agree in writing."

16. The issues surrounding the Settlor's mental capacity and who was/is entitled to occupy the position of Appointor split the family into two opposing "camps" (to adopt the description used by the Foreign Court), consisting of Daughter A on the one hand, and the Son, who has the support of his siblings and the Settlor's widow, on the other hand. It spawned a series of contentious legal proceedings in the Settlor's jurisdiction of residence, which have now spilled over to this jurisdiction.

The Foreign Court Proceedings

17. Firstly, on 5 July 2019, Daughter A brought proceedings in the Foreign Court under the mental health legislation seeking an inquiry into the Settlor's mental capacity and the appointment of a committee to manage his property and affairs ("the MH Proceedings"). The Son and another sibling (Daughter E) intervened in those proceedings. However, the Son's attempt to join the Trustee and have the issue of the validity of the Appointor Documents and the Settlor's capacity to execute them determined within the MH Proceedings were rejected by the Court, on the grounds that those questions would need to be raised in separate proceedings.

18. Consequently, on 18 August 2020, the Son brought proceedings in the Foreign Court (the "Historic Capacity Proceedings"), naming Daughter A as the defendant and seeking a

declaration that the Settlor had the capacity to execute the Appointor Documents. Daughter A defended and sought a stay of those proceedings (successfully, it would turn out) primarily on the basis that the Bahamian Court had exclusive jurisdiction to determine matters relating to the Trust, including the Settlor's capacity.

Trustee's Application for Directions

19. On 20 December 2019, the Trustee initiated s. 77 proceedings seeking directions in respect of the Foreign Court Proceedings (which included the Historic Capacity Proceedings by the time the application came to be heard on 31 May and 1 June 2021) as well as directions concerning the administration of the Trust pending the outcome of those proceedings.

20. Eight questions were posed in the original application, which were summarized by the Court (at para. 46) as follows:

> "1. What steps, if any, should the Trustee take in relation to the Foreign Court Proceedings?
> 2. What interim measures should be put in place pending the outcome of the Foreign Court Proceedings to secure the safe administration of the Trust;
> 3. Whether Trust documents should be disclosed to the Son and/or the Settlor pending the outcome of the Foreign Court Proceedings?
> 4. How should the Trustee treat the final outcome of the Foreign Court Proceedings?"

October 2021 Ruling

21. The Court disposed of these issues as follows:

> "1. The Trustee shall not be required to take any steps concerning either the Historic Capacity Proceedings or the MH Proceedings before the Foreign Court (and any appeal thereof).
> 2. The Trustee may continue to administer the Trust on the basis that the Settlor is incapacitated and that Daughter A is the Appointor of the Trust pending the final determination of the Settlor's capacity in the extant Foreign Court Proceedings.
> 3. The Trustee does not have to disclose any trust documents to the Settlor (whom it determined to be incapacitated), the Son or any of their purported representatives pending the final determination of the settlor's capacity in the extant Foreign Court proceedings. However, if the Settlor directly requests any trust documents, the Trustee should provide them.
> 4. The Trustee is entitled to its costs on an indemnity basis and shall also raise and pay from the trust fund the costs of the other parties, to be taxed on the indemnity basis if not agreed.
> 5. The Trustee and any Notice Recipient to these proceedings shall have liberty to apply."

22. As both the Trustee and Daughter A place significant reliance on the October 2021 Ruling in support of their contentions, it is important to set out the material portions of that Ruling. At para. 44, Charles J. stated:

> "44. The Trustee has found itself for the last 2 years in the invidious position of having to administer the Trust in circumstances where the Settlor's capacity and the identity of the Appointor are hotly contested issues in the Foreign Court. Faced with extant foreign proceedings and there being no other option reasonably available to the Trustee to resolve the disputes over the Settlor's capacity without recourse to the Court which law governs the administration of the Trust, the Trustee has applied for what are essentially interim directions while it awaits the outcomes of the Foreign Court Proceedings. The Trustee maintains that, although it has to await the outcome of the Foreign Court Proceedings in the absence of directions to do otherwise, this should not be treated as an admission by the Trustee that the Bahamian Court is not the most appropriate forum for a final and binding determination of the matters sought to be litigated in the Foreign Court particularly the Historic Capacity Proceedings."

23. Then, at para. 65:

> "As I see it, I do not believe that the Trustee rushed to judgment when it declared the Settlor to be incapacitated. Such a determination appears to have been based on all the facts and surrounding circumstances available to the Trustee at that time, including medical evidence which is only one aspect of the evidence, albeit an important one. The Trustee was therefore obliged under the terms of the Trust documents to recognize Daughter A as Appointor. That situation ought not to be disrupted. Daughter A will continue to act as the Appointor until any contrary determination is made."

24. However, the Court recognized that this interim position did not resolve the core issue of the potential invalidity of the exercise of any Restricted Powers in the meantime. As recorded at paras. 59 and 60 of the judgment:

> "[59] As the Trustee acknowledges, the present ambiguity concerning the identity of the Appointor has left the Trustee in a position in which it is unable to safely make distributions and carry out [the Settlor's] philanthropic ends. If notice is not given to the true Appointor prior to the exercise of any of the Restricted Powers, the exercise will be invalid. The sooner this issue could be resolved, the better.
>
> [60] All parties accept that there is a real dispute between the two camps which needs to be sorted out expeditiously…."

25. At the time of the 2021 directions Ruling, the Settlor was well into his nineties and the dispute over his mental capacity was playing out in two sets of proceedings in the Foreign Courts.

26. Several significant events have intervened since then. Sadly, in 2022, the Settlor died. Because of his death, the MH Proceedings were discontinued and dismissed. Further, Daughter A's application for a stay of the Historic Capacity Proceedings was granted, and the proceedings were permanently stayed by Ruling dated 11 April 2022.

27. Subsequently, by Standard Claim Form , the Son instituted proceedings in the Supreme Court of The Bahamas to resolve the issue of the identity of the Appointor ("Bahamian Appointor Proceedings"). Shortly afterwards, on 2 May 2023, Daughter A issued contentious probate proceedings in the Settlor's jurisdiction of residence, challenging the validity of the Settlor's will ("the Foreign Probate Proceedings"). By application dated 22 June 2023, Daughter A further sought a stay of the Bahamian Appointor Proceedings pending the resolution of the Foreign Probate Proceedings.

28. This is the current state of play of litigation against which the further application for directions is being considered.

The Current Questions

29. By the Fifth Trustee Statement, the Trustee sought the directions of the Court on the following questions:

> "1. the opinion, advice and/or directions of the Court as to whether the Trustee may charge, raise and pay US$153, 520.20 representing activity fees incurred in connection with this matter for the period 18th June 2019 to 30th September 2022, subject to it obtaining [Daughter A's] written agreement and/or providing 3 months' prior written notice to [Daughter A] before doing so;
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> 2. the opinion, advice and/or directions of the Court as to whether (without prejudice to the rights of the beneficiaries to challenge specific charges) the Trustee may in principle charge, raise and pay activity fees in accordance with the terms and conditions and Schedule of Fees in force from time to time upon it obtaining [Daughter A's] written agreement and /or providing 3 months' prior written notice to [Daughter A] before doing so;
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> 3. the opinion, advice and/or directions of the Court as to whether the Trustee may reimburse [Daughter A] for the legal costs that she has incurred in bringing the [MH] Proceedings and in defending and seeking a stay of the Historic Capacity Proceedings;
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> 4. the opinion, advice and/or directions of the Court as to whether (in light of (a) the [MH] Proceedings having been terminated following the the Settlor's death without ever determining his capacity and (b) the Historic Capacity Proceedings having been indefinitely stayed) the Trustee may for all purposes continue to administer the Trusts on the basis that [Daughter A] is the Appointor of the Trust until otherwise directed by this Honourable Court;
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> 5. the opinion, advice and/or directions of the Court as to whether the Trustee should commence proceeding before this Honourable Court seeking to have determined the issues which were before the [Foreign Court] in the Historic Capacity Proceedings;

6. directions as to notification and service of this application pursuant to section 77(2) of the Trustee Act; and

7. such further and other orders or directions as may be necessary including as to the costs of this application."

30. As matters transpired, several of these questions had either already been dealt with or were overtaken by events by the time the application came on for hearing. For example, at the Directions hearing on 5 February 2024, the Court gave directions for the application to be served on a number of entities/persons associated with the Trust ("Other Notice Recipients") to whom notice of the Directions Application was originally directed to be given by Charles J. This disposed of the directions sought at para. 6.

31. Further, the question of who was the appropriate party to institute proceedings to determine the issues which were before the [Foreign Court] in the Historic Capacity Proceedings (the question at para. 5) was also overtaken by the commencement of the Appointor Proceedings in The Bahamas by [the Son]. No order is therefore required in respect of this question.

The Legal Framework

32. Section 77 of the Trustee Act enables a trustee, or personal representative, without commencing an action, to apply to the Court "*upon a written statement for the opinion, advice or direction of the Court or Judge in Chambers on any question respecting the management or administration of the trust property…*". Section 78 provides for the application to be made upon a written statement signed by a counsel and attorney, and the Court may hear the parties in Chambers where it requires the assistance of counsel on the issues. Pursuant to s. 77 (3) and (4), the applicant trustee or personal representative is exonerated from any liability for acting on the Court's advice, unless the advice was procured by fraud or wilful concealment.

33. In addition to the statutory powers to provide judicial guidance on any particular question relating to the Trust, the Court has an inherent jurisdiction to supervise the administration of trusts. Thus, a trustee may apply for the Court's guidance in any case in which the trustee wishes to obtain the directions of the Court with respect to a proposed course of action (see, **Schmidt v Rosewood Trust Ltd.** [2003] UKPC 26). See, also, the leading case of **Public Trustee v Cooper** [2001] WTLR 901, where Hart J. cited with approval Walker LJ's four categories of cases (given in an unreported 1995 Chambers judgment) in which a trustee might typically apply to the court for directions: (i) proceedings as to whether a proposed course of action is within the trustees' powers; (ii) proceedings where the trustees seek the court's approval of the exercise of their powers, where the nature and extent of the power is not challenged; (iii) cases where the trustees surrender their discretion to the Court for it to exercise in the best interest of the estate (such as where the trustees are deadlocked); and (iv) cases where

the trustees have taken action that is being attacked as either outside their powers or an improper exercise of their powers.

34. The overriding test for the Court when directions are sought under s. 77 is what is in the best interest of the Trust. In principle, applications for directions are intended to be non-adversarial, even though they may be opposed by one or more beneficiaries or interested parties, and may therefore be very contentious. It is not necessary to attempt any exhaustive analysis of the law on the point, and I only set out the leading principles from the cases cited in the Trustee's submissions.

35. In **Marley v Mutual Security Merchant Bank & Trust Co. Ltd.** [1993] 3 All ER 198, Lord Oliver summarized the relevant principles as follows:

> "[…] A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put into possession of all the material necessary to enable that discretion to be exercised. It follows that, if the discretion which the court is now called upon to exercise in place of the trustee is one which involves for its proper execution the obtaining of expert advice or valuation, it is the trustee's duty to obtain that advice and place it fully and fairly before the court, for it cannot be right to ask the judge in effect to assume the burdens of a trustee without the information which the trustee himself either has or ought to have to enable him to carry out his duties personally. The court ought not to be asked to act upon incomplete information and, if it is so asked, the proper course is either to dismiss the application or adjourn it until full and proper information is provided.
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> Secondly, it should be borne in mind that in exercising its jurisdiction to give directions on a trustee's application, the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. That is not always easy, particularly where, as in this case, the application has been conducted as if it were hostile litigation; but it is essential that the primary purpose of the application—indeed its only legitimate purpose—be not lost sight of in academic discussion regarding the discharge of burdens of proof. Where beneficiaries oppose a proposal of a trustee with a host of objections of more or less weight, the court is, of course, inevitably concerned to see whether these objections are or are not well founded, but that must not be permitted to obscure the real questions at issue which are what directions ought to be given in the interest of the beneficiaries and whether the court has before it all the materials appropriate to enable it to give those directions."

36. Another important principle to bear in mind is that in providing "private advice" pursuant to s. 77, the court is not deciding any substantive dispute between competing litigants or making findings of facts. As stated in **Re Macedonia Orthodox Community Church St. Petka Inc** (No. 3) [2006] NSWSC 1247, a case considered under s. 63 of the New South Wales Trustee Act 1925 (which similar to s. 77 provides for the court to give directions in trust matters, although its provisions are more elaborate): [69]:

> "[…] A judicial advice application is an application by a trustee to the Court for private advice and is founded upon facts stated to the Court by the trustee, untested by adversarial procedure, and assumed by the Court to be true only for the purpose of the application. If other persons are given notice of the application under s. 63(8) of the Trustee Act so that they become bound by the advice or order of the Court in accordance with s. 63(11), they are bound only to the extent that the trustee is protected from claims by them if the trustee has followed the judicial advice and if the facts stated to the Court by the trustee in obtaining the advice is accurate. There is no finding by the Court in a judicial advice application that the facts stated by the trustee are accurate. No person bound by the advice is prevented from litigating as to the accuracy of those facts in other proceedings. If the facts found in other proceedings are not as stated by the trustee to the Court in the judicial advice application, the trustee is not protected by the Court's advice: see the general discussion by Needham J in *Harrison v Mills* [1976] 1 NSWLR 42, at 45-46."

The position of the trustee and beneficiaries on the application

37. There is very little daylight between the parties on the issues relating to the payment of the Trustee's activity fees and reimbursement of legal costs (Questions 1-3), although this is not to suggest that the parties are agreed on all points. But the main bone of contention is who ought to be the interim Appointor pending resolution of that dispute, and the lion's share of the submissions and discussion was directed to that issue. The positions are polarized along the following lines:

a. The position of Daughter A/ A Limited, (which aligns with the position of the Trustee) for continuing the administration of the Trust on the basis that Daughter A is the Appointor and is exclusively entitled to be given notice before the exercise of any Restricted Powers (in other words, to maintain the *status quo* under the 2021 Directions Ruling); and

b. The position of the Son/ B Limited, for the Son to serve as co-appointor and for the Trustees to give notice to both the Son and Daughter A in advance of exercising any of their Restricted Powers, which has the support of the other family members (The Settlor's widow and the Son's sisters).

Question 4: *Whether the Trustee may for the time being continue to administer the Trust on the basis that Daughter A is the Appointor of the Trust until otherwise directed by the Court.*

Trustee's Position

38. As this is the main controversy between the parties, I think it is appropriate to deal with it first. In written submissions, the Trustee submitted simply that "*unless and until such time as a contrary decision/direction may come to be given by this Honourable Court, the Trustee should be permitted to continue to administer the trust on the basis that [Daughter A] is the Appointor of the Trust for all purposes*".

39. In oral submissions, Mr. Smith contended that to a certain extent the Trustee's application is in principle a further application seeking the confirmation of the Court to continue the status quo. He acknowledged, however, that as a result of the various developments since the 2001 Directions Ruling, there was "*an acute concern that the Trustee might be criticized for continuing to proceed in circumstances where [the Judge] had in mind specific circumstances*" in making the Order. Thus, Mr. Smith summarized the principal question for the determination of the court as follows: "*How are the Trustees to proceed or to continue to administer the Trust having regard to the events which have transpired*?"

40. But even while acknowledging the developments post 2021, the Trustee submitted that the initial Directions are still *apropos* the current application. This is because it is said that the essence of the Ruling was to sanction the interim recognition of Daughter A as Appointor of the Trust until the final determination of the dispute about the Settlor's capacity to execute the Appointor documents, and not pending the conclusion of the then extant Foreign Court proceedings.

Daughter A and A Limited

41. Not surprisingly, Mr. Simms for A Limited/Daughter A supports the Trustee's position to maintain Daughter A as Appointor. In written submissions, Daughter A concedes that the new developments give rise to a "technical" requirement to revisit the question of whether the Trustee may continue to treat Daughter A as Appointor. However, he agrees with the Trustee that the Ruling should be read as recognizing Daughter A as Appointor pending the finding determination of the Appointor dispute.

42. In fact, Mr. Simms went so far as to submit that "nothing has changed" since the initial directions hearing to merit a departure from the 2021 Ruling, and that while the Foreign Court action to determine the Settlor's capacity will no longer play out to a conclusion, it has simply been substituted with proceedings before The Bahamas Supreme Court.

43. A Limited/Daughter A made a number of submissions in support of maintaining the status quo. Firstly, it is contended that the Son does not assert any legitimate, principled objections to Daughter A retaining the position, as he in fact earlier agreed to Daughter A occupying the role but has now reversed his stance. This criticism is made because, in a letter dated 16 February 2023 from the Son's solicitors, the Son agreed for Daughter A to remain the Appointor of the Trust for a period of six months, after which it was proposed that the Court should be required to review the situation. However, in his current prayer for relief (as contained in his Fifth Affirmation dated 3 April 2024), he invites the court to:

> "…direct the trustee to give notice to both me and [Daughter A] in advance of exercising any of the Restricted Powers under the Trust instrument, pending the determination of the Bahamas Appointor Proceedings. That order will preserve the validity of any steps that are taken pending the resolution of the identity of the true Appointor."

44. Secondly, Daughter A submits four main reasons why it is said that the Son's proposal that "*[Daughter A] and [the Son] should be treated as co-Appointors*" is without proper legal basis and would be harmful to the functioning of the Trust.

(i) Firstly, it is said that there is no evidence that the Settlor ever intended Daughter A and the Son to jointly discharge the role of Appointor, and that this is clearly contrary to the plan of succession for the role of Appointor.

(ii) Secondly, it is said that the proposal would undermine the Court's 2021 decision to recognize Daughter A as Appointor, and unless and until the Bahamian Appointor Proceedings are determined, there is no basis to interfere with the status quo.

(iii) Thirdly, if the Son were treated as a co-Appointor, he would likely have to be provided with confidential information regarding the Trust, and there is a material risk ("given [the Son's] litigious disposition"), that he would make use of his participation and/or the information obtained to commence further legal action.

(iv) Fourthly, it is said that the relationship between Daughter A and the Son has become extremely strained, and it is believed that the Son's proposal would prevent the proper functioning of the Trust and result in significant court time and wasted legal costs, which otherwise could have been applied to charitable purposes.

The Son and B Limited

45. In his written submissions, the Son, represented by Mr. Jonathan Adkin, anchors the proposal for co-appointors on two main points. Firstly, it is submitted that the administration of the Trust with Daughter A as the sole Appointor is unfair and contrary to the safe administration of the Trust.

46. The gravamen of this concern is captured in a letter to the Trustee's solicitors dated 9 March 2024 from five Notice Recipients (respectively, the Settlor's widow, , and four of his daughters) and ostensibly signed by them. The main paragraphs are set out below:

> "We have real concerns that treating [Daughter A] as the Appointor will mean that important steps (including distributions) taken by the trustee may transpire in due course to have been invalid (as notice needs to be given to the correct Appointor) or that, for fear of invalidity, the trustee is prevented from taking steps that it would otherwise wish to, disabling the proper operation of the trust. These concerns are compounded by the fact that we understand that [Daughter A] has applied for [the Son's] proceedings to be stayed, which application, in and of itself, is further prolonging this period of uncertainty for the trust.
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> We wish for the issues concerning the identity of the Appointor to be resolved as promptly as possible, and for the court to make interim orders which will protect the validity of any steps taken by the trustee before final determination. We therefore support [the Son's] proposal that notice should be given both to [Daughter A] and to [the Son] (i.e., treating them both as if they were Appointor) by the trustee during this interim period.
>
> We believe that [the Settlor] wanted [the Son] to succeed him as the Appointor of the Trust. [the Settlor] was a traditional man who had seven children and only stopped when the seventh was a son. He had discussions with all of us in which he expressed his clear wish that his successor should be [the Son], his only son. In the circumstances, we strongly believe that [the Settlor] wanted [the Son], solely, to be Appointor of the Trust and that [the Son] will be successful in establishing that he was so appointed. We do not support [Daughter A] being treated as the Appointor for the intervening period."

47. In oral submissions, Mr. Adkin contended that it would be in the best interest of the Trust if the Son is "in the tent" (as co-Appointor), because if it turns out that he was the true Appointor, years and years of the exercise of powers by the Trustee fall to be either completely invalid or at least liable to being unraveled, either on an application by the Son, or at the behest of any of the beneficiaries. This, he submitted, is not a sensible risk to run.

48. Secondly, Mr. Adkin submits that in addition to the delay already occasioned by the aborted Foreign Court proceedings, there is the prospect of further delay, as Daughter A has applied for a stay of the Bahamian Appointor proceedings pending the resolution of the Foreign Probate Proceedings.

49. The issue of the stay is not before this Court, and I therefore have nothing to say about its merits or otherwise. I simply note for these proceedings that the Son opposes the stay on a number of grounds, not least of which is the contention that the Foreign Probate Proceedings *will not* resolve the issue of whether the Settlor had capacity to execute the Appointor documents. This is because those proceedings are mainly concerned with the question of

whether the Settlor had capacity to make his last will, and in any event the Appointor issue is subject to the exclusive jurisdiction of the Bahamian Courts.

50. However, the main point advanced by the Son is that whatever the motivation for the stay, it has already caused and will likely cause further intolerable delays in the proceedings to determine the true Appointor. For example, if the stay is granted, it is estimated by the Son's lawyers that it could possibly take up to 3 years for the Foreign Probate Proceedings to proceed to trial, before the Appointor Proceedings could be resuscitated. In the meantime, the Trustee would not be able to safely make distributions from the trust, and the longer this issue remains unresolved the greater the danger and the possibility of disabling the Settlor's philanthropic mission.

51. Mr. Adkin rebuffed the reasons submitted by Daughter A that a co-appointor arrangement would be harmful and not in the interest of the Trust. Firstly, by way of background, it was contended that there was no inconsistency or change in the Son's position. The letter to the Trustee agreeing a six-month appointment subject to the review of the Court was written at a time when it was anticipated that the proceedings to determine the Settlor's historical capacity would have advanced significantly within that period. However, those proceedings had not advanced, mainly because of the stay application, and the longer this remained the case, there is the risk that the exercise of the Restricted Powers might turn out to be invalid.

52. Secondly, he contended that the observation that the Settlor never intended for Daughter A and the Son to jointly discharge the role of appointor is irrelevant. The issue for the Court is what interim arrangement should be put in place that is in the best interest of the Trust pending the resolution of whether Daughter A or the Son is the true appointor.

53. Thirdly, it is equally inaccurate and misconceived to suggest that the proposal would undermine the 2021 judicial endorsement of the Trustee's decision that it was obliged to recognize Daughter A as appointor. In fact, the evidence shows that the Trustee took an initial decision, and when asked to reconsider they indicated that they would await the outcome of the court proceedings before revisiting their decision. Further, the Court itself was clearly only concerned with giving interim directions and was not (and could not be) deciding the appointor issue once and for all.

54. As to the argument that, if allowed to serve as co-appointor, the Son would receive confidential information about the Trust, Mr. Adkin contended that this was a double edged sword. If it turns out that the Son was the true appointor after all, it would mean that Daughter A would also have received confidential information which it was never intended that she should have. In any event, the Son was willing to give an undertaking to keep confidential any information which he received as interim appointor.

55. Lastly, it is said that the allegations that the Son would cause needless disagreement in relation to running the Trust to further his personal agenda and because of his litigiousness nature are unmeritorious and inaccurate. There is no basis to attribute this behavior to the Son and no evidence before the Court to support the allegations. Indeed, Mr. Adkin posited that it would be foolish for the Son to adopt such behavior, as this would only play into Daughter A's hands and hasten a return to court.

56. The Son therefore proposes that until the determination of the Bahamian Appointor Proceedings, both he and Daughter A should be given notice by the Trustee before the exercise of any restricted powers, on the footing that either of them may be the true Appointor. It is submitted that this is an even-handed way of ensuring the safe administration of the Trust, and that Daughter A would suffer no prejudice from the Son being given notice in this way.

57. Daughter A dismisses the Son's concerns relating to the safe administration of the Trust as misplaced. Firstly, Mr. Simms contended that the Trustee has been following the approach directed by the Court since the Ruling, without incident or objection. Further, it is said that in any event, the Court has in substance "*recognized [Daughter A] as the Appointor and continues to recognize her as such until there is any finding to the contrary*". In written submissions, Daughter A characterized the Son's attempts to change or modify the current position in the face of an express Ruling as "fanciful". Lastly, he submitted that even accepting, *ad arguendo*, that the exercise of restricted powers by the Trustees could be vitiated by giving notice to the wrong person (if the Court later determined against Daughter A being the Appointor), the Court would be in a position to ratify the provision of any notice given to Daughter A in the relevant period.

Questions 1, 2: *Payment of activity fees*

58. The remuneration of a Trustee is governed by cl. 16 of the Trust Deed, which provides in material part for the Trustee to charge and be paid fees out of the Trust Fund subject to the following main conditions:

(a) The basis and rate for those fees are agreed in writing with the Appointor; or
(b) The Trustee's terms and conditions allow for the charging of such fees, and those terms and conditions have been provided to the Appointor with at least three months' written notice.

59. Further, cl. 8 of the Trustee's current Terms and Conditions (effective 25 May 2018) and Schedule of Fees (effective November 2019) permit the Trustee to charge "special activity fees" in addition to its ordinary fees for "*unusual, exacting or voluminous accounting, administrative, structuring or other services.*" Clause 10 of the Trustee's Schedule of Fees refers to "*handling litigation, sanctions or an investigation*" and "*retrieving or reviewing historical documents*" as examples of special activities. It further provides for the Trustees to

charge special activity fees for matters for which fixed fees are not specified on a time spent basis, at hourly rates ranging from $150 to $500.

Activity fees

60. The Trustee first seeks the Court's direction on the payment of US$153,520.20 for activity fees incurred for the period 18th June 2019 to 30 September 2022, subject to obtaining Daughter A's written agreement and/or providing 3 months' prior written notice to Daughter A before doing so. As indicated, the parties are not very far apart on the issues relating to the payment of historic fees.

61. Daughter A's position is that she has no objection in principle to the Trustee charging an activity fee for its work in connection with these proceedings or the litigation concerning the Trust. It accepts the Trustee's statement that it "*has had to devote significant resources towards addressing and managing this complex and protracted matter well-beyond the ordinary and usual resource requirements of trusts administered by it*".

62. The Son's position on the historic fees is that if the Court is satisfied that they have been properly incurred in the administration of the Trust, and are reasonable in amount, he is content for the Court to approve the payment.

Prospective fees

63. There is also not a lot of dissension on this issue, although as pointed out by Daughter A, there are two strands to this request. The first is said to be the "retrospective activity fee issue", which is whether the Trustee is entitled to charge activity fees from 30 September 2022 until the date at which its entitlement to charge activity fees in accordance with clause 16 of the Trust Deed arises; and the second is whether the Trustee is entitled to charge activity fees in relation to work carried out with prior approval (the "prospective activity fee issue").

64. With respect to the first, A Limited repeats its position that it has no objection in principle to the Trustee charging an activity fee for work performed prior to obtaining approval pursuant to cl. 16. As to prospective fees, Daughter A considers it uncontroversial that pursuant to cl. 16, the Trustee may charge activity fees if (i) it obtains Daughter A's written agreement to do so; or (ii) it provides three months' written notice to Daughter A of its entitlement to do so under its current terms and conditions.

Question 3: *Whether the Trustee may reimburse Daughter A for the legal costs of the MH Proceedings and in defending and seeking a stay of the Historic Capacity Proceedings*

65. As formulated in the Statement, the first limb of Question 3 was only concerned with whether Daughter A should be reimbursed for the costs of the MH Proceedings.

Notwithstanding this, counsel for the Trustee advanced this question on the basis that, subject to the Court's approval, it would be appropriate for the costs of all the represented parties (Daughter A's, the Son's and presumably Daughter E's) relating to the MH Proceedings to be borne by the Trust Fund. The basis for this, it is said, is that the outcome of those proceedings would have assisted with the administration of the Trust.

66. With respect to the costs of the Historic Capacity Proceedings, the Trustee also posits that it would be appropriate to reimburse Daughter A to the extent that she is not able to recover them pursuant to the costs award made in her favour in those proceedings (against the Son).

Daughter A's Position

67. Daughter A (through A Limited) agrees with the Trustee's position that she should be reimbursed the legal costs incurred in bringing the MH Proceedings. In support of this, Daughter A avers in her Second and Fourth Affidavits that she was compelled to bring the MH proceedings because of the serious concerns about the Settlor's mental capacity and the possibility that the Son and others may have been taking advantage of that to interfere with the established Trust structure established by "inappropriately influencing" the Settlor's exercise of his powers under the Trust Deed, based on certain events.

68. These events are said to include the following. First, there was a formal demand from Stephenson Harwood, a law firm purportedly acting for the Settlor (but who had acted or acts for the Son also), to share the Trust Documents with the Son, after Advisor A (a long-standing adviser to the Settlor), in consultation with the Trustee, had refused to share the documents with the Son. This was said to be highly unusual, because the Settlor would normally have asked Advisor A if he wished to see any documents, and in any event he had a strong working relationship with the Trustees and did not need to direct a request through solicitors. Second, there was a letter received on 2 July 2019 purportedly sent by the Settlor stating that it had always been his wish for the Son to be his successor in administering the Trust and that it was never intended for Daughter A to succeed him as Appointor. This was also said to be suspicious, as it was inconsistent with the arrangement which the Settlor had put in place some 15 years earlier when he appointed Daughter A as successor Appointor. Daughter A points out that this purported decision to alter the chain of succession of Appointor received critical commentary in the 2021 Ruling, where the Court said as follows:

> "Then, there is the allegation by the [Son's] camp that it was/is [the Settlor's] wish that [the Son] would take over from him in order that this philanthropic legacy should remain within the male line of the [Settlor's] family. This is also unusual since, in 2003/2024, when [the Settlor] was not allegedly incapacitated, he did not think of this. [The Son] was an adult at the time. Why would he wait until 2019 to come to his senses that his son should continue his legacy?"

69. Thirdly it is said that Daughter A had been prevented from accessing the Settlor since 7 May 2019, and that the Trustee's repeated requests to speak with him were also frustrated by the unwillingness of family members in the Son's camp to facilitate such a meeting.

70. Daughter A contends that in light of her own suspicions and in order to obtain the independent medical assessment requested by the Trustee, she commenced the MH Proceedings on 5 July 2019, just two days after the Trustee's determination that the Settlor was mentally incapacitated and its recognition that she (Daughter A) should therefore succeed him as Appointor. Given that the commencement of those proceedings was said to be motivated by a desire to protect the Trust and to facilitate the independent medical assessment, A Limited believes it appropriate that Daughter A should be reimbursed its costs.

71. Daughter A is neutral as to whether the other Represented Notice Parties should also be entitled to receive reimbursement for any costs incurred in the MH Proceedings (as the Son/B Limited and Daughter E have requested), if the Court were to find that she is entitled to such reimbursement. However, it is pointed out that no legal arguments were submitted by either the Son/B Limited or Daughter E as to why they should be entitled to their costs, other than the Son's statement that "*There is no reasons why [Daughter A] should be treated differently*". To the contrary, A Limited/Daughter A argued that the Son, Daughter E and the other Represented Notice Recipients were not aligned with Daughter A's objectives in seeking to determine the Settlor's capacity to manage his affairs.

72. With respect to the Historic Capacity Proceedings, A Limited's position is that Daughter A should be entitled to reimbursement of the costs she incurred in defending and seeking a stay of those proceedings, to the extent that she is unable to recover such costs from the Son under a costs order made in those proceedings. A Limited submits two main reasons why it says Daughter A should be entitled to reimbursement of costs: (i)Daughter A was a party to the Historic Capacity Proceedings for the sole reason that she succeeded the Settlor as Appointor, in accordance with the Deed of Appointment executed in 2003; and (ii) Daughter A's principal involvement was to successfully challenge the jurisdiction of the Foreign Court to hear those proceedings, thereby enforcing the exclusive jurisdiction provision in the Trust Deed and upholding the Trust Structure designed by the Settlor. Further, it is noted that both the Trustee and the Son/B Limited have confirmed that they either agree, or have no objection to Daughter A being reimbursed from the Trust for her legal fees in these proceedings.

The Son's position

73. The Son does not object to the Trustee reimbursing Daughter A for costs which she reasonably incurred in respect of the Historic Capacity Proceedings, which it is conceded were concerned with the resolution of an issue concerning the administration of the Trust.

74. However, the Son takes the point that this is not the same with the MH Proceedings, notwithstanding that they were issued contemporaneously with the development of the dispute concerning the identity of the Appointor. The Son's position is that the MH Proceedings "*concerned [the Settlor's] present capacity to manage his property and affairs rather than the*

separate questions of [the Settlor's] capacity to execute the Appointor Documents" and that these "*did not have a bearing on or connection to the administration of the Trust.*" He contends that the refusal of the Court to allow the joinder of the Trustee and entertain the Appointor dispute within the MH Proceedings is proof positive that these proceedings were not connected to the administration of the Trust.

Court's analysis and conclusions

75. As mentioned, the s. 77 jurisdiction is a unique one that provides a quick and inexpensive way for the Trustee to obtain advice and immunize itself from any legal claims if it acts pursuant to such advice. But it is a summary jurisdiction that requires the court to conduct its analysis on the basis of unestablished facts, and the court ought therefore to proceed with some degree of caution.

76. Another important factor informing the current application is that this is the second time that the Court is being approached for guidance in respect of the Appointor issue, and this will require me to consider much of the same evidence and arguments that were before Charles J. Naturally, the Court will give deference and careful consideration to previous judicial advice on a similar question. But, it still has to make its own determination as to what is in the best interest of the Trust based on the current circumstances.

Question 4: *The Appointor Issue*

77. As indicated, both the Trustee and A Limited/Daughter A support maintaining the status quo with Daughter A as Appointor. Counsel for Daughter A described the Son's position as akin to seeking to "*hijack the application to interpose himself as co-Appointor of the Trust*". In my view, considering all the circumstances of this case and the background facts as they have been explained to the Court, this was a most unfair characterization of the position of the Son, and the tempered submissions made on his behalf by Mr. Adkin.

78. I will later come to assess the reasons why Daughter A contends that recognizing the Son as interim co-appointor would be unworkable and harmful to the administration of the Trust. But I think it is important that this analysis is done against the backdrop of the chain of events that triggered the dispute between the family members, although (as noted) these facts are in contention.

79. According to the evidence led on Daughter A's behalf, it was serious concerns about the Settlor's mental capacity and the suspicion that the Son and other family members were taking advantage of his diminished capacity to interfere with the Trust Structure, that led her to take various steps to protect the Trust. (the Settlor had been diagnosed with Alzheimer's-related dementia in 2012, when he was almost 90, and suffered a fall in 2018, which caused a brain bleed.) The suspicious acts from the Son's camp are said to include an irregular request for Trust documents, the presentation of a letter, presumably from the Settlor, outlining his wishes

for his son to immediately succeed him as Appointor and continue the male lineage of the family, and various actions of the Son faction to sequester the Settlor from Daughter A and the Trustee. This, it is said, led Daughter A to take various actions to protect the Trust, which included obtaining the 3 May 2019 medical certificate from Dr. V, as well as taking legal action to have the Foreign Courts determine his capacity.

80. The Son, in his second Affirmation, provides a different version of these events. According to his account, the story starts in late 2019 when the Son was presented with documents relating to the Trust's main foundations (Corporate Beneficiary One and Corporate Beneficiary Two) which are said to have envisaged the Settlor relinquishing his role with the foundations and essentially being replaced by Daughter A, and also allotting his shares in the Corporate Beneficiary One to a longtime assistant. This not only caused the Son some concern, but it is said to have elicited an angry response from the Settlor, who denied any agreement to relinquish his role or the transfer of any shares. This is what allegedly prompted a request for documents relating to the Trust from the Settlor's lawyers, Stephenson, Harwood. On 3 May 2019, it is alleged that there was a confrontation between Daughter A and the Son over these events, and it appears (that very same day) without any consultation with the Settlor or his widow, or any other member of the family, Daughter A procured the letter from Dr. V certifying that the Settlor lacked capacity ("the Dr. V letter").

81. This letter was a fairly important development in the series of events leading to the institution of the various legal proceedings, and I therefore set out the brief contents below. It was addressed "To Whom It May Concern" and stated:

> "This is to certify that the above-named patient is suffering from advanced Alzheimer's dementia, complicated by subdural hemorrhage. He is not able to sign his own signature and he is not able to make decision relating to any legal issues, to important personal decision, to issues relating to his property/banking/finance, nor even to his own personal daily care.
>
> He requires regular medicine for his condition and constant care for his basic medical activities of daily living. His next appointment at my clinic will be on 21st June, 2019.
>
> The above statement is true to the best of my knowledge."

82. As Mr. Adkin rightly points out, whether or not Dr. V was correct in his assessment in the letter (which is disputed by other evidence) is not a matter for this Court. But he stressed that the letter must be looked at subject to several caveats. Firstly, it was pointed out that Dr. V is not a medical practitioner approved by the Foreign Country's hospital authority as having any special expertise in the diagnosis of mental illness. So it is questionable whether he would have been competent to give expert testimony before the court on this issue. (In fact, the judge who heard the MH application, commented that there may be issues about the "validity" of the report, as it was not prepared by an approved doctor under the relevant section of the MH

legislation.) Secondly, the last time Dr. V had seen the Settlor before issuing the letter was in March of 2019, and he had not conducted a cognitive assessment since September 2018, when the Settlor was suffering from the effects of the subdural haemorrhage, which were said to be transient.

83. Apparently, it was not until 28 May 2019 that the Settlor became aware of the Dr. V letter and only then (it is surmised) because the Trustees emailed Stephenson Harwood a letter dated that same date stating that they had "*received a medical certificate dated May 3, 2019, detailing [the Settlor's] current state of health*" (the Dr. V letter). The letter also indicated that that the Trustee was "*reviewing our files and consulting with counsel to determine how we should proceed.*" According to the Son, the Settlor, his widow and the rest of the family were upset with this course of events, and this triggered the Settlor's response in executing a series of documents which had the effect of appointing the Son as the new Appointor of the Trust.

84. As a result of the contentions of Daughter A and the letter from Dr. V, the Settlor's lawyers had several contemporaneous assessments done (2 June 2019, 15 June 2019, and 17 June 2019) by three highly credentialed doctors, all with specialist qualifications in psychiatry. They provided comprehensive reports on their assessments attesting to his mental capacity before the Appointor documents were executed, and they also witnessed the execution of various of these documents. These included the Appointment of a New Protector executed on 2 June 2019; the Appointment and Resignation of a Protector and Appointor document, executed on 17 June 2019; and a Deed of Removal of Appointor and Deed of Appointment of Appointor on 19 June 2019.

85. The medical professionals were Dr. W, a member of the Royal College of Psychiatrists, a Fellow of the College of Psychiatrists in the Settlor's jurisdiction of residence, a Fellow of an academy associated with psychiatry) in the Settlor's jurisdiction of residence and an approved doctor under the mental health legislation there; and Dr. X and Dr. Y, both specialists in psychiatry, members of the College of Psychiatrists, members of a council associated with medicine in the Settlor's jurisdiction of residence, and approved doctors under the mental health legislation there. They basically found that although the Settlor was suffering from mild dementia, that condition did not affect his ability to make "financial and personal decisions". Drs. X and Y indicated in one of their reports that they strongly disagreed "*with [Professor V's] opinion that [the Settlor] is suffering advanced Alzheimer's dementia.*"

86. Following the Trustee's letter of 28 May 2019, there was some back and forth between the Trustees and the Settlor's local attorneys and the Son. On 13 June 2019, Stephenson Harwood sent an email to the Trustees indicating that the Settlor had been independently assessed by doctors qualified to give opinions on capacity for the purposes of the mental health legislation in the Settlor's jurisdiction of residence, who disagreed with Dr. V's assessment. They therefore requested that the Trustee defer making any decision until there was a chance to review the additional reports. Apparently, the Trustees agreed to wait for the qualified opinions.

On 24 June 2019, the Trustees wrote to the foreign address of E Limited, again referring to the Dr. V letter and requesting "*any further evidence, be it a court order or a second medical opinion*" from Daughter A and the Son before "*we can determine our position as Trustees in declaring [the Settlor] incapacitated*".

87. According to the Son, he did not become aware of the existence of this letter until 3 July 2019, and was not made aware of its contents until (at his request) he was emailed a copy from the Trustee, along with the letter dated 3 July 2019, indicating that "*the Trustees of the Trust met today and declared [the Settlor] incapacitated*". The Trustees also indicated that they had not received any additional information, as requested in their 24 June 2019 letter, but would consider any further information regarding the Settlor's capacity. The Son responded by email on 4 July, registering surprise that the Trustees had determined the Settlor to be incapacitated, and indicating that neither he nor the Settlor received the letter of 24 June 2019, and if they had they would have provided the medical opinions to the contrary.

88. On 5 July 2019, Stephenson Harwood wrote to the Trustee inviting it to reverse its decision and conduct a full and proper investigation into the Settlor's mental state. The additional medical opinions were attached. The Trustee's response (by email of 12 July 2019) was that "*it would be entirely unsatisfactory for the trustee to reverse its determination...based upon a multiplicity of 'battling' reports signed and/or witnessed by various medical professionals*." On 31 July 2019, attorneys for the Trustee wrote to Stephenson Harwood on behalf of the Trustees indicating that they were made aware of the MH Proceedings and would await the determination of "*that eminently well-placed court*" before taking any steps to revisit and/or modify its prior determination in respect of the Settlor.

89. Mr. Adkin was at pains to point out that he was not levelling any criticism at the 2021 Ruling, or the actions of the Trustees leading to the recognition of Daughter A, although the Son's position in the original application (as noted by Charles J at para. 13) was that the Trustee may have rushed to judgment in declaring the Settlor incapacitated. Mr. Adkin, for his part, did not press that submission before me, but submitted that the Trustee in the first instance seemed to have taken a pragmatic view by recognizing Daughter A in the interim as Appointor, but then made it clear that they would adjust that position based on the Court's determination. He emphasized, however, that it was impossible to disregard the stark contrast between the paucity of medical evidence as to the Settlor's capacity contained in the short letter of Dr. V, who was not a specialist, and the comprehensive contemporaneous assessments and reports done by the three qualified mental health experts.

90. As indicated, I am not required to make any findings one way or the other on any factual matters, including the medical opinions. But, as pointed out in the **Marley** case, where beneficiaries oppose the proposal of the Trustee, the court is concerned to see whether or not those concerns are well founded. I therefore do have to form some preliminary view of the

facts. In this regard, I cannot say that the concerns of the Son's camp are not well founded. At the very least, I think the evidence safely demonstrates that there is a *bona fide* dispute as to whether the Settlor had mental capacity during the critical period in 2019 when the Appointor Documents were executed and when he was declared incapacitated by the Trustee. The evidence of the Son's camp as to the events during 2019—and I note in passing that counsel for Daughter A strenuously resisted Mr. Adkin's attempt to adduce this evidence as an attempt to "retry the evidence"—also stands as a counterpoise to the suggestion that the alleged acts of the Settlor late in his twilight years to change his mind about the Appointor were completely out of the blue and inexplicable.

Daughter A's arguments that the Son's proposal would be harmful to the Trust

91. With respect, I prefer the submissions of Mr. Adkin on these points. Dealing with Daughter A's arguments in turn, to say that the recognition of joint Appointors would derogate from the Trust and the plan of succession for the Appointor respectfully does not at all help with the question of what should be done in the interim. If it turns out that the Settlor did in fact have capacity to change the Appointor in 2019 and lawfully did so, treating Daughter A as Appointor in the interim would also be contrary to the Testator's plan for the Appointor, although it would be saved by the Court's sanction. But the reality is that this Court has only been presented with two possibilities pending the determination of the rival claims of Daughter A and the Son to occupy the position of Appointor: (i) the recognition of one of them as appointor to the exclusion of the other; or (ii) an inclusive arrangement with both of them as *de facto* appointors.

92. So far, the logic for preferring the appointment of Daughter A over the Son seems to be that it is not in dispute that Daughter A was named the first successor in the 2003 Deeds, when presumably the Settlor was fully possessed of his mental faculties, and that this line of succession was not questioned until the purported 2019 appointments. However, her succession as Appointor was subject to several contingent events, one of which was that it was only to take effect if the original Appointor (the Settlor) became incapacitated. Thus, it was the act of the Trustee declaring the Settlor incapacitated that ushered in the chain of succession leading to her recognition as Appointor.

93. As has been explained, this was done on 3 July 2019, largely based on the Dr. V letter. In the 2021 Directions Ruling, the Court emphasized that the Trustee did "*not rush to judgment when it declared the Settlor to be incapacitated*" based on the facts and medical evidence available at the time. It is not disputed that the additional medical evidence was *not* provided to the Trustee in advance of their consideration. But this does not change the fact that at the time when the Settlor was declared incapacitated, there were in existence rival Appointor documents inconsistent with the line of succession in the 2003/2004 Deeds, as well as a significant corpus of professional medical opinion disputing the Dr. V opinion.

94. Obviously, it is for the Court deciding the Appointor Proceedings to determine the issue of the Settlor's capacity at the time of the execution of the 2019 documents, based on all the available evidence, including the medical evidence. But until this critical issue is determined, it does not seem to me that Daughter A has any superior claim over the Son to the role of Appointor.

95. Secondly, it is said that the Son's proposal would undermine the 2021 decision to recognize Daughter A as Appointor. With respect, I am at a loss to understand the basis for this submission. It is reasonably clear that the 2021 Directions Ruling was issued with the expectation that the Foreign Country's courts would in the very near future make some pronouncement on the issue of the Settlor's capacity that may have provided some guidance to the Trustee, even though it was accepted, on normal conflict of law principles, that the Trustee would not be strictly bound by any Ruling or guidance from the foreign court. Further, the direction for the Trustee to continue to administer the Trust with Daughter A as Appointor on the basis that the Settlor was incapacitated was made subject to the express condition of "*pending the final determination of the Settlor's capacity in the extant Foreign Court Proceedings*." With those proceedings gone by the wayside, it is arguable that the 2021 Directions Ruling have been rendered effete according to its own terms.

96. Also, while the Son accepts that the Trustee's initial decision to recognize Daughter A as Appointor may have been a pragmatic one, it was always understood that this was subject to reconsideration and change. In fact, when the Trustee was presented with the Son's proposal, through his lawyers in February 2021, the response (23 March 2021) was to say that "*We confirm that the Trustee would have no objection to implementing this proposal if the Court so orders or if all interested persons agree.*" Furthermore, the express liberty to apply given in the original directions Ruling in 2021 could only have been in contemplation that the status quo could change and the parties might need to return to court for further directions. Thus, a change or variation of those original Directions must always have been within the contemplation of the Trustee and the Court, and A Limited/Daughter A cannot reasonably contend otherwise.

97. The point has been made (by Daughter A and the Trustee) that the Historic Capacity Proceedings have been replaced by similar proceedings in this jurisdiction, and that therefore the legal landscape confronting the Court is basically the same as when the original directions were given. While this is true, the context is now very different. For example, it has been over three years since Directions were given, and the parties are no closer to a resolution of who is the true Appointor. To the contrary, Daughter A has taken steps to stay (and it is alleged by the Son stall) the very proceedings that could bring some clarity and legal finality to this issue. This is not a good look, considering that it was Daughter A who sought a stay of the Foreign Court Proceedings in favour of The Bahamas specifically to have these issues determined according to the contract law of the Trust, and hopefully with some expedition, as the 2021 Directions Ruling contemplated. But whatever the motivation for the stay application, the expectation that there would be an expedited determination of the Appointor issue that agitated the 2021 directions has now evaporated into thin air, and there is the very real prospect that the

Trustee could be administering the Trust for an indeterminate period under a penumbra of doubt as to the validity of the exercise of restricted powers.

98. I also agree with the submissions of Mr. Adkin that the risk of disclosure of confidential documents cuts both ways. At the moment, Daughter A is entitled to see confidential documents by virtue of her recognition as Appointor. But if the Court were to rule she was not the true appointor, all of that could be unraveled and challenged. Further, no evidence was presented to the Court to show that the Son is any more litigious than Daughter A or disposed to make any improper use of Trust documents.

99. Next it is said that there is a danger that any co-operative arrangement would prevent the proper functioning of the Trust because of the strained relationship between Daughter A and the Son, and the latter's propensity for litigation. This, it is said, could potentially eat up resources in litigation that could otherwise be applied to charitable purposes.

100. It is accepted that the dispute has caused a division between the claimants (Daughter A and the Son) and other family members, and that there will inevitably be litigation until the issue of the Settlor's mental capacity is resolved and the identity of the Appointor determined. But this is likely to happen whether or not a co-operative arrangement is put in place. As noted, there is no evidence before the Court to suggest that the Son is any more litigious than Daughter A, and both of them have instituted litigation in connection with these proceedings.

101. Further, so far as litigation costs go, these are subject to the control of the Court, which will always act to protect the Trust. In any event, these concerns have to be balanced against the potential harm that could ensue if the Appointor Proceedings do not progress and the Trust continues to operate for an extended period with potentially the wrong Appointor. The 2021 Ruling acknowledged that the ambiguity surrounding the identity of the Appointor created a situation in which the Trustee was "*unable safely to make distributions and carry out the Settlor's philanthropic ends*."

Position of the other beneficiaries

102. There is a further point that I would mention, and it has to do with the position adopted by the majority of beneficiaries in this application, which is to support the Son's proposal. As noted, the Trustee's position is that it has no objection to instituting this proposal either if sanctioned by the Court or if all the parties agree. I asked Mr. Simms if it was significant that the majority of beneficiaries supported the Son's position. His response was that "*they are all [the Son's] puppets*", and essentially invited the Court to disregard their wishes. With respect, I do not consider that the stated position of the majority of beneficiaries, most (if not all) of whom have important corporate roles with respect to the various Trust companies and access to legal advice, can be cursorily dismissed as being under the sway of their youngest sibling. While the Court can obviously ignore the wishes of the beneficiaries if it does not consider them aligned with the best interests of the Trust, I am not of the view that I should turn a blind eye to

the fact that all the other family members support the Son's proposal, and have formally indicated that to the Court.

Court's conclusions

(Question 4)

103. For the foregoing reasons and considerations, I accept the submissions of counsel for the Son that an arrangement that requires notice to be given to both Daughter A and the Son with respect to the exercise of Restricted Powers would be in the best interest of the Trust until it can be determined which of them, according to the law of the Trust, is the Appointor. In my opinion, this would allow the Trustee to make distributions and carry out its functions without having to second-guess the validity of the exercise of its Restricted Powers, as notice would have been given to both potential Appointors. I do not see why such an arrangement would not be workable, as the Trustee would still be free to administer the Trust according to its terms and there would be no fetter on the exercise of its discretion. In fact, it is notable that Daughter A did not set out any specific reasons why it was said a co-appointor arrangement could not work, other than to assert that the Son would be unreasonable and litigious. Mr. Adkin dismissed these concerns as a mere "spectre" and indicated that the principal feature of the Trust sought to be protected by the arrangement was the entitlement to give notice of the exercise of the restricted powers. Any other powers to be exercised by the Appointor would be done consensually, and in the event of disagreement directions could be sought from the Court.

Questions 1, 2

104. It is settled law that a Trustee has a right to be reimbursed for all expenses properly incurred by him in the administration of the trust estate, which includes legal or professional expense (see **Goodsir v Carruthers** (1858) 20 D 1141; **Ann Maxine Patton v Alvaraz et. al.** [2020]1 BHS J. No. 22; and see s. 50 of the Trustee Act). These principles were not in dispute between the parties and no one suggested that that the expenses were not properly incurred in the discharge of the Trustee's duties.

105. With respect to US$153,520.20 or activity fees incurred for 18th June 2019 to 30 September 2022, the Court has had reference to the schedule of fees set out in the Fifth Trustee Statement, and to the explanation of the Trustees that it has had to devote significant resources beyond the ordinary towards administrative functions in connection with the Trust. The Court is therefore satisfied that the fees were properly incurred in connection with the administration of the Trust and therefore direct that they be paid from the Trust fund.

106. In respect of prospective fees, I am also satisfied that pursuant to cl. 16 of the Trust Deed the Trustees may charge such fees subject to one of two conditions: (i) obtaining the Appointor's written agreement to do so; and/or (ii) to providing 3 months' written notice of its entitlement under its current terms. I would therefore in this regard make the direction that the Trustee is entitled to charge and be paid these fees subject to complying with the requisite clause of the

Trust Deed, and with the qualification that both Daughter A and the Son are to be treated in the interim as Appointor for the purposes of cl. 16.

Question 3

107. There is no dispute between the parties as to the principles governing the payment of costs in trust or estate cases. The payment of legal costs out of a trust or estate is governed by special rules, and is one of the exceptions to the general principle that costs are payable to the successful party by the losing party, i.e., costs follow the event (see O. 59(3)(3), and CPR 71.2). Where an application is made to the court by a trustee or other fiduciary, he or she is entitled to have those paid out of the trust fund, provided he or she has not acted unreasonably, and to the extent such costs are not recovered or paid by any other person (Ord. 59(6)(2), and CPR 71.19). These principles may be extended to applications by beneficiaries, who may also have an entitlement to be reimbursed for costs (by analogy to the position of a Trustee) if the application raises a point which would have justified an application by the Trustee. The test is whether the costs are incurred for the benefit of the estate.

108. The position of beneficiaries falls into the second category of trust litigation identified in **Re Buckton [1907]**, 2 Ch. 406 (at 413-415, per Kekewich J.), in which a party to trust litigation other than a Trustee may be entitled to costs out of the estate (see also, **Ann Maxine Patton v Alvaraz et. Al.** [2020]1 BHS J. No. 22, cited by the Trustee). The first is where the trustee is bringing proceedings for the guidance of the court as to the construction of the trust instrument or some other question arising in the course of administration. The second is where the application is made by someone other than the trustee, but which fall into the same kind of applications contemplated in the first category. And the third is where a beneficiary is making a hostile claim against the trustees or another beneficiary. Usually the court will award costs out of the Trust fund in the first two categories; the third category is treated the same way as ordinary adverse litigation, and costs are awarded on the same principle (i.e., costs follows the event).

109. However, in setting out the principles in **Re Buckton**, Kekewich J acknowledged that the lines may sometimes become blurred between cases in the second and third categories, but added the caveat that:

> "...when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think to be rigidly enforce in adverse litigation, and order the unsuccessful party to pay the costs."

110. Further, as Charles J. noted in Ann Maxine Patton, "*it is settled law that a protector's legal status in relation to costs and his right of indemnity in trust proceedings are analogous to that of a trustee if the protector has fiduciary functions*", quoting **Re JP Morgan 1988 Employee Trust** [2013] JCA 146, where Nugee JA said [23]:

> "Second, although JPM is not a trustee, it is a person with functions in relation to the Trust which are fiduciary. I agree with the Commissioner (at paragraph [17] of his judgment on costs) that such a person is entitled to an implied equitable indemnity in respect of costs reasonably incurred by it in the discharge of such functions: see Lewin on Trusts [18th edn., 2008] §21-31. Advocate Pearmain before us accepted that the Commissioner was right so to hold. The Commissioner said (at paragraph [20] of this judgment on costs): -
>
> > 'The underlying principle, in my view, is that a person exercising fiduciary powers in the interests of the beneficiaries cannot, absent a finding of misconduct, be expected to meet the costs reasonably incurred by him or her in the exercise of those powers out of his or her personal assets. The fiduciary's implied right of indemnity is to be equated therefore to a trustee's right to be reimbursed in full and not to be subject to taxation.'

111. As noted, the Trustee ultimately presented this issue before the Court as a request for advice on whether all of the represented parties, not just LY, should be reimbursed for their costs in the MH Proceedings. To summarize, Daughter A argues that she should be entitled to remuneration for her costs because the MH Proceedings were allegedly instituted to "protect the Trust" and facilitate the independent assessment of the Settlor's mental capacity, as had been proposed by the Trustee.

112. I do not apprehend that the exercise of providing any directions as to whether Daughter A or the other participants in the MH Proceedings should be remunerated for their costs requires me to undertake a microscopic analysis of those proceedings to determine whether or not it comes within the second or third category of cases. As noted by Kekewich J. in **Re Buckton**, there is often not any bright dividing line between the two categories. I accept that those proceedings were not directly concerned with the Appointor issue, but I do not agree that they had no bearing or connection with the Trust. As asserted by Daughter A, at least part of the motivation was to commission an independent assessment of the Settlor's mental capacity, which was done under the umbrella of those proceedings by the representative of a government body, although this did not take place until late 2021. It will be recalled that the Trustee had asked for a further medical opinion or court order, with respect to the Settlor's mental capacity. Although these proceedings were terminated prematurely by the death of the Settlor, in my view the outcome may have assisted the Trustee in any re-assessment of its position on the Settlor's mental capacity.

113. I also note that the proceedings were brought under the mental health legislation of the Settlor's jurisdiction of residence, by without notice process, seeking various declarations and reliefs from the Court. It did not name the Son or any of the other beneficiaries as defendants, although the Son and another sibling intervened to defend the proceedings. But it was not commenced as hostile litigation between beneficiaries or against the Trustee.

114. I would therefore hold that the MH Proceedings did raise questions which were connected to the administration of the Trust, even if not directly related to the Appointor issue. It was instituted just 2 days after the Trustee declared the Settlor incapacitated, and the request

for an independent and impartial medical assessment, may have clarified the conflicting medical opinions confronting the Trustee. In fact, it is noted that one of the directions sought by the Trustee in the original application was whether it should take any steps in relation to those proceedings. The Trustee therefore clearly contemplated that those proceedings might have been of some potential relevance to the administration of the Trust.

115. I therefore direct that Daughter A is entitled to be reimbursed for her costs of the MH Proceedings. It is significant that all of the other parties either supported or were neutral to the other notice participants receiving their reasonable costs of those proceedings, if the Court were to determine that Daughter A should be reimbursed her costs. I will therefore also direct that they should be reimbursed their reasonable costs.

116. All the parties concede that the Historic Capacity Proceedings, dealing as it did with whether the Settlor had capacity to execute the Appointor documents, were properly within the second category and concerned with the administration of the Trust. Thus, all the parties are agreed that Daughter A should be entitled to be remunerated for her costs out of the Trust fund for her part in defending and seeking a stay, although the Son contends that this should only be to the extent that she is unable to recover her costs from the costs awarded against the Son.

117. I would therefore direct that the trustee may reimburse Daughter A for the legal costs that she has incurred in defending and seeking a stay of the Historic Capacity Proceedings.

CONCLUSION & DISPOSITION

118. Having regard to the foregoing, I would make the following orders and directions, and invite the parties to prepare a draft Order to give effect to them:

(1) The Trustee may charge, raise and pay US $153,520.20 representing activity fees incurred in connection with this matter for the period 18 June 2019 to 30 September 2022, subject to obtaining Daughter A's written agreement and/or providing 3 months' prior written notice to Daughter A before doing so.
(2) The Trustee may charge, raise and pay activity fees in accordance with its terms and conditions and Schedule of Fees in force from time to time upon it obtaining Daughter A's and the Son's written agreement and/or providing 3 months' prior written notice to Daughter A and the Son before doing so.
(3) The Trustee may reimburse Daughter A for the legal costs incurred in bringing the MH Proceedings, as well as reimburse the Son and any other Notice Party who participated in those proceedings for the legal costs they incurred in participating in those proceedings. Further, the Trustee may reimburse Daughter A for the legal costs she incurred in defending the Historic Capacity Proceedings, to the extent that such costs are not recoverable from the Son.
(4) In light of the fact that (a) the MH Proceedings have been terminated following the Settlor's death without ever determining his capacity, and (b) the Historic Capacity

Proceedings have been indefinitely stayed, the Trustee shall, from the date of this Order, administer the Trust on the basis that Daughter A and the Son are co-Appointors of the Trust, pending the determination of the Appointor Proceedings or until otherwise directed by this Honourable Court. In this regard, to the extent that the Trustee is required to give notice to the Appointor under the Trust or wishes to communicate any matter to the Appointor, the Trustee shall give notice to or communicate with both Daughter A and the Son. To the extent that Daughter A or the Son wish to exercise any of the Appointor's powers, such powers shall be exercised consensually, and in the event of disagreement, directions sought from the Court.

(5) The Trustee is entitled to its costs on an indemnity basis and shall also raise and pay from the Trust fund the costs of the other parties, to be taxed on an indemnity basis if not agreed.

(6) The Trustee and any Notice Recipient to these proceedings shall have liberty to apply.

Klein J.

19 December 2024