COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

IN THE MATTER of the A Settlement (**"the Trust"**)
established 17th August, 2000

AND IN THE MATTER of Section 77 of the Trustee Act 1998
(Chapter 176, Revised Statute Laws of The Bahamas 2000)

AND IN THE MATTER of an application by The Bank of Nova Scotia Trust Company (Bahamas) Limited as Trustee of the said Trust

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: John Minns with Eryn Wilmott for the Applicant

Hearing date(s): 2 July 2026

DECSION

WINDER, CJ

This is the application of the Bank of Nova Scotia Trust Company (Bahamas) Ltd. (the Trustee) pursuant to Section 77 of the Trustee Act for the advice, opinion or direction of the court in relation to the management and administration of trust property. On 2 July 2026 I provided the advice and opinion of the Court in relation to this matter and promised to put my reasons in writing for doing so; I do so now.

[1.] The Trustee has applied to the Court pursuant to Section 77 of the Trustee Act and the inherent jurisdiction of the Court for the advice, opinion or directions of the Court as to whether it is justified in continuing to administer the Trust notwithstanding its inability to locate the executed Deed of Retirement and Appointment ("the DORA"), by which it was appointed the successor Trustee to MeesPierson (Bahamas) Limited ("MeesPierson").

[2.] Section 77, 78, 79 and 98 of the Trustee Act provides as follows:

> 77. (1) A trustee or personal representative may without commencing an action apply upon a written statement for the opinion, advice or direction of the Court of Judge in Chambers on any question respecting the management or administration of the trust property or the assets of any testator or intestate.
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> (2) Such application shall be served upon and the hearing attended by all persons interested in such application or such of them as the Judge thinks expedient.
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> (3) A trustee or personal representative acting upon the opinion, advice or direction given by the Judge shall be deemed so far as regards his own responsibility to have discharged his duty as such trustee or personal representative in the subject matter of the said application.
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> (4) Subsection (3) shall not extend to indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction if he is guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction. (5) The costs of such application shall be in the discretion of the Judge.
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> 78. Where any trustee or personal representative applies for the opinion, advice or direction of a Judge under section 77, the written statement shall be signed by a counsel and attorney and the Judge may require the applicant to attend him by his counsel and attorney either in Chambers or in Court where he deems it necessary to have the assistance of a counsel and attorney.

79. The Court may make such orders as from time to time shall seem necessary to give effect to the provisions of sections 75, 76, 77 and 78.

...

98.This Act and every order purporting to be made under this Act shall be a complete indemnity to all persons for any acts done pursuant thereto and it shall not be necessary for any person to inquire concerning the propriety of the order or whether the Court by which the order was made has jurisdiction to make it.

[3.] Section 77 of the Trustee Act is to be an effort at codification of certain prevailing common law principles in relation to the court's supervisory jurisdiction over trusts.

[4.] Long ago, in **Re Beddoe Doenes v Cottam** [1891-94] All ER Rep Ext 1697, the English Court of Appeal recognized the jurisdiction of the court to render its views on the management of trusts by trustees. *Lindley LJ*, opined at page 1703:

> But a trustee, who, without the sanction of the court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate he ought not to be allowed to charge them against his *cestuis que trust,* unless under very exceptional circumstances. If, indeed, the judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate. I entirely agree that a trustee is entitled as of right to full indemnity out of his trust estate against all his costs, charges, and expenses properly incurred. Such an indemnity is the price paid by a *cestui que trust* for the gratuitous and onerous services of trustees; and in all cases of doubt costs incurred by a trustee ought to be borne by the trust estate and not by him personally. The words "properly incurred" in the ordinary form of order are, in my opinion, equivalent to "not improperly incurred." This view of the right of a trustee to indemnity is in conformity with the settled practice in Chancery, and with *Turner v Hancock (supra),* the latest decision on the subject. But considering the ease and comparatively small expense with which trustees can obtain the opinion of a judge of the Chancery Division on the question whether an action should be brought or defended at the expense of the trust estate, I am of opinion that, if a trustee brings or defends an action unsuccessfully and without leave, it is for him to show that the costs so incurred

were properly incurred. The fact that the trustee acted on counsel's opinion is in all cases a circumstance which ought to weigh with the court in favour of the trustee; but counsel's opinion is no indemnity to him even on a question of costs.

[5.] Further, per *Bowen LJ* at page1706,

If there be one consideration again more than another which ought to be present to the mind of a trustee, especially the trustee of a small and easily disposed of fund, it is that all litigation should be avoided unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk should be incurred. If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the court whether the point is one which should be fought out or abandoned. To embark in a lawsuit at the risk of the fund without this salutary precaution might often be to speculate in law with money which belongs to other people.

[6.] The Trustee's application was made by way of the Statement of Tanya Hanna, Partner in the Trust & Estate Practice Group of the law firm of GrahamThompson (the Firm), attorneys for the Trustee. The short statement provides, in part, as follows:

5. The [A] Settlement was established by Declaration of Trust dated August 17, 2000 by MeesPierson.
6. That on or around 2003, the Firm was instructed by MeesPierson to act on its behalf in connection with the sale of a significant portion of its trusts business to Scotiatrust ("the "Trust Business"). The acquisition of the book of business was effected by a Sale and Purchase Agreement dated 1st February, 2003 between MeesPierson and Scotiatrust ("the Agreement"). Exhibited hereto at pages 37-73 is a copy of the Agreement. The [A] Settlement is listed in the Schedule to the Agreement … as one of the Trusts to be transferred to Scotiatrust as the new trustee.
7. The sale and Purchase of the Trust Business was completed in May of 2003.
8. As a part of our engagement, we prepared template Deeds of Retirement and Appointment (DORAs"). The DORAs facilitated the transfer of the relevant trusts from MeesPierson to Scotiatrust and evidenced the retirement of MeesPierson and the appointment of Scotiatrust. The templates were drafted based on who had the power to appoint a new trustee under the trust deed of each trust. Clause 5(i) of the [A] Settlement empowers the current trustee of the Trust to appoint a new trustee. The

DORAs took a nearly identical form to the template attached hereto at pages 75 to 79.

9. We are instructed that during a routine examination by the Central Bank of The Bahamas, the DORA for the [A] Settlement could not be located. We are further instructed that despite thorough and diligent searches of the files associated with the Trust, both on premises and at the storage facilities where such files are maintained, and the office generally, neither the DORA nor a copy of it could be located.

10. We are instructed that while in the process of conducting the searches referred to in paragraph 9 above, they located a document entitled "*The [A] Settlement Notes to the Financial Statements*" dated January 31, 2004, which makes reference to the DORA for the captioned Trust as being dated September 2, 2003. A copy of the Notes to Financial Statement is exhibited hereto at page 80.

11. Additionally, Scotiatrust has located a letter signed by the Settlor of the Trust dated 2 September, 2003, confirming to MeesPierson his agreement that Scotiatrust be appointed as the new trustee of the Trust. Exhibited hereto is a copy of the said letter at page 74.

12. Based on documents reviewed and inquiries made of Scotiatrust's employees, I verily believe that the DORA was executed sometime in the latter half of 2003.

13. Based on our instructions, the Trust has been continuously administered in accordance with the trust deed since 2 September 2003.

14. For the reasons set out above, I respectfully invite the Court to grant an order that Scotiatrust is entitled to continue administering the [A] Settlement notwithstanding that it is unable to locate the original nor a copy of the duly executed DORA.

[7.] I adopt the helpful and concise summary of the factual background provided by the Applicant:

i. The Trust was established by declaration of trust dated 17 August 2000. MeesPierson (Bahamas) Limited was appointed as the original trustee.

ii. In or around 2003, Scotiatrust acquired the majority of MeesPierson's book of business pursuant to a Sale and Purchase Agreement dated 1 February 2003. The Trust was one of a number of trusts acquired by Scotiatrust as part of that acquisition. The sale and purchase of the trust business was concluded in May 2003.

iii. DORAs were prepared by GrahamThompson to facilitate the transfer of the relevant trusts from MeesPierson to Scotiatrust and evidenced the retirement of MeesPierson and the appointment of Scotiatrust. The templates were drafted based on who had the power to appoint a new trustee under the trust deed of each trust.

iv. Clause 5(i) of the [A] Settlement empowers the current trustee of the Trust to appoint a new trustee.

v. During a routine examination by the Central Bank of The Bahamas around February 2017, the DORA could not be located. Despite thorough and diligent searches of the files associated with the Trust, both on premises and at the storage facilities where such files are maintained and inquiries of staff members, neither the original nor a copy has been found. In all likelihood, the DORA has been misplaced.

vi. While in the process of conducting the searches referred to above, Scotiatrust located a document entitled "*The [A] Settlement Notes to the Financial Statements*" dated January 31, 2004, which makes reference to the DORA for the Trust as being dated 2 September, 2003.

vii. Additionally, Scotiatrust located a letter signed by the Settlor of the Trust dated 2 September, 2003 confirming to MeesPierson his agreement that Scotiatrust be appointed as the new trustee of the Trust.

viii. Since 2 September 2003, Scotiatrust has continuously administered the Trust in accordance with the Trust Deed.

[8.] In **Porlock Pty Ltd** [2015] NSWSC 1243, a decision of the Supreme Court of New South Wales, the plaintiff, trustee of the JDB Carr Trust No.2., made a similar application for judicial advice. JDB Carr Trust No.2, which held substantial assets, was established in or about 1957, although it is unclear who the settlor was. The challenge in ***Porlock Pty Ltd*** was that a copy of the Trust Deed could not be located and the trustee sought the advice of the Court and confirmation of its belief as to how it held the trust property.

[9.] The language of Section 63 of the Trustee Act (Australia) is settled in similar terms as The Bahamas' Trustee Act, and provided as follows:

(1) A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.

(2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.

(3) Rules of court may provide for the use, on an application under this section, of a written statement signed by the trustee or the trustee's Australian legal practitioner, or for the use of other material, instead of evidence.

(4) Unless the rules of court otherwise provide, or the Court otherwise directs, it shall not be necessary to serve notice of the application on any person, or to adduce evidence by affidavit or otherwise in support of the application.

[10.] According to, *Young AJA* in **Porlock Pty Ltd**:

"…The court has no power to actually recreate a Trust Deed. We are not in the same situation as one is when there is a lost will. What the court is doing is advising the trustee as to whether it would be justified in dealing with the trust property in the way in which it proposes."
7. There have been relatively few authorities as to what one does when one cannot find a Trust Deed. Right back in 1874 Faucett, PJ dealt with Hewitt v Farrell (1874) 12 SCR (NSW) (Eq) 94. His Honour was troubled about the Statute of Frauds in holding that there was a trust when it was not clear to him whether there was an actual Trust Deed in existence. He also was concerned that there was no secondary evidence of the terms of the trust. Accordingly he declined to make an order.
8. However, there are three differences in the present case:
(a) this is an application for judicial advice;
(b) there is secondary evidence; and
(c) there is evidence that the deed actually existed so there is no problem with the Statute of Frauds."

The Order made by the Court was as follows:

"(1) Order pursuant to section 63 of the Trustee Act 1925 (NSW) that the plaintiff is justified in managing and administering the JDB Carr Family Trust No 2 (Trust) pursuant to the terms contained in a letter dated 22 August 1984 from W M Samuels to James David Brownlow Carr as contained in pages 11 to 15 of Exhibit 'JC-01' of the affidavit of James David Brownlow Carr affirmed on 19 March 2015 (Letter).
(2) An order that the costs of these proceedings be borne by, and paid out of, either the income or capital of the Trust."

[11.] In **Barp Nominees Pty Ltd** [2016] NSWSC 990, the Trustee similarly sought judicial advice, from the Supreme Court of New South Wales, that it was justified in managing and administering the trust estate known as the 'Sandrin Family Trust' pursuant to the terms contained in a document entitled Deed of Trust and dated 23 August 1974. There were two trusts established by Giovanni Barp and Gilda Barp for their two children, Giselda Sandrin and Clelia Cisera. The trusts were established for the Sandrin family and the Cisera family.

The trust deed for the Cisera trust remained in existence and there was no issue in relation to it, however the trust deed for the Sandrin trust had been lost. The evidence was that the two family trusts were set up at the same time and that they shared equally in certain property interests which it is assumed were originally acquired by Mr. and Mrs. Barp or entities owned or controlled by them.

[12.] In **Barp Nominees Pty Ltd** *Pembroke J* was satisfied that the two trusts mirrored each other and that the only differences were as to the beneficiaries and the person who controlled the trust. He noted:

> "I have had the benefit of the very thorough advice of counsel for the plaintiff, Mr Barlin, who has drawn my attention to the decision of Young AJA in Porlock Pty Ltd [2015] NSWSC 1243. The secondary evidence in this case of the existence and terms of the lost trust deed are more than adequate to satisfy me that the advice sought is appropriate. This is not an application to reconstruct the trust or to create one in the same terms. It is merely an application that the trustee is justified in managing and administering the trust estate in accordance with terms which are substantially the same as the terms of the Cisera trust deed. Naturally, those terms have been modified where appropriate to reflect the different family interests involved.
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> The plaintiff has recognised and assumed the burden of demonstrating the need for 'clear and convincing proof not only of the existence but also of the relevant contents' of the missing trust deed: see Maks v Maks (1986) 6 NSWLR 34 at 36 per McLelland J and Porlock Pty Ltd [2015] NSWSC 1243 at [6] to [8]. As I said, this is not a case of reconstruction of a trust and it is far more than mere guesswork or an exercise of the imagination. The application is based upon the actual personal observation and remembrance of the contents of the lost document. The fact that there was a mirror trust deed for the other side of the family fortifies me in reaching the conclusion that the advice sought is appropriate."

[13.] In the case of the A Settlement, the Trustee contends that evidence clearly points to the existence of an executed DORA. Firstly, the Trust was amongst the book of Business acquired by Scotiatrust from MessPierson. Secondly, the Hanna Statement speaks to the procedure which accompanied the acquisition, in terms of having a DORA executed for each individual trust. Thirdly, the Trustee has on file a letter from the settlor agreeing to the appointment of Scotiatrust as successor trustee. Fourthly, and perhaps most importantly, during the course of their searches, the Trustee has located a document dated 31 January 2004 entitled *Notes to the Financial Statements*, which makes express reference to the DORA as being dated 2 September, 2003. Further, the Trustee says, there is no doubt as to the terms of the DORA as the Hanna Statement exhibits the standard form DORA used during the acquisition process for trusts such as the [A] Settlement.

[14.] I accept the Trustee's submission.

[15.] As in the case of **Barp Nominees Pty Ltd**, the present case is far more than mere guesswork or an exercise of the imagination. The Taylor Affidavit, appended to the Hanna Statement, describes the circumstances in which the DORA was discovered to be missing and the extensive searches undertaken. Despite those diligent searches, the DORA cannot be located. Further, there is no evidence of any competing trustee, no evidence that MeesPierson continued to act as trustee after that date and Scotiatrust's appointment has never been challenged.

[16.] In the circumstances, I am satisfied that the Trustee has provided 'clear and convincing proof not only of the existence but also the relevant contents' of the missing DORA. As with the Australian authorities, this is not an application to reconstruct the trust or to create one in the same terms but an application that the Trustee is justified in managing and administering the trust estate in accordance with terms of the Settlement. I therefore advised and opined that the Trustee is justified in administering the Trust as the successor Trustee to MeesPierson in accordance with the terms of the [A] Settlement, notwithstanding that it is unable to locate the original or a copy of the duly executed DORA.

[17.] I also ordered that the Trustee shall be relieved and excused wholly from any liability and be fully indemnified pursuant to Section 77(3) and Section 98 of the Trustee Act for any and all things done or not done by it in accordance with or further to this order.

Dated the 17th day of July A.D. 2026

Sir Ian Winder

Chief Justice