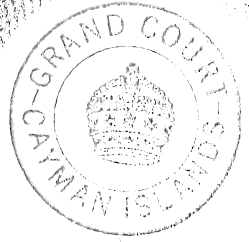


Original



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2

3 CAUSE NO. 153 of 1995

4

5 In the matter of the Cotorro Trust originally constituted by a Trust
6 Agreement dated the 1st day of June 1979 between Maria Ernestina
7 Barcardi y Gailard and Roywest Trust Corporation (Cayman) Limited, now
8 named Coutts & Co. (Cayman) Limited.

9

10 AND

11

12 In the matter of the Trust Law (Revised)

13

14 BETWEEN: COUTTS & CO. (Cayman) LIMITED

15

16

PLAINTIFF

17

18

- AND:
1. JERRY M. LINDZON
 - 19 2. ELENA GOMEZ DEL CAMPO DE LINDZON
 - 20 3. ELENA LAURA PESSINO DE BALMASEDA
 - 21 4. CESAR JAIME DE BALMASEDA
22 (A minor, by his Guardian ad Litem George
23 Giglioli on his own behalf and on behalf of all
24 minor and remoter beneficiaries of the Cotorro
25 Trust)
 - 26 5. SANTIAGO CASAS
 - 27 6. MARIANA ELENA PESSINO DE QUIRCH

28

29

DEFENDANTS

30

APPEARANCES:

31

Mr. Graham Ritchie of Charles Adams, Ritchie & Duckworth for the
32 Plaintiff.

33

Mr. John Mowbray Q.C. and Mr. Justin Appleyard instructed by Mr. Neil
34 Timms of Maples and Calder for the 1st and 2nd defendants.

35

Mr. Lynton Tucker instructed by Giglioli & Co. for the Guardian ad litem.

36

Mr. Terence Etherton Q.C. instructed by Mr. William Helfretch of Ian
37 Boxall & Co. for the 5th defendant.

38

Mr. Angus Foster of W.S. Walker & Co. for the 6th defendant.

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5 **RULINGS**

6 The court has before it applications for directions constituted by eight
7 separate summonses variously and respectively brought by the parties in the
8 action. The cause of action was itself originally instituted by the Plaintiff
9 Trustee's originating summonses dated 7th April 1995, and as amended on
10 8th August 1995.

11 The various reliefs sought in the summonses now presented are helpfully
12 described in an Agenda for this directions hearing. It contains twelve items
13 of which all but three were resolved by directions which, in the end, were
14 either agreed or uncontested as between all the parties present.
15

16 Those three items, numbered 8, 9 and 11 being contested, called for specific
17 rulings.
18

19 I set out the Agenda items:
20

- 21 1. Application of Mariana Elena Pessino De Quirch,
22 extending her time for filing an acknowledgement of
23 service and/or for leave to be joined as Sixth Defendant
24 in these proceedings.
25
- 26 2. Application of the Fourth Defendant for a declaration
27 pursuant to paragraph 1 of the summons dated 19th
28 December, 1996 (Tab 26 Vol V) - to the effect that the
29 steps taken on his behalf would not constitute an act or
30 proceeding such as would violate the "no contest" clause
31 of the Trust deed.
32
- 33 3. Application of the Fourth Defendant pursuant to GCR O.
34 15, r.13A for notice of the proceedings to be served on
35 Pictet Bank & Trust Limited. (By reference to the
36 written requests for distribution of capital to Pictet Bank
37 and Trust as Trustees of the Beto Trust. Tab 28A).
38

- 1 4. Application of the Fourth Defendant under paragraph 6
2 of his said summons for a representation order in place
3 of the Order made by paragraph 3 of the Order dated
4 29th June, 1995 to better define the class of beneficiaries
5 to be represented by him through his guardian ad litem.
6
- 7 5. The withdrawal or dismissal of the Third Defendant's
8 summons dated 31st July, 1996 (Tab 18. Vol V) with
9 consequential costs orders in these proceedings against
10 the Third Defendant.
11
- 12 6. The formulation of the question or issue to be tried as a
13 preliminary issue in April 1997: - the Plaintiff/Trustee's
14 summons of the 3rd October 1996; the Fifth Defendant's
15 of 26th July 1996; (the Third Defendant's of 31st July
16 1996); and the Fourth Defendant's summons of the 19th
17 December 1996.
18
- 19 7. Directions as to the evidence to be adduced for the trial
20 of the preliminary issue in April 1997.
21
- 22 8. Directions as to the form the proceedings should now
23 take (paragraph 1 of the Plaintiff's summons of 3rd
24 October, 1996 Tab 21. Vol V).
25
- 26 9. The Fifth Defendant's application for pre-emptive costs
27 pursuant to paragraph 2 of his summons dated 26th July,
28 1996 (Tab 16. Vol V) - to cover the trial of the
29 preliminary issues in April 1997.
30
- 31 9A. The Fifth Defendant's application for costs to be paid
32 from the Trust up to the hearing of today (summonses of
33 Fifth Defendant of 5th June, 1996 and 26th July, 1996).
34
- 35 10. The First and Second Defendants' application for leave
36 to use documents filed in these proceedings for the
37 purpose of the Florida proceedings instituted against
38 them by the Third Defendant.

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11. The application of the First and Second Defendants for a declaration and perpetual injunction against the Third Defendant pursuant to paragraphs 1 and 2 of their summons dated 31st December, 1996 (Tab 33. Vol V) and supported by the Plaintiff - paragraph 5 of its summons of 3rd October 1996.

12. Disposal of the First and Second Defendants' application to strike out part of the affidavit of Huw Moses pursuant to paragraph 1 of their summons dated 22nd October 1996, (Tab 23. Vol V).

BACKGROUND

In order especially that the three contested matters upon which I must give specific rulings can be put in context, some of the history of this cause must be set out.

When heard in April 1995, the trustee's originating summons was supported by affidavit evidence which showed reasons for the trustee's concern that the third defendant intended to challenge the Trust in this jurisdiction or in Spain, where she was domiciled. She had raised specific allegations against the validity of the Trust as it was originally constituted on 1st June, 1979, and as to the settlement upon it by the Grantor of the assets which are very valuable shares in the Bacardi family companies.

The third defendant had also raised certain allegations against the Management Committee in respect of the distribution of some 50% of the capital of the Trust to the second defendant, who was entitled under the Trust as originally constituted to the income for life, but not to the capital.

The capital distributions had been effected pursuant to certain amendments to the Trust Deed to allow them.

The validity of those amendments were, therefore, also challenged. Other difficulties experienced or anticipated by the Trustee were also brought to

1 the attention of the Court within the originating summons. In all, at that
2 time, there were six main issues described as follows in a ruling of the 29th
3 June 1995, which followed from the first hearing .
4

5 “From the evidence presented by affidavit so far the difficulties relate to six
6 main issues:

7
8 (i) The challenge to the Trust on the basis that it may
9 not have been validly constituted. That is a
10 challenge which, at its highest level, has been
11 merely adumbrated so far. There are indications
12 from correspondence from attorneys on behalf of
13 Mr. and Mrs. De Balmaseda that it is not a
14 challenge likely to be pursued, but nonetheless
15 remains of obvious concern to the trustee until it is
16 unconditionally withdrawn or resolved.
17

18 (ii) The uncertainty surrounding the nature of the
19 objectives behind the Spanish legal proceedings
20 which have been instituted. In respect of them, the
21 trustees have a justifiable concern that there Mrs.
22 De Balmaseda in particular, the only beneficiary
23 who has not signified in those proceedings that the
24 trust assets do not form a part of her
25 grandmother’s free estate, may yet seek to
26 challenge the trust in those or other Spanish
27 proceedings. In that regard it is to be noted that
28 the statutory limitation period for the bringing of
29 such a claim could be 15 years or longer.
30

31 (iii) The trustee is also faced with a demand from Mrs.
32 De Balmaseda, a lineal contingent income
33 beneficiary of the trust in her own right and from
34 Mr. De Balmaseda on behalf of his son Cesar Jr.
35 also a lineal contingent beneficiary (of capital) for
36 authenticated copies of all Trust documents.
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On the other hand, the trustee is urged by Mr. and Mrs. Lindzon not to provide those copies for the reason of the apparent likelihood that such documentation may be used towards an attack upon the trust in Spain or elsewhere.

The Lindzons have also raised the concern that any information about the trust may be abused by Mr. De Balmaseda in particular in an attempt to extract an unjust settlement of his claim (purportedly raised on behalf of his wife and son) against them and against the Trust.

- (iv) Capital distributions made to Mrs. Lindzon between 1985 and 1989 by which 50% of the capital of the Trust, as represented by shares in the underlying companies, was distributed to her pursuant to powers granted to her and vested on the Management Committee by way of amendments to the Trust Deed.

The validity of those amendments and of the subsequent distributions has been challenged on grounds not yet formally presented to the trustee but at best adumbrated as relating to the conflict of interest on the part of Mr. Lindzon, as a member of the Management Committee, in agreeing to such amendments in favour of his wife and this to the ultimate disadvantage of contingent beneficiaries and remoter issue who may some day succeed to entitlement.

Those categories of beneficiaries would include Mrs. De Balmaseda as a daughter of Mrs. Lindzon and Cesar De Balmaseda Jr., Mrs. De Balmaseda's son.

1 (v) The trustee has suspended income distributions to
2 Mrs. Lindzon pending directions from this court.
3 That is an understandable recourse, given the
4 nature of the challenges raised or foreshadowed
5 against the Trust and having regard to the legal
6 advice which the trustee has received.
7

8 Nonetheless, it must consider its obligations to
9 Mrs. Lindzon as a beneficiary who is and has
10 always been, on the face of the Trust Deed,
11 entitled to the distribution of income.
12

13 Since the death of the Grantor her mother, she has
14 been entitled to 100% of the net income of the
15 Trust. That entitlement, standing by itself, is
16 unlikely to be impeached if the original validity
17 issue does not succeed and from all indications so
18 far, it will not likely be advanced.
19

20 (vi) The trustee is also concerned that the position of
21 the minor beneficiary Cesar Jr. be not abused by
22 Mr. De Balmaseda in particular, in the course of
23 the inevitable proceedings which must now
24 develop for the resolution of the issues which have
25 been raised.
26

27 The minor's father has been clearly shown to be a
28 moving force, if not also the master-mind behind
29 the challenges which have been raised. He had
30 also been shown to be less than objective,
31 motivated as he appears to be by a deep dislike for
32 Mr. Lindzon.
33

34 The concern is that if given a position of influence
35 over any aspect of these proceedings, which he
36 would attain by virtue of being guardian of Cesar
37 Jr., he might abuse that position to the ultimate

1 detriment of the Trust as a whole and at its
2 expense”.

3
4 In light of the possible challenges to the Trust Deed and amendments and
5 other issues foreshadowed, the court decided that the trustee’s institution of
6 the proceedings was entirely appropriate.

7
8 The 1st, 2nd, 3rd and 4th defendants were also then joined as parties to the
9 proceedings.

10
11 Notwithstanding the manifest hostile intents of the 3rd defendant , the
12 trustee’s initial objective, expressed through its attorney Mr. Ritchie and
13 accepted by the court, was to have all allegations resolved as expeditiously
14 and comprehensively as possible and with the least possible further damage
15 to the Trust or to familial intrarelationships.

16
17 Further directions were also given (see Order of 29th June 1995) that the
18 necessary Trust documentation be provided to Mrs. De Balmaseda to enable
19 her advisors properly to identify and plead her allegations, provided suitable
20 undertakings were forthcoming from her attorneys to prevent the abuse of
21 those documents to launch an attack upon the Trust elsewhere.

22
23 Moreover, as the 3rd defendant could only claim access to Trust documents
24 qua beneficiary of the Trust, a Deed of Acknowledgement was also required
25 of her and of her husband disavowing any allegation against the validity of
26 the Trust as originally constituted or against the settlement upon the Trust
27 of its assets. A beneficiary may not claim an entitlement to Trust
28 documents while at the same time challenging the validity of the Trust.

29
30 The trustee’s proper concerns and the directions of the court
31 notwithstanding; neither the 3rd defendant, nor any other defendant for that
32 matter, took any steps in the action.

33
34 And so matters remained until the trustee brought a summons for further
35 directions on 22nd February 1996. The main point of that summons was to
36 require the 3rd defendant to particularise her claims against the Trust by
37 way of affidavit evidence, within the time to be fixed for so doing, or else
38 be estopped from raising them thereafter.

1

2 In response, the 3rd defendant's attorney on 22nd April 1996, filed a cross-
3 summons propounding a form of Deed of Acknowledgement for the
4 approval of the Court to be executed by the 3rd defendant and her husband
5 and in order to meet the terms of the ruling of the 29th June 1995 (later
6 formalised in an Order of 2nd August 1995), in that regard. Her cross-
7 summons also sought directions that the other parties to the action enter into
8 similar Deeds of Acknowledgement and that their attorneys give
9 undertakings similar to those required of her attorneys. She also sought
10 orders removing the Guardian ad Litem of her son the 4th defendant, and
11 appointing her step-daughter instead.

12

13 The 5th defendant also applied to be joined in the action on his summons
14 dated 5th June 1996. Representation orders in respect of his class of adult
15 contingent capital beneficiaries were also sought by him, and an indemnity
16 from the Trust fund of the costs of so doing as well.

17

18 His summons of 5th June 1996, the Trustee's summons of 22nd February
19 1996 and the cross-summons of the 3rd defendant of the 22nd April 1996
20 were all heard together on the 18th June 1996.

21

22 On that hearing, the 5th defendant was joined as a party, but his application
23 for representation orders and costs were refused.

24

25 As to the Deed of Acknowledgement, a form substantially in keeping with
26 the amended draft propounded by the 3rd defendant was approved by the
27 court and required to be executed by her and her husband before access to
28 copies of Trust documents was to be provided.

29

30 Similar Deeds were not required of any other party as no allegations against
31 the Trust had been raised by any of them. Written rulings were given in
32 respect of the issues taken up in those summonses. An impromptu
33 application by the 1st and 2nd defendant, that the proceedings be directed to
34 proceed as if begun by writ, was also refused.

35

36 Notwithstanding those events, and the fact that her attorneys repeatedly
37 asserted that there was to be on her behalf no challenge to the original
38 validity of the Trust, or as to the settlement upon it of the assets, the 3rd

1 defendant and her husband - (the latter because of the evidence that he
2 greatly influenced her making of the allegations - and because he separately
3 claimed on behalf of his son Cesar Jr) - have refused to execute and have, to
4 date, not executed the Deed of Acknowledgement.

5
6 After that hearing, no steps were taken in the action apart from the filing of
7 some of the various summonses and affidavits which are taken up in the
8 present Agenda items.

9
10 So matters remained until the 5th November 1996, when it was ordered, on
11 the trustee's summons of 17th October 1996: that a further notice of action
12 be served on all adult beneficiaries of the Cotorro Trust, such notice to
13 include the summons of the 5th defendant of 26th July, that of the 3rd
14 defendant of 31st July 1996 and that of the plaintiff of 3rd October 1996.

15
16 And so the stage was set for the hearing of many of the issues raised and
17 identified in the Agenda for this hearing, and on the various summonses. Of
18 the Agenda items, only those raised by the 4th defendant's later summons
19 of the 19th December 1996 and that of 1st and 2nd defendant of the 31st
20 December 1996, were yet to come.

21
22 Then on the 20th December 1996, it was brought to the attention of the
23 court on an ex parte application by the 1st and 2nd defendants, that the 3rd
24 defendant had commenced proceedings on 9th December 1996 against them
25 and others (including her sister, now the 6th defendant in these proceedings)
26 in Florida.

27
28 For those purposes, the 3rd defendant had resumed the use of her family
29 name, a practice she had not deemed necessary for participating in these
30 proceedings, nor the evidence discloses, in the ordinary course of her life
31 before.

32
33 It was plain from her complaint filed in Florida, that at the very heart of it
34 were the same allegations of self-dealing, fraud, conspiracy and breach of
35 duty, which she had either raised in these proceedings in her summons of
36 the 31st July 1996 or had alluded to in her affidavit earlier filed on 1st May
37 1996. These were in essence also the same as she had adumbrated in the

1 earlier allegations which had caused the trustee's concerns and its proper
2 institution of the originating proceedings before this Court in April 1995.

3
4 That history notwithstanding, the complaint failed to disclose to the Florida
5 Court the fact that these proceedings were already engaged and that the
6 Trust is a Cayman Islands trust and governed by the laws of the Cayman
7 Islands.

8
9 I formed the view that the complaint filed in Florida, insofar as it relates to
10 the 1st and 2nd defendants, was vexatious and intended to be oppressive.
11 Insofar as it raised issues against the Cotorro Trust, or as to the validity of
12 amendments to the Cotorro trust for determination in Florida, it would seek
13 to violate the obvious principle that Cayman Islands law governs the Trust
14 and the fact that Cayman is the only proper forum for the determination of
15 such issues.

16
17 Against that background, and notwithstanding the natural caution and
18 respect which this court must exercise before seeking to restrain
19 proceedings before any foreign court by such an order; it was ordered on the
20 ex parte application of the 1st and 2nd defendants that the third defendant
21 should be restrained from prosecuting the Florida complaint, as against
22 them.

23
24 The third defendant was also restrained from prosecuting proceedings in
25 any court in any other jurisdiction (other than these proceedings) against the
26 Cotorro Trust. The 3rd defendant was given liberty to apply to set those
27 orders aside.

28
29 She elected not to do so. Instead, on the 23rd December 1996, in a letter
30 from her local attorneys to the Clerk of the Court, she purported to
31 withdraw her summons filed in these proceedings (dated 31st July 1996)
32 and to advise that she intended to take no further part in these proceedings.
33 Her attorneys, on their application, were subsequently allowed to come off
34 the record.

35
36 Included amongst the relief now sought, is that in the summons of the 1st
37 and 2nd defendants, supported by the trustee and the 6th defendant, for

1 orders making that anti-suit injunction permanent. I will need to elaborate
2 on this issue when giving my reasons for the decision on that summons.
3

4
5 **The Agenda Items and Summonses**

6
7 I have already indicated that only three issues of those in the Agenda were
8 contested or not agreed. During the hearing I indicated my intentions to
9 grant the various orders which were uncontested or agreed.
10

11 One of the three contested issues, Agenda item 8, needed to be resolved to
12 allow the arguments on the others to proceed and so a decision was given
13 during the hearing.
14

15 Brief reasons for that will also follow herein.
16

17 **Agenda item # 1** was also resolved at the outset to allow the 6th defendant
18 to be joined and to take part in the proceedings.
19

20 I now formally grant the directions already approved in respect of the other
21 uncontested Agenda items in the following terms:
22

23 **Item 2:** Application of the 4th defendant for a declaration pursuant to
24 paragraph I of his summons dated 19th December 1996.
25

26 Article 21 of the Trust Deed originally contained a provision which would
27 exclude from benefit any beneficiary who sought to challenge the Trust.
28 Notwithstanding that Article 21 was purportedly removed by virtue of a
29 subsequent amendment to the Deed, as that amendment is amongst those
30 now in question, there is some doubt whether Article 21 is saved.
31

32 Where they apply, forfeiture clauses are required to be given a strict
33 construction by the Court: In re Pozot's Settlement Trust [1952] 1 Ch. 427
34 at 434.
35

36 Against the background of the history of this dispute, it is obviously
37 appropriate that the minor and remoter beneficiaries, and any other persons
38 whose interests are to be represented by the guardian ad litem the 4th

1 defendant, should not be at risk of disentitlement for taking part in these
2 proceedings. That fact has already been recognised in the making of the
3 representation order and by the appointment of the guardian ad litem in
4 respect of that class. Order in terms.
5

6 **Item 3** : This is the application of the 4th defendant for notice of the
7 proceedings to be served on Pictet Bank & Trust Limited in the Bahamas to
8 ensure that they be bound by the outcome. Pictet Bank & Trust is the
9 Trustee of the Beto Trust upon which the shares which were distributed by
10 way of capital from the Cotorro Trust were settled. The Beto Trust is said
11 to have been settled by the 2nd defendant.
12

13 It is therefore obviously prudent that Pictet Bank and Trust be now joined in
14 the event a tracing claim becomes necessary after the determination of the
15 “self-dealing” issues to be tried in April. It is so ordered. Pictet Bank
16 and Trust is to be served with the most recent form of notice of action
17 (dated 5.11.96); the originating summons; amended originating summons
18 and the formal order to be derived from the present directions summonses.
19

20 **Item 4**: Application by the 4th defendant under paragraph 6 of his summons
21 of 19th December 1996 to better define the class of persons to be
22 represented by him. Order in terms of paragraph 6 of his summons, as
23 amended by the Court.
24

25 **Item 5**: This concerns the withdrawal or dismissal of the 3rd defendant’s
26 summons.
27

28 The attempt by her attorneys (in their letter to the Clerk of the Court of 23rd
29 December 1996) - to withdraw the summons without the leave of the Court,
30 has been misconceived. See the Grand Court Rules 1995 Rule 21 sub rule
31 6. No application has been made for leave to withdraw, although the Court
32 was told that she or her advisors had accepted that leave was required.
33

34 In those circumstances, the application of the 1st and 2nd defendants, that
35 her summons be dismissed with consequential orders as to costs, could not
36 be refused. They and all the other parties have been affected and put to
37 considerable costs by the summons which was abandoned. The order
38 dismissing the summons was made during the proceedings, at the stage

1 when the issues under Agenda items 9 and 9A were argued, so as to make it
2 plain that the proceedings remain ground by the trustee's not any
3 defendant's summonses, for the purposes of the costs to come.
4

5 **Item 6:** This related to the definition of the issues to be tried as preliminary
6 issues in April 1997. These issues were eventually agreed by all parties in
7 the form of the draft very helpfully propounded by the 4th defendant,
8 although they had been separately and variously identified in the other
9 parties' (including the 3rd defendant's) summonses. During the
10 proceedings I ordered that the form of draft of the issues propounded by the
11 4th defendant should be used and should stand, for those purposes, as the
12 schedule to the plaintiff/trustee's summons of the 3rd October 1996.
13

14 **Item 7 :** The only point argued here was whether documents relating to the
15 Beto Trust in the Bahamas and to three other trusts taking or to take under
16 it, should be adduced for the trial of the preliminary issues in April 1997.
17 The application was that of the 1st and 2nd defendants.
18

19 In answer to a question from the court, Mr. Mowbray said: "I entirely accept
20 that a distribution at the direction of the 2nd defendant is the same as a
21 distribution to her for the purpose of deciding the questions of conflict of
22 interests". The questions of conflict of interests are at the core of the
23 preliminary issues to be tried in April 1997.
24

25 That being so, I see no relevance and therefore no admissibility in the
26 foreign trust documents in question.
27

28 Moreover, the parties would be put to great trouble and expense in having to
29 consider those documents for use at the hearing. That cannot be justified so
30 long as their relevance is doubted. My direction is that they may not be
31 adduced for the April hearing.
32

33 I accede to Mr. Tucker's application, that the parties have leave to adduce
34 all admissible evidence in the form of affidavits.
35

36 **Agenda Item 8 :** I directed that the proceedings should continue in the form
37 of non-contentious construction proceedings as commenced by the plaintiff/
38 trustee up to the conclusion of the trial of the preliminary issues set for

1 April 1997. To that end, I directed that the issues to be tried were those as
2 agreed by the parties (absent the 3rd defendant) and now set out in the
3 substituted schedule of the trustee's summons of 3rd October, 1996.
4

5 I now set out brief reasons for so directing.
6

7 At the time of so directing I indicated that I had accepted the arguments
8 made by the 4th and 5th defendants why I should not accede to the
9 application of the trustee in that regard. The trustee had applied under
10 G.C.R. Order 28 r.4(5) and r.7 & 8 for directions that the proceedings
11 continue as if commenced by writ; alternatively that they continue upon the
12 trustee's amended originating summons on the basis that the 4th and 5th
13 defendants be directed to file points of claim identifying and pleading each
14 and every claim they wished to make that the relevant amendments to the
15 Trust and the distributions made order them, were void or voidable.
16

17 The alternative proposal which would cast the 4th and 5th defendants in the
18 role of claimants, was developed during the arguments by which time, the
19 primary proposal of the trustee, that the 3rd defendant summons should
20 stand as the claim or counterclaim, was no longer tenable. It had by then
21 been known that her summons was either to be withdrawn or dismissed.
22

23 The 1st and 2nd defendants supported the trustee's application for pleadings
24 by way of points of claim, while also secondarily supporting the position, as
25 eventually ordered, that the issues defined in the 4th defendant's summons
26 be ordered to be decided as preliminary issues under Grand Court Rules,
27 Order 33 rule 3.
28

29 It is the general rule that proceedings against trustees of a contentious
30 nature, charging the trustees with breach of trust or with default in the
31 proper performance of their duties, are normally to be by writ and not by
32 originating summons. This is to provide the trustees with full opportunity
33 and machinery for discovering precisely what are the charges being levelled
34 against them. So stated Mr. Justice Buckley (as he then was) in the leading
35 English case on the point: Sir Lindsay Parkinson & Co. Ltd Settlement
36 Trusts [1965] 1 W.L.R. 372 at 374. That is a principle which has received
37 the general endorsement of the Court of Appeal in: Cayman Islands News
38 Bureau Limited v Cohen and Cohen Associates [1987] CILR 370.

1
2 One is to be sympathetic to the view expressed on behalf the trustee in this
3 case, that the intention of certain parties to the proceedings are hostile and
4 contentious.

5
6 The allegations raised by Mrs. De Balmaseda against the 1st and 2nd
7 defendants in their personal capacities and against the 1st defendant and
8 others as members of the Management Committee, are plainly hostile and
9 contentious. And notwithstanding that she had raised in correspondence
10 and in paragraphs 12 and 21 of her affidavit of 1st May 1996, claims of
11 invalidity against the Trust as originally constituted and claims of forgery
12 and fraudulent conspiracy against the Management Committee and the
13 trustee; no such claims were specifically pleaded by her summons of 31st
14 July 1996 filed in these proceedings.

15
16 On 3rd May 1996, in a written ruling, I expressed reasons why I refused to
17 direct that the proceedings be from then determined in the form of hostile
18 proceedings, as if begun by writ.

19
20 Since then, Mrs. De Balmaseda has commenced hostile proceedings in
21 Florida, not as against the trustee, but as against the 1st and 2nd defendants
22 and others.

23
24 For reasons already expressed and to be more fully developed below, I have
25 issued an injunction to restrain her from prosecuting those proceedings as
26 they relate to the 1st and 2nd defendants. This is to be expanded to include
27 the 6th defendant (as a former member of the Management Committee) and
28 the trustee insofar as any further proceedings abroad may be contemplated
29 against it.

30
31 A further development since the ruling of the 3rd May 1996, relevant also in
32 this context, has been the dismissal of the 3rd defendant's summons upon
33 her expressed intention not to take further part in these proceedings. She
34 nonetheless remains a party and is amenable to the outcome.

35
36 I must now proceed as matters presently stand. At present, the only issues
37 standing for determination before the court are those raised in the various
38 summonses of the other parties giving rise to the question of construction of

1 the amendments to the Trust Deed and of the validity of the distributions
2 made under them.

3
4 Neither the 4th nor the 5th defendant has raised, at any stage, any of the
5 wider allegations raised by the 3rd defendant.

6
7 There is no evidence before the court on which those wider allegations
8 could be based. Nor is there evidence on which to conclude that the 5th
9 defendant, in particular, is really a “shadow party” in these proceedings
10 ultimately only seeking to advance his mother’s contentious claims.

11
12 Through his counsel, he has disavowed any present intention to commence
13 any personal action against the trustee or any other defendant. I also accept
14 that the “self-dealing” issues to be resolved in April 1997 may not
15 necessarily lead to hostile action on his behalf against the Trust, the trustee
16 or any other defendant.

17
18 If those issues are decided as he contends, then the next logical step would
19 be for the trustee to recover the shares distributed to the Bahamian trust, for
20 the benefit of the Cotorro Trust as a whole, if not for the preferred benefit of
21 the 2nd defendant, who claims the right to the capital distributions.

22
23 As matters presently stand, there is no reason to believe that that could not
24 be achieved. If that is achieved, then no separate issue of damages is likely
25 to arise as between the beneficiaries and the trustee - the 2nd defendant
26 would have been entitled to the income from the shares, in any event. If
27 sizeable portions of the shares are irrecoverable then different
28 considerations may arise. But at present there is no basis for that view.

29
30 If the determination of the issues in April go against the 5th defendant and
31 he chooses to commence personal action based on allegations of breach of
32 trust or fiduciary duty or some other cause, the Court must then regard his
33 position in that different light.

34
35 For now he has elected not to do so and it would be wrong of this Court to
36 direct him to commence some form of hostile claim which he, at present,
37 has not raised and has disavowed. All this, notwithstanding the sympathy

1 the Court has for the need of the 1st, 2nd and 6th defendants, in particular,
2 and of the trustee, to ascertain what all claims will be.

3
4 The 4th defendant's position is even more clearly stated. Mr. Tucker on his
5 behalf very helpfully demonstrated to the court the complete lack, in these
6 proceedings, of any evidential basis for the allegations made by Mrs. De
7 Balmaseda in the Florida proceedings in relation to the alleged forgery (the
8 inclusion of the name of the 1st defendant among the persons from whom
9 the Management Committee could have been constituted) and in relation to
10 the alleged conspiracy surrounding the retirement of Mr. William Walker
11 (now deceased) as a member of the Management Committee.

12
13 These two, apart from the strict issues of construction, were the only issues
14 contained in the 3rd defendant's summons, now dismissed, which might
15 have involved disputed matters of fact. Even though raised obliquely in the
16 summons, the 3rd defendant filed no evidence in these proceedings to
17 substantiate them. At best there is mere speculation in paragraphs 12 and
18 21 of her affidavit, in respect of those issues.

19
20 On that basis Mr. Tucker properly submitted as follows (paras. 3.5 and 3.6
21 of his outline submissions):

22
23 "It is submitted that the appropriate position for
24 the guardian ad litem to adopt in relation to the
25 above allegations, all very serious ones, is that on
26 the evidence available there is no question of the
27 4th defendant advancing any claim based on the
28 allegations nor to suggest to the court that the
29 matters require further investigation. It is quite
30 inappropriate for the guardian to adopt the role of
31 detective, incurring expense in investigating
32 alleged frauds of which no evidence has been
33 placed before the court. The 4th defendant has not
34 alleged and does not allege fraud. That is an end
35 of the matter. It would be quite wrong to direct
36 points of claim on the basis that it is likely or even
37 remotely possible that the 4th defendant through
38 his guardian, will be promoting claims based on

1 allegations of facts of the kind raised by the 3rd
2 defendant”.

3
4 I agree. And I accept that the guardian’s stance, taken so far in these
5 proceedings, has been entirely in keeping with the independent and
6 impartial role required of him, in the circumstances of this case.

7
8 Mr. Tucker also submitted on behalf of the guardian, that there is nothing
9 unusual in the court determining questions of construction and law by
10 originating summons procedure even in relation to capital which has gone
11 out of the trust. As examples of this he cited Re Beatty [1990 1 W.L.R.
12 1503; Re: Abrahams [1969] 1 Ch. 463 and Re Diplock [1940] Ch. 988.

13
14 Finally on this point, I was satisfied that the proceedings, as they presently
15 stand as between the active parties, fall squarely within the category of
16 those proceedings contemplated by the Court of Appeal in Cayman Islands
17 News Bureau Limited v Cohen and Cohen Associates Limited [1987] CILR
18 370 at pages 380-387: as being more appropriate to be commenced and
19 prosecuted by originating summons.

20
21 **Agenda Items 9 & 9A** : This is the 5th defendant’s application for costs
22 incurred and for pre-emptive costs up to the trial of the preliminary issues,
23 to be indemnified from the Trust fund.

24
25 It must be considered in the light of the earlier ruling and directions that the
26 proceedings remain contained within the trustee’s originating summons and
27 are to be regarded as non-hostile proceedings up to the determination of the
28 preliminary hearing on the purely constructional issues of self-dealing,
29 which have been raised.

30
31 It is to be borne in mind, that those issues pivot essentially around the
32 questions whether or not the members of the Management Committee
33 suffered a conflict of interest so as to prevent them properly from exercising
34 any fiduciary duties owed to the beneficiaries in general, when they voted to
35 amend the Trust Deed to allow distributions of capital and subsequently to
36 actually distribute the capital.

37

1 The same is true of the question whether the 1st and 2nd defendants were
2 effectively authorised to vote in favour of the distributions as they did and,
3 if so, whether they were precluded from so doing because they suffered a
4 conflict of interest with duty.

5
6 The question in a nutshell is whether the powers existed and if so, whether
7 they were validly exercised.

8
9 They are plainly constructional issues to be decided without regard to any
10 disputed issue of fact.

11
12 By themselves they involve no allegation of breach of trust or any other
13 hostile allegation of the sort earlier raised by the 3rd defendant and now
14 raised by her in the Florida complaint, against the 1st and 2nd defendants
15 and others.

16
17 The preliminary issues involve no hostile claim against the Trust, rather, if
18 determined in favour of the proponents, the 4th and 5th defendants, it could
19 result in the Trust fund being redoubled.

20
21 All the foregoing characteristics of the preliminary issues convince me that
22 they come squarely within the first or second of the three categories of
23 claims mentioned in Re Buckton. Buckton v Buckton [1907] 2 Ch. 406 per
24 Kekewich J. at pages 414-15:

25
26 “In a large proportion of the summonses adjourned
27 into court for argument, the applicants are trustees
28 of a will or settlement who ask the court to
29 construe the instrument of trust for their guidance,
30 and in order to ascertain the interests of the
31 beneficiaries, or else ask to have some question
32 determined which has arisen in the administration
33 of the trusts. In cases of this character I regard the
34 costs of all parties as necessarily incurred for the
35 benefit of the estate, and direct them to be taxed as
36 between solicitor and client and paid out of the
37 estate

38

1 There is a second class of cases differing in form
2 but not in substance from the first. In those cases
3 it is admitted on all hands, or it is apparent from
4 the proceedings, that although the application is
5 made, not by trustees (who are respondents) but by
6 some of the beneficiaries, yet it is made by reason
7 of some difficulty of construction, or
8 administration which would have justified an
9 application by the trustees, and it is not made by
10 them only because for some reason or other, a
11 different course has been deemed more
12 convenient. To cases of this class I extend the
13 operation of the same rule as is observed in cases
14 of the first class. The application is necessary for
15 the administration of the trust and the costs of all
16 parties are necessarily incurred for the benefit of
17 the estate regarded as a whole. There is yet a
18 third class of cases differing in form and substance
19 from the first and second. In this class an
20 application is made by a beneficiary who makes a
21 claim adverse to other beneficiaries, and really
22 takes advantage of the convenient procedure by
23 originating summons to get a question determined
24 which, but for this procedure, would be the subject
25 of an action commenced by writ, and would
26 strictly fall within the description of litigation. It
27 is often difficult to discriminate between the
28 second and third classes, but when once convinced
29 that I am determining rights between adverse
30 litigants I apply the rule which ought, I think, to be
31 rigidly enforced in adverse litigation, and order the
32 unsuccessful party to pay the costs. Whether he
33 ought to be ordered to pay the costs of the trustees
34 who are, of course, respondents or not is
35 sometimes open to question but with this possible
36 exception, the unsuccessful party bears the costs
37 of all whom he has brought to court”.

1 Here, although the outcome of the preliminary issues might yet be in favour
2 of the 1st and 2nd defendants, it would, in that event, be unsuccessful and
3 unfavourable for the Trust as a whole. If so, the proponents of the argument
4 for invalidity would have been unsuccessful as well.

5
6 In that debate, the trustee stands ready to be guided by the outcome and to
7 act on any direction given by the court. Thus, up to then the trustee stands
8 neutral, although it will put before the court such arguments as it is advised.

9
10 Although instigated by the allegations of the 3rd defendant, the matter came
11 before the court upon the trustee's originating summons, pursuant to section
12 45 of the Trust Law, and properly so.

13
14 Although hostile issues loomed, they were known to emanate from one
15 quarter only - that of the 3rd defendant, but after her summons was
16 dismissed other issues properly remained to be dealt with within the Section
17 45 proceedings: these preliminary issues.

18
19 On the undisputed facts, these issues were identified and defined separately
20 by all the experience counsel in the case, as real issues to be determined.

21
22 In the draft form agreed, and pursuant to order, they are now scheduled to
23 the trustee's construction summons for determination in April.

24
25 Thus, although they had been raised by the other parties as well, that order
26 was intended to reflect the opinion of the court that the preliminary issues
27 should go forward within the context they had been raised, on the trustee's
28 summons for directions.

29
30 That being so, the preliminary issues remain technically within Justice
31 Kekewich's first class, (Re Buckton, supra) even though the specific issues
32 had been first formulated by the 5th defendant, and may have then come
33 within the second class.

34
35 The fact that the 5th defendant's mother may yet harbour hostile intentions,
36 is no basis for treating the 5th defendant as hostile for the purposes of
37 deciding whether to allow his costs of those preliminary issues.

38

1 Having recited that background, I now turn to consider the leading modern
2 case on the point.

3
4 The discretion exercised in favour of a pre-emptive costs order may not be
5 exercised in this case for the same reason it was exercised in the leading
6 case of McDonald and Others v Horn and Others [1995] 1 All E.R. 961. In
7 that case an analogy was drawn between the rights of a minority shareholder
8 bringing a derivative action on behalf of his company and the
9 plaintiff/beneficiary of a pension trust fund, on the basis that both had given
10 consideration for their entitlements, unlike ordinary trust beneficiaries, and
11 therefore had stronger entitlements than the latter to their costs of actions
12 taken on behalf of all members or beneficiaries.

13
14 Nonetheless there are relevant factors common to this and to the case of
15 McDonald v Horn :

16
17 (i) if the proponents are successful the objective
18 would be to seek restitution for the benefit of the
19 Trust as a whole (page 972 letters e-g);

20
21 (ii) the issues of construction have been isolated
22 and stand alone (page 972 letter c);

23
24 (iii) here although the beneficiaries have not
25 contributed to the Trust fund, they must be
26 regarded as equally having a moral right to be
27 satisfied that it is being properly administered in
28 the sense that no improper unauthorised action,
29 will operate to their detriment (page 973 letters e-
30 f);

31
32 (iv) this is not a case in which the 5th defendant,
33 as proponent, would ultimately be litigating
34 without any risk whatsoever as to costs - as a
35 contingent capital beneficiary any depletion of the
36 Trust fund is likely to affect him as well as the
37 other beneficiaries. In that regard he is no less at

1 risk than anyone else in his class. (page 974 letter
2 b).

3
4 Although McDonald v Horn is not authority for the proposition that a
5 beneficiary of an ordinary family trust (as distinct from a pension trust fund)
6 should be able to plead his own impecuniosity as a basis for a pre-emptive
7 costs order against the trust (page 973 letters h-j) such impecuniosity is
8 bound to be a relevant factor in the exercise of the discretion, when taken
9 with all the others.

10
11 Having said that, I do not go so far as to find that unless the 5th defendant is
12 funded from the Trust, some proper claims will never be litigated.

13
14 Nonetheless, there are factors in this case which persuade me that by
15 funding him, I will be choosing the most economical means for the full and
16 fair investigation and argument of the preliminary issues. Those are
17 relevant factors: McDonald v Horn: pages 974 letter j and 975 letter f.

18
19 The guardian ad litem has been advised that in addition to his counsel Mr.
20 Tucker, he should instruct senior counsel to present the arguments on the
21 preliminary issues.

22
23 Given the complexity of those issues and the consequences of the outcome,
24 whatever they may be; no one would gainsay that advice.

25
26 But Mr. Tucker who gave that advice and who is himself a very experienced
27 and able chancery lawyer, would advise the guardian to dispose with
28 instructing leading counsel, if Mr. Etherton Q.C. for the 5th defendant, is to
29 be arguing the preliminary points. That commonality of purpose is nothing
30 more than the product of the coincidence of the similar advice separately
31 and independently given by both counsel to their respective clients. As they
32 would both be arguing in substance the same, there would be the need for
33 the forensic skills and insights only of one leading counsel. So, absent Mr.
34 Etherton, some other leading counsel would have to be retained and his fees
35 idemnified from the Trust fund, at the instance of the guardian.

36
37 With that factor in mind, the economics are in favour of the 5th defendant -
38 the only additional costs would in practice be those of his instructing

1 attorney. When that is compared to the significance of the preliminary
2 issues - both to the respective classes of beneficiaries and to the trust as a
3 whole - those additional costs are not an important factor.

4
5 All that notwithstanding, it must be clear that the judge hearing the
6 preliminary issues will be bound to make an order in favour of the 5th
7 defendant, otherwise I should now be reluctant to make pre-emptive orders:
8 McDonald v Horn supra at page 971 letters f-g. If not clearly so, I would be
9 at risk of unduly fettering the trial judge's discretion. The need for caution
10 in the making of a pre-emptive costs order does not, however, require me
11 now to undertake a scrutiny of the competing merits of the arguments. I
12 think it must therefore suffice that there are serious issues raised to be tried
13 now within the trustee's summons.

14
15 With all that in mind, I am satisfied that it is appropriate that a pre-emptive
16 or protective order be now made to secure the 5th defendant's costs of the
17 preliminary hearing - but only up until then.

18
19 All I need say of events beyond that time is that he will likely come within
20 the third category of the Re Buckton principles (supra); if he brings
21 litigation which may truly be considered hostile to the Trust.

22
23 I think it must follow that the 5th defendant should be entitled to his past
24 costs, at least as of the event of the filing of his summons defining his
25 approach to the preliminary issues. Since then he has acted on advice
26 entirely in an objective and non-hostile manner and has sought nothing
27 more than he should be reasonably entitled - the clarification of those issues
28 of construction.

29
30 The 1st, 2nd and 6th defendants would also seek protective orders for costs
31 on the same basis as the 5th defendant, in the event, as I have found, that the
32 latter should have them.

33
34 As a matter of the exercise of discretion, I view their circumstances
35 somewhat differently.

36
37 In the first place none pleads impecuniosity as a factor to be put in the
38 balance. As regards the economics of the exercise, it cannot be said that it

1 is in the interest of the Trust as a whole, that their interest be separately
2 represented and paid from the Trust fund. In the present context of what is
3 deemed non-litigious proceedings, that is not the same thing as saying that
4 their positions are hostile to the Trust. They are equally entitled to have the
5 issues clarified in the present context without engaging hostile proceedings.
6 But at the end of the day, if they are wrong, a judge may well decide that
7 their costs should not come from the Trust fund.

8

9 I also think that the same factors hold true but even more so in respect of
10 past costs - to the extent the 1st and 2nd defendants are to be understood as
11 seeking them from the Trust fund.

12

13 While they properly responded as if under attack from the outset,
14 particularly by the 3rd defendant, the 1st and 2nd defendant have never
15 advocated the containment of the action, but instead have always urged its
16 conversion into partisan litigation. They have been responding, and
17 understandably so, to protect their own interests, from the outset.

18

19 I decline orders in their favour and that of the 6th defendant for costs from
20 the Trust fund. However, there is the separate matter of whether they or any
21 of them should have costs from the 3rd defendant. That is to be addressed
22 below.

23

24 **Item 10** : This is the 1st and 2nd defendant's application for leave to use
25 documents filed in these proceedings for the purposes of defending the
26 Florida proceedings brought against them by Mrs. De Balmaseda. A formal
27 order was approved during the proceedings allowing this, but on condition
28 that only such use of the evidence be employed as is advised to be necessary
29 in light of the anti-suit injunction earlier ordered by this Court. A further
30 condition was also imposed that the Florida court be asked to grant such
31 orders as it might properly grant to protect the confidentiality of the
32 documents.

33

34 **Item 11** : This is the 1st and 2nd defendant's application for declaratory and
35 injunctive relief against the 3rd defendant pursuant to paragraphs 1 and 2 of
36 their summons dated 31st December 1996. It is supported by the trustee -
37 see paragraph 5 of its summons of 3rd October 1996 and by the 6th

1 defendant. The 4th and 5th defendants wished to take no part in this aspect
2 of the proceedings and were allowed to withdraw.

3
4 **The Declaratory Order**

5
6 The objective of such an order would be to bar the 3rd defendant once and
7 for all from claiming any further benefit to be derived from the distribution
8 of capital effected pursuant to the amendments to the Trust Deed or any
9 remedy or relief based on any allegation that any such amendments were
10 ineffective or that they, or the distributions made under them, ought to be
11 set aside.

12
13 The order is sought on the basis that the 3rd defendant has benefited from
14 the capital distributions by having accepted a further distribution of some
15 29.15 of the shares from that capital and has elected to retain that benefit. I
16 see from evidence that the shares she received are valued in the order of 1
17 million dollars.

18
19 It is a settled rule of English (and hence Cayman) law that a beneficiary who
20 has elected to take under an instrument cannot subsequently reject it and
21 claim rights inconsistent with it: Douglas -Menzies Umphelby [1908] A.C.
22 224 and Pitman v Crum Ewing [1911] A.C. 217. Both of those cases were
23 considered and approved in Lemos v Coutts & Co. (Cayman) Ltd. [1992-
24 93] CILR 460.

25
26 In this case there is unrefuted evidence that the 3rd defendant has received
27 the benefit and has elected to retain the shares notwithstanding her own
28 challenge to the validity of the very amendments which allowed them.

29
30 I say the evidence is unrefuted. I should make it plain that by that I mean
31 insofar as there is no evidence to the contrary.

32
33 Mr. Moses for the 3rd defendant did appear on her instruction limited only
34 to that purpose, to apply to adjourn the present summons of the 1st & 2nd
35 defendant, stating that the 3rd defendant denied the evidence and wished an
36 opportunity to contest the summons by instructing new attorneys in the
37 case.

38

1 For reasons then expressed in a written ruling, I refused the application for
2 the adjournment. If there is to be evidence to refute that upon which I now
3 rely, the 3rd defendant will have a proper opportunity to present it, before
4 the order I make finally takes effect.

5

6 During the arguments, I raised the question with counsel whether it was
7 necessary that the 3rd defendant should have been specifically put to an
8 election by means of legal process: as was decided would be done for
9 instance, in Pitman v Crum - Ewing (supra) or as happened in the Douglas-
10 Menzies case (supra). I asked this because of my concern that the 3rd
11 defendant should have been fully aware of the legal consequences of her
12 election.

13

14 The evidence is that she received the 29.15 shares entirely as a volunteer in
15 circumstances which would not necessarily have given rise to an election
16 between that benefit and any other to be foregone because of any challenge
17 to the amendments, later to be impugned, which enabled them.

18

19 She would therefore not have addressed her mind to that prospect and
20 would not have “elected”, at the time of receipt.

21

22 However, the evidence shows that the 3rd defendant received the
23 distribution of shares in December 1989 and has retained them even while
24 challenging the enabling distributions of capital from the Trust, here and in
25 Florida.

26

27 Although at first she may not have been aware of the legal basis on which to
28 challenge the validity of the distributions (as to which see paragraph 140 (f)
29 of her Florida complaint) the 3rd defendant has asserted that invalidity from
30 before April 1995, when the Trustee brought these proceedings. Yet she
31 has retained the benefit of the shares and has not offered to return them to
32 the Trust.

33

34 In my view, the 3rd defendant’s attitude falls full square within the
35 principles: she seeks to approbate and reprobate at once the amendments
36 under which she has taken. A person is not allowed to do that: see Lemos
37 at page 504 times 15-30 (supra).

38

1 In this case that attitude of the 3rd defendant demands an estoppel even
2 more so because of the oppressive consequences to the Trust and to the
3 other beneficiaries whom she has attacked.

4
5 In light of all the foregoing I am also of the view that the 3rd defendant
6 need not have been fully aware of the legal consequences of her taking of
7 the shares when she did. She need not be shown to have elected at that
8 time.

9
10 Events since then have sufficiently satisfied me that the applicants
11 (including the 6th defendant and the trustee who gave notice of their
12 intention of joining in on this application) are entitled to the relief which
13 they seek.

14
15 The extent to which a beneficiary who elects must be shown to know the
16 legal consequences of the election, will depend on the circumstances of the
17 case: Holder v Holder [1968] 1 Ch. 353. That was a case in which
18 acquiescence in a breach of trust was found to have estopped a subsequent
19 claim based on the breach, but where the acquiescence was with full
20 knowledge of the facts, albeit without legal advice as to the consequences.
21 A fortiori, in a case such as this, where the benefit is sought to be retained
22 and there is shown to be full knowledge of the facts, and legal action
23 brought based on the alleged breach.

24
25 The order sought will have far-reaching consequences for the 3rd defendant
26 but none that will place her in any less favourable position than she now is
27 in respect of her entitlements under the Trust. Having elected to them, it
28 will leave her in possession of the shares, prevent her from seeking any
29 further entitlement under the distributions and will prevent her from
30 pursuing any claims based on allegations that the amendments which
31 enabled the distributions and hence the benefit which she has elected, are
32 bad.

33
34 The order does not go so far as to preclude any other entitlement under the
35 Cotorro trust, not dependent upon or to be affected by the impugned
36 amendments.

37

1 As a matter of the exercise of my discretion, I regard the relief sought in the
2 declaratory order to be fair and appropriate. Order in terms of the draft
3 propounded, including liberty to the 3rd defendant to apply to set aside
4 within 21 days, otherwise the same shall become final.
5

6 **Injunctive Orders**
7

8 At an earlier stage in these proceedings I granted the ex parte injunctive
9 order to which I already referred herein: restraining the 3rd defendant's
10 conduct of the action in Florida.
11

12 That was on the basis, of which I am still persuaded, that the proper forum
13 for the resolution of disputes touching the Cotorro trust is the Cayman
14 Islands and that the action in Florida was intended to be vexatious and
15 oppressive.
16

17 In light of the declaratory order now made, the rights of the 1st, 2nd and 6th
18 defendants and the trustee to injunctive relief, stand on that equitable
19 footing as well.
20

21 In the Lemos case (supra) Justice of Appeal Kerr at page 508 (quoting Lord
22 Diplock in British Airways Board v Laker Airways Ltd. [1985] A.C. 68 at p.
23 810) stated:
24

25 "In British Airways Board v Laker Airways Ltd in
26 illustrating the type of case on which an applicant
27 may seek an injunction restraining proceedings in
28 a foreign court on a matter pending in an English
29 court, Lord Diplock said:
30

31 "Of such defences it is not difficult to
32 point to a number of examples most
33 of them equitable in historical origin,
34 such as estoppel in pais (which was
35 also a defence at common law),
36 promissory estoppel, election, waiver,
37 standing by, laches, blowing hot and
38 cold - to all of which the generic

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description of conduct that is
“unconscionable” in the eye of
English law may be given”.

The 1st, 2nd and 6th defendants and the trustees are now entitled not to be
sued for any claim based on any allegation that any amendment to the
Cotorro Trust Agreement under which shares in the Bacardi Company have
been distributed, was ineffective, or that such an amendment or any
distribution made under it ought to be set aside.

I therefore grant the injunctions in the terms sought in the form of the draft
amended order handed in. The applicants and the trustee all agree that the
injunction should be conditioned in two important respects:

(i) to allow the 3rd defendant to continue to
participate in these proceedings as presently
constituted and;

(ii) to allow the 3rd defendant liberty to apply,
as in the case of the declaration.

As to this latter condition see Societe Commerciale de Reassurance v Eras
International Ltd (No. 2) (1995) 2 All E.R. 278 at 295 f to g.

Before leaving this issue, there are important other points which I feel I
should note, being especially mindful of my duties of comity owed to the
Florida court.

I remain firmly of the view, not only that the Cayman Islands is the proper
forum, but also that the proceedings instituted in Florida, while these here
are pending and without that fact being disclosed to the Florida court, are
intended for those and other reasons, to be vexatious and oppressive.

Our highest court, the Privy Council, has held that where a remedy was
available both in England (Cayman) and in a foreign court, the Cayman
court would in general only restrain the plaintiff from pursuing the foreign
proceedings if the pursuit would be vexatious and oppressive. And before
so doing, the Cayman court must be the natural forum for the action, and it

1 must take account not only of the injustice to the defendant if the plaintiff is
2 allowed to pursue the foreign proceedings, but also the injustice to the
3 plaintiff if he is not allowed to do so: Societe Aerospatiale v Lee Kui Jak
4 [1987] A.C. 871 and Dicey & Morris on The Conflict of Laws 12th Edition
5 page 10.

6
7 As to the balancing of the competing advantages and disadvantages I see the
8 following as being of significance:

9
10 1. The 3rd defendant, Mrs. De Balmaseda,
11 remains amenable to this court's jurisdiction. She
12 is a defendant properly served: see The
13 Aerospatiale case (supra) at p. 892 E. Her
14 interests in the Trust remain amenable to the
15 jurisdiction in order that an injunction may be
16 converted to an effective remedy.

17
18 2. Notwithstanding her decision to take no
19 further part in the proceedings, she has no power
20 to withdraw the issues from the Court. Other
21 parties properly seek a determination of them.
22 The Cayman proceedings came first and she
23 decided to take part in them.

24
25 3. There is the possibility that conflicting
26 judgments could result if the issues are to be
27 decided here as well as in Florida - the law in
28 Florida relating to trusts may be substantially
29 different from Cayman law.

30
31 4. By restraining her conduct of the Florida
32 proceedings, Mrs. De Balmesada will lose little of
33 which it would be unjust to deprive her by
34 confining her to this jurisdiction. Florida is not
35 her home but Spain, and no clear, legitimate
36 convenience to suing in Florida over Cayman
37 appears. All claims against the 1st and 2nd
38 defendants Mr. and Mrs. Lindzon, derived from

1 the Cotorro Trust, can be satisfactorily litigated
2 here bearing in mind also that the Trust is
3 governed by Cayman law (see Article nineteen A
4 (page 15) of the original Trust Agreement; Article
5 twenty-one A substituted by the third amendment
6 (page 67) and by the Fourth amendment (page 92).
7 This is the natural forum to decide questions of
8 Cayman law affecting such a trust.
9

10 5. It appears from the complaint filed in the
11 Florida court that there are to be claims to punitive
12 and multiple damages. But such claims have been
13 forsworn in the leading cases as being illegitimate
14 advantages for the purposes of deciding which is
15 the more appropriate forum: The Aerospatiale
16 case (supra) at page 899 f-h and Simon
17 Engineering PLC v Butte Mining (No. 2) [1996] 1
18 Lloyds Reports 91.
19

20 6. Equally wrong would be the pursuit of the
21 action in Florida in order to compel advantages
22 which, though regarded as legitimate there, would
23 be regarded as oppressive here. By this I have in
24 mind in particular the machinery of pre-trial
25 discovery and interrogatories which can be
26 prolonged and expensive and easily abused to fish
27 for information to pad an otherwise
28 unparticularised claim; the ability to litigate on a
29 contingency fee basis, the recovery of costs as
30 damages and the inability (as I am advised) of a
31 successful defendant to recover costs.
32

33 These were all factors which have led other judges (see for example Simon
34 Engineering PLC (supra) as they do me, to conclude that the English, (here
35 Cayman) forum is the proper forum and that there is a good reason why the
36 decision to stop the foreign proceedings should be made here rather than in
37 the foreign court.
38

1 Moreover, there is evidence which I find compelling, at paragraph 9 of the
2 1st defendant's second affidavit in these proceedings, that Mrs. De
3 Balmaseda would seek to use undue pressure and influences to achieve her
4 ends in the Florida suit.

5
6 This includes, for example, the threat of embarrassment by the filing of
7 private family correspondence in such a way as to facilitate disclosure to the
8 media and onward to the public.

9
10 I end by quoting from the judgement of the Privy Council delivered by Lord
11 Goff in The Aerospatiale case at page 894 c-g a paragraph which sums it all
12 up:

13
14 "..... their Lordships bearing in mind the words of
15 caution expressed by Bowen LJ in McHenry v
16 Lewis (1883) 22 Ch. D 397, 407-408, quoted
17 above, think it wise to remember the breath of the
18 jurisdiction. In particular, the possibility must be
19 borne in mind that foreign proceedings may be
20 restrained not only where they are vexatious, in
21 the sense of being frivolous or useless, but also
22 where they are oppressive, and also that as Bowen
23 LJ observed, everything depends on the
24 circumstances of the particular case, and new
25 circumstances have emerged which were not
26 perhaps, foreseen by our Victorian predecessors.
27 Their Lordships refer in particular, to the fact that
28 litigants may now be encouraged to proceed in
29 foreign jurisdictions, having no connection with
30 the subject matter of the dispute, which exercise
31 an exceptionally broad jurisdiction and which
32 offer such great inducements, in particular greatly
33 enhanced, even punitive, damages, that they may
34 tempt litigants to pursue their remedies there. In
35 normal circumstances, application of the now very
36 widely recognised principle of forum non
37 conveniens should ensure that the foreign court
38 will itself, where appropriate, decline to exercise

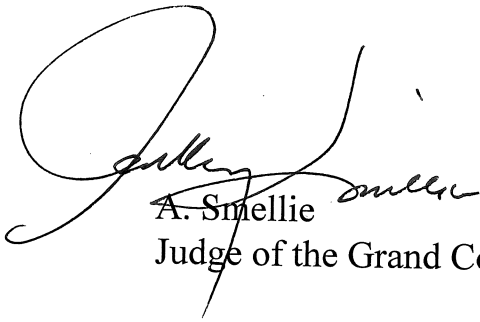
1 its own jurisdiction, especially as the existence of
2 any particular advantage to the plaintiff in that
3 jurisdiction (eg. availability of assets for execution
4 within the jurisdiction) can usually be protected, if
5 thought appropriate, by granting a stay upon
6 terms. But a stay may not be granted, and if, in
7 particular, the English court concludes that it is the
8 natural forum for the adjudication of the relevant
9 dispute, and that by proceeding in the foreign
10 court the plaintiff is acting oppressively, the
11 English court may, in the interests of justice grant
12 an injunction restraining the plaintiff from
13 pursuing the proceedings in the foreign court. As
14 Bowen LJ said in Peruvian Guano Co. Bockwoldt
15 23 Ch. 225, 223, the court will interfere when a
16 party is acting under colour of asking for justice
17 “in a way which necessarily involves injustice to
18 others”.

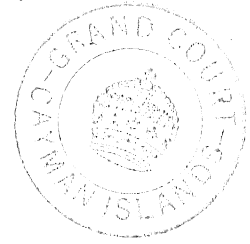
19
20 For all the foregoing reasons I grant the injunction in the terms of the formal
21 draft order prepared, as amended during the arguments.

22
23 A final word as to costs. The 1st and 2nd defendants and the trustee are
24 clearly entitled to their costs of obtaining the declaratory relief and
25 injunctive orders and as against the 3rd defendant. I so order. I also take
26 the view that their applications as against the 3rd defendant for their costs
27 otherwise incurred in these proceedings is justified. I so order. The 6th
28 defendant only just joined in but she had to respond to the issues raised
29 nonetheless. Her costs are also to be paid by the 3rd defendant. Costs to be
30 taxed, if not agreed, on the party and party basis (see In re Ojeh Trust
31 [1994-95] CILR 118).

32
33 **Agenda Item 12** : This aspect of the 1st and 2nd defendant’s summons was
34 adjourned generally with liberty to restore.

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A. Smellie
Judge of the Grand Court



Dated this 17th day of January 1997