



In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

2018 No: 476

**IN THE MATTER OF THE TRUST SETTLED BY A EUGENE BROCKMAN ON
26 MAY 1981 FOR THE BENEFIT OF HIS CHILDREN AND CHARITIES**

IN THE MATTER OF RSC O. 85 AND PART IV OF THE TRUSTEE ACT 1975

BETWEEN

~~DOROTHY KAY BROCKMAN~~

~~(In her personal capacity and in her capacity as intended representative of the other
human discretionary and contingent Beneficiaries pursuant to RSC Order 15/13)~~

BCT LIMITED

(In its capacity as Trustee)

Plaintiff

And

(1) MEDLANDS (PTC) LIMITED

(In its capacity as the Former Trustee)

(2) THE ATTORNEY GENERAL

(In her capacity as Representative of the Charitable Beneficiaries)

(3) MARTIN LANG

(In his capacity as the Trust Protector)

(4) DOROTHY KAY BROCKMAN

(In her personal capacity and in her capacity as the Representative of the other Human Discretionary and Contingent Beneficiaries pursuant to RSC Order 15/13)

~~(4) BCT LIMITED~~

~~(In its capacity as the intended new Trustee)~~

Defendants

RULING

Hearing Date: Thursday 24 March 2022
Decision: Thursday 04 May 2022

Plaintiff: Mr. Keith Robinson (Carey Olsen Bermuda Limited)

1st Defendant: Mr. Robert Ham QC of Counsel and Mr. Matthew Mason (Wakefield Quin Limited)

2nd Defendant: Ms. Lauren Sadler-Best (Crown Counsel on behalf of the Attorney General)

3rd Defendant: Mr. John Machell QC of Counsel and Mr. Lewis Preston (Kennedys Chudleigh Ltd)

4th Defendant: Mr. Francis Tregear QC of Counsel and Ms. Sarah-Jane Hurrion (Hurrion & Associates Ltd)

Application for the form of Order to be settled from Previous Ruling of the Court re the Court's Supervisory and Equitable Jurisdiction to sanction indemnities in respect of an outgoing trustee

RULING of Shade Subair Williams J

Introduction

1. The factual and procedural background to these proceedings may be understood by reference to the below list of previous reported judgments:
 - (i) *St John's Trust Company (PVT) Ltd v Watlington and Ors* [2020] Bda LR 25 (Application for strike-out), per Hargun CJ;

- (ii) *Re the B Trust, Medlands (PTC) Ltd v Attorney General et al* [2020] Bda LR 42 (Beddoe and Administrative Proceedings: Disclosure and Joinder Applications), per Subair Williams J;
- (iii) *St John's Trust Company (PVT) Ltd v Watlington and Ors* [2020] Bda LR 76 (Consequential Relief), per Hargun CJ;
- (iv) *St John's Trust Company (PVT) Ltd v Watlington and Ors* [2021] Bda LR 14 (Leave to Appeal Costs), per Hargun CJ;
- (v) *Medlands (PTC) Ltd and Ors v Commissioner of the Bermuda Police Service* [2020] Bda LR 26 (Judicial Review), per Hargun CJ;
- (vi) *Re the B Trust, Medlands (PTC) Ltd v Attorney General et al* [2021] COA (Unreported)
- (vii) *Re the B Trust, Medlands (PTC) Ltd v Attorney General et al* [2021] SC (Bda) 41 Com (12 May 2021) (Appointment of new trustee and indemnities), per Subair Williams J;

The Present Application

2. The present application arises out of the most recent ruling from this Court made on 12 May 2021 (“the May Ruling”), by which I declined a category two *Public Trustee v Cooper* application for this Court to assume BCT Limited’s power of discretion to grant indemnities or to decide the issue of a retention of trust funds. In the May Ruling I outlined the extent of this Court’s approval and blessings in the form of non-binding opinions, given the sufficiently momentous impact of the sums of money involved in the indemnities which were in question.
3. In the May Ruling I expressed various opinions to show this Court’s approval of the following proposed indemnities:
 - (i) Medlands’ legal fees relating to the handover process between Medlands and BCT Limited;
 - (ii) The uncontroversial indemnity claimed by Medlands in respect of its Court-ordered liability to indemnify the former trustees. (However, it was also my general view that with the change of trusteeship, Medlands’ liability for those indemnities should pass on to the new trustee);

- (iii) Medlands' costs associated with bringing Mr. Gilbert's directorship in Medlands to an end;
 - (iv) Medlands' costs for Mr. Gilbert's communications and his examination of information and documents regarding Point Investments Ltd ("PIL");
 - (v) Medlands' costs associated with its liability for Zobec's administrative services during its tenure as trustee and in bringing that trusteeship to an end;
 - (vi) Medlands' legal fees arising out of any cooperation it provided to the DOJ in relation to the Trust when Medlands was the Trustee and
 - (vii) The costs of keeping Medlands 'alive' (The extent of approval here was for coverage of the expense of Medlands' registration and regulatory requirements needed for it to see the 376 proceedings through to completion.
4. For the indemnities which I considered worthy of apprehension or disapproval, I provided my reasoning which applied to the following indemnities requested by Medlands:
- (i) Mr. Gilbert's costs of defending the Cayman Islands Court proceedings commenced by Messrs. Watlington and Ferguson;
 - (ii) The costs of an appeal from the 447 proceedings and
 - (iii) The Conyers Indemnity
5. I also refused the invitation made to this Court for its sanction of a retention of funds for Medlands.
6. This Court is now asked to construe the May Ruling (i.e. its refusal to accept or exercise BCT Limited's discretionary power to decide on the issuance of various indemnities) with its earlier Order of 26 March 2021 ("the March Order"). In the March Order BTC Limited was formally appointed as the new trustee and I directed that the terms of the outgoing trustee were to be settled in accordance with a Schedule annexed to the Order, which in material part provided that the liabilities of the Trust would include:
- "1.17.6 any claims by the Directors under the Director Indemnities, including any Indemnity Costs provided that the Director Indemnities are valid, effective and enforceable obligations;*

1.17.7 any payments or sums due under the Gilbert Indemnity, including any Indemnity Costs provided that the Gilbert indemnity is a valid, effective and enforceable obligation;

1.17.8 any payments or sums due under the Conyers Indemnity, including any Indemnity Costs provided that the Conyers Indemnity is a valid, effective and enforceable obligation;

...

provided that Liabilities shall not include any liabilities arising as a result of actual fraud, intentional wrongdoing or negligence on the part of Medlands.

...”

Analysis and Decision

7. On behalf of the Protector, Mr. Machell QC submitted that the March Order and the May Ruling contained irreconcilable differences in that the Schedule to the March Order effectively granted indemnities which this Court not only refused to grant but even disapproved of in its May Ruling. It was said that the Protector’s Counsel astutely foreshadowed a possible quandary prior to the formalizing of the March Order in his warning that the inclusion of the Schedule to the March Order would prove premature. On the Protector’s proposals, the entire Schedule ought to have been excluded and settled only after the May Ruling.
8. Supposing that there is no scope for aligning the directions under the March Order with the May Ruling, it seems to me that the resulting incongruity could only be resolved by a variation of the March Order. This approach engages the pivotal question as to whether the March Order expressly or by necessary implication reserved a power of variation or discharge onto this Court. The answer to that question would then call for a proper construction of the wording of the March Order, particularly where it provides [3]:

“The terms on which Medlands shall be discharged as trustee of the Trust and replaced by BCT are as set out below and in the Schedule to this Order subject to such further directions as may be given by Subair-Williams J [Subair Williams J] on her determination of the issues which were the subject of submissions made to her at the hearing on 26 March 2021.”

9. Mr. Tregear QC submitted that the March Order only allowed for additional directions to be made as opposed to enabling a full-scale variation of the Order. He said that the word “only” could easily be inserted into the term to give it the true meaning which it already bears: “*subject [only] to such further directions...*”. Mr. Tregear QC further pointed out that I already ruled in favour of the inclusion of the Schedule on 1 April 2022, notwithstanding the Protector’s

expressed reservations. Consequently, he contended, the Court is now bound by its apparent support for the indemnities provided for under the Schedule. Sprinting towards this finish-line, Mr. Tregear QC, Mr. Ham QC and Mr. Robinson all argued that the March Order is now intransigent and beyond the point of variation, save only for the making of additional or supplemental directions which do not disturb the effect of the directions already given, including the Conyers and Gilbert Indemnities which were, to some extent, the subject of dispute at the 26 March 2021 hearing (“the March 2021 hearing”).

10. As I see it, the intention and meaning of this Court’s Order is discernable not only from the wording of the Order itself, notwithstanding its hint of mischief, but also from the submissions and remarks made to and by the Court at the March 2021 hearing. The subject of the Court’s approach to the Indemnities was clearly a live and disputed issue between the parties.
11. At the March 2021 hearing Mr. Tregear QC expressed the Beneficiaries’ natural concern for the assets of the Trust to be preserved and for the indemnities not to be given a wider scope than that which was permissible by law, having regard to the “reasonable” threshold stated in the Trust Indenture. He submitted that the Court had to strike a balance between those beneficially interested and the interest for the outgoing Trustee to be properly indemnified for costs reasonably incurred. Mr. Tregear QC also noted that in the ordinary course, indemnities paid by trust assets would only apply to the outgoing Trustee itself as opposed to its third party service-providers, such as directors and law firms. To that he added; “...*but, of course, when we come to look at the detail, it is not part of the Beneficiaries’ case, in light of the indemnities already given to third parties such as the directors and the lawyers, that Your Lady should make any determination as to whether those indemnities are proper indemnities to have been given.*”
12. Mr. Tregear QC informed this Court that the liabilities under Conyers Indemnity and the Gilbert Indemnity were imported into the draft Order and were qualified by a condition that they must prove to be ‘*valid, effective and enforceable obligation[s]*’. Counsel explained that this would afford BTC Limited an opportunity to learn more about the circumstances under which those indemnities were given as it was entirely possible, he envisaged, that they were properly made. On this point, Mr. Tregear QC commented that Medlands’ decision to provide the Conyers Indemnity was driven by Conyers’ requirement for an indemnity as a condition of their continued representation of Medlands.
13. In respect of the Gilbert Indemnity, Mr. Tregear said; “*Today is not the day to argue whether the Indemnity was properly given. It may well have been perfectly properly given and in the interest of the Trust and we don’t need to look at that in too much detail because it’s agreed in the terms of the draft which was circulated that those indemnities should be recoverable provided that they create a valid, effective and enforceable obligation. So that question, ... a qualified obligation there- but how that works out, BTC can only really say when they have*

seen the opinions which Medlands had which led to those indemnities being given- and if those indemnities were properly given then that's the end of it. Those indemnities will be covered by the... indemnities which are proposed between the parties on the appointment of BTC. That's one area that Kiernan Bell deals with but that in a sense is not something Your Ladyship has to rule on."

14. Mr. Tregear QC submitted that the same approach he was requesting to be used for the Gilbert Indemnity should be given to the Conyers Indemnity.
15. At the March 2021 hearing the proposed inclusion of the Conyers Indemnity and the Gilbert Indemnity in the Schedule was uncontroversial between the Beneficiaries, BTC Limited and Medlands. Discord between Beneficiaries and Medlands arose more so on the question as to whether the matters covered by those indemnities exceeded that which was permitted under the general law. However, Mr. Tregear QC contended that the qualifying language in the draft Order was enough to allay any such concerns.
16. On behalf of the Protector, Mr. Machell QC, on the other hand, did not engage the Court on the scope of the indemnities to be given to Medlands or Mr. Gilbert. Mr. Machell was only concerned to address me on the legal jurisdiction of this Court and whether I had a power to order any indemnity that was beyond the legally recognized indemnity to which an outgoing trustee would be entitled. Mr. Machell QC described the point as an '*arid*' one, submitting that even if the Court was not so empowered under its equitable supervisory jurisdiction, it had a statutory power to order this extraterritorial tier of indemnities under section 47. Mr. Machell QC correctly submitted that the Court had to satisfy itself under section 47 that it would be expedient for the Trustee to be authorized to be given indemnities on the terms sought by Medlands.
17. Also at the March 2021 hearing I stated that I would reserve my final ruling and canvassed the interim position with the Protector's Counsel in respect of the new trusteeship taking effect as of 1 April 2021. In response, Mr. Machell QC suggested that a two part Order was a measure available to the Court. Applying that approach, Mr. Machell QC opined that it was open to the Court to confirm the trustee appointment leaving the remaining relief in relation to the departure of Medlands to be settled after the handing down of a reserved ruling on the indemnity issue.
18. During the course of Mr. Tregear's final remarks to this Court at the March 2021 hearing, he said; "*...in terms of timing, of course we understand that Your Ladyship will want to reserve judgment in relation to a lot of detailed issues which Your Ladyship has been presented with in a very short space of time. But we respectfully submit that it would still be possible to have the appointment take effect on the 1st of April even if the, um, Your Ladyship's determination of the scope of the indemnities had to follow thereafter."*

19. It was clearly stated to the Court on 26 March 2021 that neither the Beneficiaries, Medlands nor BCT Limited were inviting this Court to examine the original decision by which Medlands granted the Gilbert and the Conyers Indemnities. However, it was also plain to this Court that whether or not any compromise on Medlands' proposals for the granting of the Conyers Indemnity and the Gilbert Indemnity had been agreed between these particular parties, this Court would nevertheless be required to exercise its own judicial analysis before making any ultimate finding that it was expedient, under section 47 of the Trustee Act 1975, to grant or sanction its final approval of the Gilbert and the Conyers Indemnities, even if subject to conditional terms of approval. Any such final Order of approval from this Court could only be forthcoming after my final deliberations on whether the Court's offering of its authorisation would be appropriate in these circumstances and, if so, the proper terms on which those indemnities might be granted or directed.
20. At the invitation of Counsel, I also redirected my attention to an opening passage from the May Ruling wherein I stated [13]:
- “Having heard oral submissions together with the written submissions of Counsel for the Plaintiff, the Protector, Medlands and BCT Limited, I granted the Plaintiff’s application for a representation order and I confirmed the change of trusteeship. This was subsequently formalized by a written Order of this Court dated 26 March 2021. However, I reserved my ruling on the disputed issues relating to the indemnities to be granted to Medlands to cover its liabilities as the outgoing trustee. This ruling contains the decision of the Court in respect of those indemnities together with my reasons for granting the Plaintiff’s application for appointment in a representative capacity.”*
21. It is plain from a reading of the May Ruling that the March Order was intended to simply confirm and formalize the Court's granting of (i) the representation order and (ii) the change of trusteeship to enable a 1 April start-date. It was plainly the Court's intention for the March Order to serve as a preliminary holding ground in respect of any ruling or further directions it would make in relation to the indemnities after having heard arguments on 26 March 2021. I do not accept that the term “*subject to such further directions*” in these circumstances effectively restricted this Court from considering the first open and unanswered question as to whether I would or should allow the Trustees to surrender its powers to this Court in respect of the indemnities.
22. Implicitly, in making the March Order, the Court had not yet finally determined whether to grant or withhold its support of any indemnity, applying the “expediency” test provided for under section 47. If at that early stage I had found that I was satisfied that it was expedient to grant or confirm approval of the Conyers and Gilbert Indemnities, the Order would have so stated. Necessarily, the Order would have also stated that this Court accepted the surrender of the incoming Trustees' powers and thereby found it expedient to direct (in obligatory language)

the granting of those indemnities. However, this was not the effect or wording of the March Order.

23. Instead, the March Order envisaged that I could make any further directions in respect of the indemnities upon my final determination of the issues which were the subject of the submissions. Clearly, the subject of the submissions included the question of “expediency” under section 47. Whether it was expedient for this Court to accept the surrender of the Trustee’s powers to grant the indemnities was in issue, whether or not it was controversial between any of the parties. It was always for this Court alone to determine whether under section 47 or whether under its equitable supervisory jurisdiction it would exercise these original jurisdictional powers which are otherwise vested in the Trustee alone.
24. In my May Ruling, I refused to accept any surrender of power by the Trustees. This Court was always entitled to make that finding and nothing in the March Order precluded it from finding as it did in the May Ruling. The March Order was designed to allow the Trustees to take flight on 1 March on a supposition that this Court might likely approve of the long-term residency of the qualifying language in respect of the Conyers and Gilbert Indemnities. However, the permanency or expiry of those liability clauses in the Schedule were expressly subject to any further directions I would make once I had fully adjudicated the issues. In the end, I refused to take on the Trustee’s powers and I further expressed my apprehension and disapproval of the Conyers Indemnity and a component of the Gilbert Indemnity. From those findings arose the further directions I was entitled to make.
25. Mr. Ham QC asked me to consider whether there was any good reason for me to revoke the March Order. He submitted that to do so would deviate from the pragmatic approach recommended by the Court of Appeal in the ruling of Smellie JA. Further, Mr. Ham QC pointed out, the Court may take comfort in knowing that Ms. Dorothy Brockman, in her personal capacity and as the representative of the other discretionary and contingent Beneficiaries, has not only been heard but has confirmed the Beneficiaries’ approval of the granting of the Gilbert and Conyers Indemnities on the conditional terms stated. Another factor for consideration by this Court was said to be the time and costs which would be wasted in requiring the Trustee to now amend the Schedule and create new Deeds of Indemnities.
26. However, I am bound to agree with Mr. Machell QC, albeit that his submissions secluded him from the other parties. As he invited me to do, I reject the stated concerns about wasted time and costs as ‘overblown’ given that the amending of the Schedule and the drafting of the Deeds of Indemnities would amount to not much more than simple strokes of a draftsman’s pen.
27. In my judgment, this Court has no alternative but to revoke the inclusion of the Conyers Indemnity and the Gilbert Indemnity from the Schedule to the March Order in order to give proper effect to the Court’s stance and opinions in the May Ruling whereby I refused to employ

the first instance powers of the Trustee. It is evident from the May Ruling that this Court did not find that it would be expedient under section 47 to direct the Trustee as to how it should exercise these powers to grant indemnities.

28. This was not simply an academic point. The answer to Mr. Ham QC's question as to what good reason the Court would have to revoke the indemnity clauses from the Schedule is outlined in the May Ruling where I explained this Court's opinion of disapproval and/or apprehension for the granting of the Conyers Indemnity and an aspect of the Gilbert Indemnity. This Court therefore ought not to now allow those indemnities to be shielded by judicial approval only for the sake of avoiding the time and costs of a straightforward amendment to the Schedule.
29. On Mr. Robinsons' and Mr. Tregear's submissions, the Trustee needed the benefit of time to examine the propriety of those indemnities. It is plausible that the Trustee's investigations will or already have revealed that Medlands was free of any "*actual fraud, intentional wrongdoing or negligence*" in granting those indemnities. That is now a matter for the Trustee to determine and it may or may not be aided by the opinions stated by this Court in May 2021. More so, the Trustee may even return to this Court for its supervisory assistance if and once it has determined for itself that the Indemnities are in fact worthy of the Court's opinion of approval, notwithstanding the views expressed by this Court in May 2021.
30. Until any such time, I now "further direct" that the March Order is to be amended so to remove from the Schedule paragraphs 1.17.6 - 1.17.8 and any other portions of the Schedule which were uniquely purposed to give effect to paragraphs 1.17.6 - 1.17.8.

Dated this 4th day of May 2022

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT