In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 053

IN THE MATTER OF THE C TRUST
AND IN THE MATTER OF THE TRUSTEE ACT 1975
AND IN THE MATTER OF ORDER 85 OF THE RULES OF THE SUPREME COURT

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Mr Keith Robinson, Carey Olsen Bermuda Limited, for the Plaintiff** **Mrs Fozeia Rana-Fahy, MJM Limited, for the 1st and 2nd Defendants** **Mr Matthew Watson, Cox Hallett Wilkinson Limited, for the 3rd Defendant** **Mr Jonathon O'Mahony, Conyers, for the 4th Defendant**
Date of Hearing:	**27 June 2019**
Date of Judgment:	**22 July 2019**

REASONS FOR RULING

Statutory jurisdiction of the Court appoint trustees under section 31(1) of the Trustee Act 1975; inherent jurisdiction of the Court to make an order authorising the trustees to administer the trust on the basis that the previous actions of the trustees were valid and effective actions

Introduction

1. At the conclusion of the hearing of this matter on 27 June 2019 I ordered that:

   (1) The Plaintiff ("Current Trustee") be appointed as from the date of the Order as the sole trustee of the C Trust ("the Trust") under section 31(1) of the Trustee Act 1975 ("1975 Act");

   (2) The Current Trustee may be at liberty to continue to manage the assets of the Trust on the basis that it had been validly appointed as trustee of the Trust by deed dated 1 July 2015.

2. The application was formally made by the Current Trustee and was supported by a range of adult beneficiaries as well as the *guardian ad litem* representing all minors, unborn and unascertained beneficiaries of the Trust. Indeed, the adult beneficiaries who appeared in relation to this application expressly sought relief from the Court in terms of paragraphs (1) and (2) above.

3. I now give my reasons for making the Order I made on 27 June 2019.

Background

4. The Trust was established by deed dated 22 June 1965 between the Settlor and the Original Trustee ("the Trust Deed"). The Trust is a discretionary trust for the benefit of a class of beneficiaries that includes the Settlor and the Settlor's brothers, then living or born at any time thereafter, subject to certain limitations in favour of the male line of descendants.

5. Pursuant to an Order dated 9 May 2019, the First and Second Defendants were appointed to represent all minors, unborn and unascertained beneficiaries of the Trust.

6. The assets owned by the Trust include controlling shares of several holding companies which in turn own a vast network of industrial trading entities in Africa, employing a very substantial workforce, and are extremely valuable.

7. By a Deed of Retirement and Appointment of New Trustees dated 29 December 1999 ("the Deed"), the Original Trustee retired and the Current Trustee was purportedly appointed in its place.

8. The power of appointing new trustees under the Trust Deed was vested in the Protectors appointed under the Trust Deed. The Trust Deed provided that a named company incorporated in the United Kingdom and another named company operated in the state of New York, United States of America, acting jointly, constituted the Protectors.

9. However, it appears that when the Current Trustee was appointed by the Deed, the appointment was made with the consent of a successor Protector. The validity of the successor Protector's own appointment is very much in doubt.

10. The Current Trustee has been recently advised by its legal advisers that it is likely its appointment was invalid, or ineffective, or void, and therefore it does not have the legal title to the assets and all the actions the Current Trustee has taken with respect to the Trust assets and all distributions that have been made in the belief that the Current Trustee was validly appointed, are likely to be invalid.

11. The same difficulty arises in respect of both subsequent purported changes of trustee. By a deed dated 9 August 2001, the Current Trustee was replaced by a trust company registered in Lichtenstein, followed by a deed dated 1 July 2015 whereby the Current Trustee was again purportedly appointed and the Lichtenstein trust company retired.

12. It is in these circumstances that the Current Trustee makes the application seeking an order that: (1) it be appointed as the sole trustee of the Trust; and (2) it may be

at liberty to continue to manage the assets of the Trust on the basis that it had been validly appointed as the trustee of the Trust.

13. The present applications are supported by *guardian ad litem* to the First and Second Defendants. It is the considered position of the *guardian ad litem* that there can be no benefit to the class of beneficiaries to allowing the Trust to operate without a properly and validly appointed trustee who has the power and authority to perform the duties of trustee. In his view, the task of reconstituting the records of the Trust over the last 20 years would be an impossible task, and the expense of doing so would likely be an enormous drain on the resources of the Trust, which will also not be for the benefit of minors, unborn and unascertained beneficiaries of the Trust.

14. The Third Defendant is a beneficiary of the Trust and represents the position of 10 adult beneficiaries (including himself). In his view the Current Trustee has been involved in advising the family for many years on both the operation of trusts, as well as their management and has a very good understanding of the family, its philosophy and the way it has operated. Having carefully considered the matter, the Third Defendant believes that confirming the Current Trustee is in the best interests of the Trust. This course is to be preferred to the risk of potentially affecting the Trust through the appointment of a new trustee, which may take time to identify and get up to speed and impact the ability to address urgent issues. In light of these issues the Third Defendant requests the Court to "*make the Order in accordance with paragraph 1 and 2 of the Plaintiff's Amended Originating Summons".*

15. The Fourth Defendant is also a beneficiary of the Trust. He says that because he has always considered the Current Trustee to be the trustee of the Trust, notwithstanding any potential technical defect in its appointment, and because he was and remains supportive of the confirmation of the Current Trustee's appointment as trustee, he asked to be joined to the proceedings. He requests *"that the Court make the Order sought by the [Current Trustee] as putative trustee of the Trust".*

The application to appoint trustees

16. The statutory jurisdiction of the court to appoint trustees is to be found in section 31(1) of the 1975 Act which provides that:

> *"31(1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee."*

17. In order to exercise its statutory jurisdiction to appoint trustees, the Court needs to be satisfied that it is expedient to make the proposed appointment (See *Lewin on Trusts*, 19th edition at [15-005]). In principle the test for "expediency" under section 31(1) should be no different from the test of "expediency" under section 47 of the 1975 Act. In relation to section 47, the Court has previously held that the requirement of "expediency" should be construed to mean "expedient for the trust as a whole" (See *GH v KL* [2011] (Bda) Civ (2 December 2010), decision of Ground CJ; *In the Matter of A Trust (Change of Governing Law)* [2017] SC (Bda) 38 Civ (19 May 2017), and *In the Matter of G Trusts* [2017] SC (Bda) 98 Civ (15 November 2017), decisions of Kawaley CJ; and my own decision in *In the Matter of the H Trust* [2019] SC (Bda) 27 Com (30 April 2019)).

18. In this case the power of appointing new trustees of the Trust is given solely to the Protectors acting jointly. In 1997, for reasons which are not entirely clear, "*the family"* assumed that it could validly appoint a sole Protector in place of the two Protectors specified in clause 6(a) of the Trust Deed. It now appears to be accepted that such an appointment is likely to be invalid. What is clear is that the mechanism for appointing new trustees under clause 6(a) can no longer be relied upon. In the circumstances, the only option open for the appointment of new trustees is an application to this Court under section 31(1) of the 1975 Act.

19. As submitted by the beneficiaries and the *guardian ad litem* the present position is clearly unsatisfactory. I accept the submission made by the *guardian ad litem* that there can be no benefit to allowing the Trust to operate without a properly and validly appointed trustee who has full power and authority to perform the duties of trustee. This is particularly so where, as here, the Trustee has an oversight responsibility over a vast network of extremely valuable trading concerns in Africa. In the circumstances, I have no hesitation in concluding that it is indeed "expedient" that the Court exercises its discretion under section 31(1) to order that the Current Trustee be appointed as the trustee of the Trust.

Inherent jurisdiction to confirm prior administration

20. The Current Trustee and the beneficiaries request the Court to make an order that the Current Trustee may be at liberty to continue to manage the assets of the Trust on the basis that it has been validly appointed as trustee of the Trust by deed dated 1 July 2015. It is submitted on behalf of the *guardian ad litem*, as noted above, that the task of reconstituting the records of the Trust over the last 20 years would be an impossible task, and the expense of doing so would likely be an enormous drain on the resources of the Trust. The *guardian ad litem* supports an order validating the actions that the Current Trustee has taken since 1 July 2015 on the following basis:

    (1) There has been no suggestion to date that the Current Trustee has been guilty of a breach of trust in the conduct of the trusteeship to date that would be affected by an order appointing the Current Trustee as trustee.

    (2) The appointment as trustee would not per se cure any potential breach of trust that may have occurred in the course of the trusteeship *de son tort* to date.

    (3) Clause 8 of the Trust provides that, *"No trustee shall be personally liable for any act or omission of his or to which he was party, unless the same be proved to have been done or omitted in bad faith on his part*". There is no suggestion of any bad faith on the part of the Current Trustee.

(4) It appears that the appointment was made improperly as a result of confusion and a lack of clear understanding of the meaning and effect of the Trust Deed, and a misapprehension of the rights of *the family* to nominate and appoint a trustee.

21. I accept the submission made by Mr Robinson, on behalf of the Current Trustee, that the Court has inherent jurisdiction to intervene in the administration of a trust and to approve certain acts on the part of trustees and/or authorise trustees to do certain things which are an effective departure from the terms of the trusts where it is not possible to obtain the consent of all the beneficiaries because they are not all *sui juris.* One of the earliest exposition of the inherent jurisdiction of the court in the context of administration of trusts is to be found in the judgment of Romer LJ in *Re New* [1901] 2Ch 534, at 544:

"As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorized by its terms. The cases of In re Crawshay, decided by North J., and In re Morrison, decided by Buckley J., are instances where the Court was asked to sanction steps to be taken by trustees which it thought unjustifiable, and which it declared it had no jurisdiction to authorize. But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the cestuis que trust, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being sui juris or in existence, then it may be right for the Court, and the Court in a proper

case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to. By way merely of illustration, we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death, and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale: in such a case the Court would have jurisdiction to authorize, and would authorize, the trustees to postpone the sale for a reasonable time.

It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the Court must be considered and dealt with according to its special circumstances."

22. The judgment of Romer LJ was cited in approving terms in the House of Lords decision in *Chapman v Chapman* [1954] AC 428 at 452 as an example of a case where the Court has allowed the trustee of the settled property to enter into some business transaction which was not authorised by the settlement.

23. Francis Tregear QC, in his article for *Trust & Trustees Volume 19 No 1 February 2013* at pages 23-30, suggests that the exercise of the inherent jurisdiction of the court may provide a slightly more principled approach (than the concept of ratification) to the possible problems posed by the situations that arise when

invalidly appointed trustees have acted in the administration of the trust. He suggests:

> *"If the object of the exercise is to cure the problem as pragmatically as possible without necessarily wanting to go so far as to rewrite history, there may be other avenues to explore which involve effectively authorising the trustees (who may on being appointed by the court be the same trustees as were previously acting as trustees de son tort) to administer the trusts for the future on the basis that their previous actions were valid and effective. Thus, the trustees would be under no obligation to review previous acts and take action on the basis of any intermeddling by them in the affairs of the property of the trust. This means that the trustees can get on with the administration of the trust and are not frozen by the possibility that anything they do will compound their difficulties for the beneficiaries in the event of having to "unscramble" the trusts affairs."*

24. In the Jersey case of *In The Matter of the Z Settlement* [2016] JRC 048, the Royal Court was faced with an application by a beneficiary that the court ratify certain specified acts of the "Purported Trustees" who were not validly appointed but had thought in good faith that they had been. The Court, heavily influenced by the opinion provided by Lynton Tucker (senior editor of *Lewin*), considered that the court may, exercising its inherent jurisdiction, confirm the acts or omissions of trustees which may not have been authorised by directing that the current trustees take no action in respect thereof . At paragraph 64(iii), Commissioner Clyde-Smith described the process as follows:

> *"64(iii) Confirmation by non-intervention in acts or omissions which were not or may not have been authorised but have nevertheless actually been acted upon, so that these acts or omissions remain undisturbed and the trusts are accordingly administered on the same footing as if those acts or omissions had been done or omitted by or with the authority of a duly constituted trustees. An example is where the trustees de son tort who have control over the trust assets, and mistakenly believe that they are duly constituted trustees,*

operate a discretionary income trust so as to make distributions of trust income among a class of beneficiaries in a manner which would have been entirely proper had the trustees been duly appointed and those distributions are subsequently left undisturbed on the same footing as though they had been validly made.

67 The third form of confirmation does not depend upon whether the initial act or transaction was valid or void, but does depend upon its having been acted upon, though it may be acted upon in a negative as well as positive manner. Acts may be void, but are not necessarily without effect. For instance, if trustees de son tort distribute income under an income discretionary trust to a beneficiary, the distribution may be void so that the income remains held on the original trusts, but the beneficiary will obtain a legal title to the distribution, and if the beneficiary spends the distribution by paying it to a purchaser without notice, it will be gone. Further, though Purported Trustees are not duly authorised to act as trustee, what they do is not necessarily void or voidable at all, as where trust capital or income is distributed by purported trustees to a beneficiary who is entitled to receive it under the terms of the trust without any exercise of the power or discretion being involved."

25. Having analysed the factual position, the Royal Court agreed with the parties that, consistent with the advice of Lynton Tucker, the objectives of the parties in seeking ratification, which were in themselves sound, were better achieved in this case by orders based on confirmation by the replacement and confirmation by non-intervention in the interests of the beneficiaries as a whole and the competent administration of the trust. Accordingly, the Court made orders authorising and directing the duly constituted trustees of the trust for the time being firstly to confirm by replacement the distribution to the beneficiary and secondly to leave undisturbed the acts or omissions of the Purported Trustees so that the trust is administered on the same footing as though those acts or omissions had been validly done with the authority of duly constituted trustees.

26. In *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 [51], [66] the Privy Council confirmed the existence of the court's inherent jurisdiction to supervise and when necessary or appropriate to intervene in the administration of the trust, for the purposes of securing the competent administration of the trust. The cases discussed above provide support for the proposition that the Court may, exercising its inherent jurisdiction, order that the current trustees leave undisturbed the acts or omissions of previous trustees, the validity of whose appointment may be in issue, so that the trust is administered on the same footing as though those acts or omissions had been validly done with the authority of the duly constituted trustees.

27. In *Re New* Romer LJ emphasised at 545 that, "*It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction."* It has been suggested that the exercise of the inherent jurisdiction falls in certain defined categories: (i) to authorise otherwise unauthorised acts of management or administration of the trust property where an emergency arises connected with the trust property; (ii) to authorise otherwise unauthorised transactions as a matter of salvage; and (iii) to authorise and approve compromises of genuine disputes over the destination of trust property (See Francis Tregear QC at 27, 28).

28. In my judgment these categories are not exhaustive and should be seen as examples where the court has exercised its inherent jurisdiction. However, these categories or examples do not define all the circumstances in which the Court may find it necessary or appropriate to exercise its inherent jurisdiction to intervene in the administration of the trust.

29. Having regard to the affidavit evidence before the Court, I accept that the task of re-constituting the records of the Trust over the last 20 years would be an impossible task, and the expense of doing so would likely be an enormous drain on the resources of the Trust. I accept that this is a pragmatic and sensible response to a situation which has arisen through no fault of the Current Trustee or the beneficiaries. I also bear in mind that this order does not prejudice any of the

beneficial class since it does not operate so as to relieve the Current Trustee of any liability that may exist outside the ambit of Clause 8 of the Trust. In the circumstances, exercising the inherent jurisdiction of the Court, I make the Order that the Current Trustee be at liberty to continue to manage the assets of the Trust on the basis that it had been validly appointed as trustee by deed dated 1 July 2015.

Dated 22 July 2019

NARINDER K HARGUN
CHIEF JUSTICE