

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 003

**IN THE MATTER OF A SETTLEMENT ESTABLISHED ON 15 JANUARY AND
KNOWN AS THE H 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

Date of Hearing: 16 April 2019

Date of Judgment: 30 April 2019

RULING

Introduction

1. This is an application by Butterfield Trust (Bermuda) Limited, as trustee of the H Trust (“the Trustee” and “the Trust” respectively) for the following orders:

First, a declaration that Mr P is not a Protector of the Trust on the ground that his purported nomination as successor Protector by one of the original Protectors acting *unilaterally* contravened the requirement within the Trust Deed, that this power of nomination be exercised by the original Protectors acting *jointly*.

Second, an order appointing Ms M and Ms G as Protectors of the Trust under the Court’s inherent jurisdiction to appoint persons as protectors, where there is a vacancy which cannot be filled by the machinery created by the relevant trust instrument, in order to ensure the proper exercise of the fiduciary powers vested in the office of protector by the trust instrument.

Third, an order conferring on the Trustee the power to amend the Indenture of Settlement dated 15 January 1990 (“the Trust Deed”) pursuant to Section 47 of the Trustee Act 1975 (“the 1975 Act”) on the ground that the variations intended to be made are within the broad scope of Section 47 and are plainly expedient.

2. The factual background to these applications is taken from the two affidavits of Catherine Smith sworn on 13 December 2018 and 11 March 2019 respectively.

Validity of the appointment of Mr P as successor Protector

3. The Trust Deed makes the following provisions in relation to the appointment of original and successor Protectors:

“SECOND: TRUST PROTECTORS. The provisions regarding the appointment and retirement of the Protectors and successor Protectors and the powers of the Protectors are as follows:

2.01: DESIGNATION OF ORIGINAL AND SUCCESSOR PROTECTORS

The original and successor Protectors shall be those persons named in the Fourth Schedule hereto. Each of the original Protectors shall as such serve from the date of this Settlement until his death or withdrawal from office. The Protectors serving from time to time under this Settlement may designate any person to succeed them as Protectors in case of their death or withdrawal from the office of protector, and they shall have the power to revoke such designation

and make a new designation so long as they are acting as Protector. The last person so designated as successor Protector (if any) shall qualify to serve as successor Protector only if none of the persons named in the Fourth Schedule hereto shall be willing and able to serve as Protector. If such a named successor shall be willing and able to serve, such person shall qualify to serve and commence service as Trust Protector upon the death or withdrawal of the previously named Trust Protector. Upon qualifying as a Protector, each successor shall have the same power to designate a further successor and to revoke any such further designation. Each such designation or revocation shall be made by written notice delivered to the Trustee. Any Protector may withdraw from office if there is then appointed a successor Protector who is willing and able to serve...”

4. The Fourth Schedule of the Trust Deed provides as follows:

“The Original Trust Protectors and the successive, successor Trust Protectors who shall serve pursuant to the terms of the above written Settlement are as follows:

Original Trust Protectors: Mr. F and Mr. W (to act jointly as one or, if one of them ceases to serve as Trust Protector, the remaining person to act alone)” (emphasis added).

5. Pursuant to a Designation of Successor Trust Protector dated 8 May 1997, Mr W purported to appoint Mr R as successor Protector. Mr R accepted that designation, and on 28 May 1997, by way of Resignation of Trust Protector, Mr W resigned as Protector.
6. Pursuant to a Designation of Successor Trust Protector dated 23 May 2002, Mr R purported to appoint Mr P as his successor Protector. Mr P accepted that designation, and on 31 May 2002 by way of a Resignation of Trust Protector, Mr R purported to retire as Protector.

7. Mr F died on 30 March 2011. It is not known whether Mr W is still alive.
8. In the circumstances, the Trustee raises the question as to whether Mr P has been validly appointed as successor Protector. I agree with the submission made on behalf of the Trustee that having regard to mandatory provision requiring the Protectors to act jointly, the purported appointment by Mr W of Mr R as the successor Protector must be invalid and the subsequent purported appointment by Mr R of Mr P as a successor Protector must also be invalid. As noted above, the Fourth Schedule sets out that the Original Protectors (Mr F and Mr W) must act jointly as one. In the circumstances the unilateral actions of Mr W in purportedly appointing Mr R as the successor Protector was not in accordance with the provisions of the Fourth Schedule and any purported appointment was invalid. The purported appointment by Mr R of Mr P was also invalid on the ground, *inter alia*, that Mr R was not validly appointed as successor Protector and had no authority to make any such appointment.

The appointment by the court of Ms M and Ms G as Protectors of the Trust

9. In relation to this application, the Trustee points out that there is no power to appoint a Protector in the Trust Deed other than under section 2.01 of the Second Article set out at paragraph 3 above. The appointment of a new Protector is now impossible to achieve due to the death of Mr F. In the circumstances, the Trustee seeks to remedy this deficiency by applying to the Court to exercise its inherent jurisdiction to appoint two new Protectors.
10. Mr Robinson, appearing for the Trustee, submits that the Court has inherent jurisdiction to appoint protectors in certain circumstances where the trust instrument makes provision for such an office. I consider that this submission is well founded and is supported by the commentary at 3.42 of *Holden, Trust Protectors* (Jordan 2011) and the decision of the Manx Court (Hegarty JA and Smith JA) in *Rawcliffe v Steele* [1993-95] 426.

11. In *Rawcliffe v Steele* the court held that it had the power in principle to remedy the defect caused by the failure to appoint the protector. Hegarty JA outlined the scope of the jurisdiction at 503 in the following terms:

“It seems to me that, once a power is categorised as a fiduciary power, the donee of the power is in a position sufficiently analogous to that of the trustee in the traditional sense to make it difficult to see why the court cannot appoint a person to exercise those powers, even in cases which fall outside the limits of the particular cases that I have instanced. In my judgment, though the jurisprudence may not be fully developed as in the case of a trustee in the classical sense, there is a legal framework within which discretionary powers of this kind are to be exercised which is independent of the particular person exercising those powers and which, to some extent at least, constrains and guides him. I therefore consider that the court’s inherent jurisdiction to appoint a new trustee extends so as to enable it, in appropriate circumstances, to appoint a person to exercise fiduciary powers under a trust even though he may not be a trustee in the classical sense. Furthermore, I take the view that the court could, if necessary, in the last resort, itself exercise fiduciary powers under a trust, though it would not normally do so.”

“Accordingly, I would hold that where a fiduciary power intended to be vested in a person other than a trustee, in the absence of any clear indication that the personal characteristics of that individual are an essential ingredient in the exercise of the power, the court has power either to appoint a person to exercise that power or, perhaps exceptionally, to exercise the power itself” (at 507).

12. Smith JA also considered that the inherent jurisdiction of the court to appoint a protector was similar in scope with the jurisdiction to appoint a trustee and held at 530:

“In my opinion, those characteristics are characteristics that are equally applicable to a carefully chosen trustee, and it has never been suggested that such characteristics as that would prevent a court

appointing a trustee, if for some reason a trustee did not actually exist at the time of the trust was constituted. Accordingly, in my opinion, the court could and if necessary should appoint a protector just in the same circumstances as it would appoint a trustee if the trustee was either not appointed or declined to act”.

13. Applying the analysis in *Rawcliffe v Steele*, it seems reasonably clear that the powers vested in the Protector under the Trust Deed are of a fiduciary nature to be exercised for the benefit of the beneficiaries of the Trust. The powers vested in the Protector under the Trust Deed include the authority to remove trustees and appoint successor trustees; the authority to move situs of the Settlement; and the authority to require and approve accounts. This Court has previously held that the power to remove and appoint trustees was fiduciary in nature (See: *Von Knieriem v Bermuda Trust Company Limited* [1994] Bda LR 50, Meerabux J. at 12-13; and *In the Matter of the F Trust* [2015] SC (Bda) 77 Civ Kawaley CJ at para 18).
14. It is also the case that it cannot reasonably be said that the personal characteristics of the original Protectors were essential ingredients in the exercise of the powers conferred upon as Protectors. This is demonstrated by the fact that the Trust Deed made provision for successor Protectors to be selected and appointed in the sole discretion of the original Protectors.
15. In the circumstances the Court is satisfied that the appointment of the proposed Protectors by the Court is in the best interests of the due administration of the Trust. In taking this view the Court has noted that the proposed new Protectors are willing and able to accept the office and are legal professionals with deep experience in the private client field. The Court has also noted that the proposed appointment of the new Protectors is in accordance with the wishes of the senior representatives of the two branches of the family who are beneficiaries of the Trust. The mere fact that the proposed Protectors are legal professionals in the private client field does not, in the Court’s view, present an insuperable conflict that which would disqualify them from acting as successor Protectors. Indeed, the appointment of legal professionals as protectors would appear to be common practice in the arena of international trusts.

Conferring on the Trustee the power to amend the Trust Deed

16. The Trustee wishes to avoid the need to make further applications to appoint Protectors in similar circumstances. It is noted that the Trustee has no power of amendment under the Trust Deed. In order to avoid the possibility of a recurrence of the present problems, the Trustee seeks for the Court to give the Trustee the power to amend the Trust Deed pursuant to its powers under section 47 of the 1975 Act, to allow for the Trustee to appoint a Protector in the event that the office of Protector becomes vacant in the future.
17. In addition, given that the proposed new Protectors are both legal professionals with the expectation of being able to charge the Trust for their services as Protectors, the Trustee proposes that the Protector's ability to be remunerated should be expressly stated in the Trust Deed.
18. The proposed amendments to the Trust Deed by the Trustee are as follows:
 - (a) To be added following section 2.01 of the Second Article, section 2.01A:

“If notwithstanding the provision of section 2.01 there shall at any time be no Protector of the settlement the Trustee shall by deed irrevocably appoint any person not being one of the Trustees to be a Protector”.
 - (b) A new clause 2.05 of the Second Article:

“Any Protector who is a solicitor or other person engaged in a profession or business shall be entitled to charge and to be paid of normal professional or other charges and incidental expenses for business done, services rendered or time spent personally or by such Protector's firm in the conduct of the office including acts which a Protector not engaged in any profession or business could have done personally”.

19. This application is made under section 47 of the 1975 Act which provides:

“Power of court to authorise transactions relating to trust property

47 (1) Where any transaction affecting or concerning any property vested in trustees, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by any provision of law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the Court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.”

“Transaction” is defined in section 47(4) as:

“(4) In this section, "transaction" includes any sale, exchange, assurance, grant, lease, partition, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any investment or application of capital, and any compromise or other dealing, or arrangement.”

20. In *GH v KL & Others* [2010] SC Bda LR 86 Ground CJ, considered that the concept of “transaction” is given a very broad interpretation in this context:

“7. I think that the proposal is a transaction within this very broad definition. I am guided in that by the way the English courts have interpreted the expression in the similar context of s. 64 of the Settled Land Act 1925: see e.g. Raikes v Lygon [1988] 1 WLR 281; and Hambro v Duke of Marlborough [1994] 3 WLR 341.”

21. In *Hambro v Duke of Marlborough* [1994] Ch. 158, cited by Ground CJ above, Morritt J. emphasised at 166 C-F that it was necessary to give the words in this section a fair and not restricted construction:

“Second, the submission appears to me to be contrary to the decision of the Court of Appeal in In re Downshire Settled Estates; Marquess of Devonshire v Royal Bank of Scotland [1953] Ch. 218. In that case Roxburgh J. had refused to sanction an arrangement under section 64 which removed a protected life interest to enable a partition between life tenant and remainderman. He had decided that the section only permitted the court to authorise transactions which were of an administrative character as opposed to rewriting the beneficial trusts. The Court of Appeal took a different view which was unaffected by the decision of the House of Lords on the subsequent appeal. Sir Raymond Evershed M.R. said, at p. 252:

“With all respect to the judge, we are unable to agree that the word “transaction” in this section should be given a restricted meaning such as he suggests. The word is one of the widest import, as is emphasized, in our judgment, by the terms of the second subsection, which made the meaning of the word comprehend (inter alia) any application of capital money “and any compromise or other dealing, or arrangement”

Thus, consistently with that decision, it is necessary to give the words a fair and not restricted construction”.

22. Having regard to these authorities, I am satisfied that the proposed amendments fall within the broad ambit of the concept of a “transaction” referred to in section 47.
23. I am also satisfied that the proposed amendments are plainly expedient. It is plainly expedient for the Trust as a whole that if the current situation arises again, notwithstanding the provisions of Clause 2.01, that the Trustee should have the

power to appoint a Protector as opposed to having to make an application to this Court invoking the inherent jurisdiction of the Court to make such an appointment.

Conclusion

24. In the circumstances the Court:

- (1) Declares that Mr P has not been validly appointed as a Protector of the Trust;
- (2) Appoints Ms M and Ms G as Protectors of the Trust; and
- (3) Confers on the Trustee the power to amend the Trust Deed as set out in paragraph 18 above.

25. I will hear any application in relation to costs.

DATED this 30 April 2019.

NARINDER K HARGUN
CHIEF JUSTICE