



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION 2017: 257

### IN THE MATTER OF THE E TRUST

#### RULING

(in Camera)

*Jurisdiction- trust governed by Bermudian law but administered in Jersey-proceedings commenced by trustees in Jersey to approve the decision of the trustees to sell a trust asset-proceedings commenced in Bermuda to remove trustees and to prevent trustees from exercising powers in a way approved by the Jersey Court- application by Defendants to set aside Order granting leave to serve them out of the jurisdiction-forum non conveniens-lis alibi pendens-abuse of process-comity*

Date of hearing: November 28, 2017

Date of Reasons: November 30, 2017

Mr Michael Mello QC and Mrs Jennifer Woods, Appleby (Bermuda) Limited, for the Applicants/Defendants

Mr Ben Adamson, Conyers Dill and Pearman Limited, for the Respondents/Plaintiffs

#### **Introductory**

1. The E Trust is governed by Bermudian law but administered in Jersey. On June 15, 2017, DW Trustees Ltd., the Trustee of the E Trust (“the Trustee”), commenced proceedings (“the Representation”) in the Royal Court of Jersey (“the Jersey Court”) seeking directions, *inter alia*:

(1) confirming that the Trustee was not required to retire;

- (2) declaring that any purported removal of the Trustee under section 26(1) of the Trustee Act 1975 under Bermuda law was invalid; and
  - (3) approving the Trustee's decision to sell a trust asset consisting of real estate (the "Property").
2. On July 10, 2017 the Jersey Court, following an *inter partes* hearing of the a jurisdictional challenge by the Respondents/ Plaintiffs herein:
  - (1) ruled that Jersey was "*clearly the most convenient forum for the Representation*";
  - (2) approved the Trustee's decision not to retire;
  - (3) ordered that the Trustee "*shall remain as trustee of the said trusts until further order of this Court*"; and
  - (4) approved the decision of the Trustee to market the Property.
3. On July 12, 2017, the settlor and one beneficiary of the E Trust issued a Generally Endorsed Writ out of this Court seeking, *inter alia*, the following relief:
  - (1) An order under section 31 of the Trustee Act 1975 removing and replacing the Trustee; and
  - (2) An order setting aside the purported decision by the Trustee to sell the Property. Alternatively, declaring that the decision was invalid.
4. On July 14, 2017, the Respondents issued an Ex Parte Summons seeking, *inter alia*, leave to serve the Writ out of the jurisdiction under Order 11 rule 1(1) (j)<sup>1</sup> of this Court's Rules. It was argued that despite the potential for competing decisions from the two courts, in legal terms only this Court had the competence to deal with the removal of the Trustee. I granted leave to serve out on July 20, 2017.

---

<sup>1</sup> Order 11 rule 1(1) permits service abroad where:

*"(j) the claim is brought to execute the trusts of a written instrument being trusts that ought to be executed according to the law of Bermuda and of which the person to be served with the writ is a trustee, or for any relief or remedy which might be obtained in any such action;..."*

5. On October 5, 2017, the Jersey Court delivered a full reasoned judgment on jurisdiction (explaining its July 10, 2017 decision) and rejected the Respondents' application for a stay, having been advised that the present proceedings had been commenced. Commissioner Clyde-Smith pivotally held that the following factors justified the conclusion that "*Jersey was the most appropriate forum*":
  - the Trustee was resident in Jersey;
  - the Trust was administered in Jersey;
  - four out of five of the Trustee's directors were resident in Jersey;
  - the majority of beneficiaries and the settlor were UK domiciled;
  - there were no assets in Bermuda;
  - the relief sought by the Trustee was directions as to its own conduct;
  - requiring the Trustee to litigate in Bermuda at its own initial expense would impose an unfair additional costs burden;
  - the only connection with Bermuda was the proper law of the Trust.
  
6. Having obtained leave to enter a conditional appearance, the Applicants issued a Summons herein on October 9, 2017 seeking the following substantive relief:
  - (1) an order setting aside this Court's July 20, 2017 Order on the grounds of forum non conveniens and *lis alibi pendens*; alternatively
  - (2) an order staying all further proceedings on the same grounds.
  
7. On October 31, 2017, the Jersey Court approved the Trustee's further decision to sell the Property, and gave reasons for that decision on November 9, 2017.
  
8. Meanwhile, back in Bermuda, directions were ordered in relation to the Applicants' Summons on October 20, 2017. Skeleton arguments were to be filed three days before the hearing. The Respondents filed no skeleton argument leaving the Court and the Applicants' somewhat bemused as to what opposition, if at all, the Respondents proposed to mount. In fairness, the 2<sup>nd</sup> Respondent in an Affidavit sworn on November 3, 2017 had prior to the hearing revealed the following somewhat beguiling stance:

- the application to set aside the Ex Parte July 20, 2017 Order was opposed;
- it was agreed that the present action should be stayed to allow proceedings before the Jersey Court and the Court of the *lex situs* of the Property to “run their course”;
- the dismissal of the present action was opposed;
- the proposition that Jersey was a more appropriate forum than Bermuda, a question of law, was opposed.

9. In the event, Mr Adamson in his oral response to the opening submissions of Mr Mello QC conceded that as a result of unsuccessful attempts to appeal the Jersey Court’s jurisdictional ruling, his clients could no longer seek the relief they originally sought in relation to the Trustee’s dealings with the Property. He conceded that paragraphs (4) to (7) of the Endorsement of Claim were liable to be struck out and did not oppose setting aside the July 20, 2017 Order to that limited extent. However, he contended that as regards the removal of the Trustee aspect of the present action, there was no sufficient legal basis for either setting aside leave to serve out or dismissing or even staying the present proceedings altogether. The applicants’ counsel orally applied for the present action to be dismissed to avoid any possible impediment to the sale of the Property.

10. On November 28, 2017, I accordingly reserved judgment on the contentious aspect of the application and costs, and further indicated that when deciding the reserved issues, I would give reasons for my decision to Order on that date that:

- (1) the Ex Parte Order dated July 20, 2017 shall be set aside as regards the Plaintiffs’ claim for the relief set out in paragraphs (4) to (7) of the Endorsement of Claim contained in their Generally Endorsed Writ;
- (2) paragraphs (4) to (7) of the said Endorsement shall be struck out on the grounds that pursuit of such relief would constitute an abuse of process.

11. The only issues in controversy are whether (a) the Respondents are correct to contend that only this Court, and not the Jersey Court, is competent to remove the Trustee, and that (b) there is a fundamental distinction to be made between the application to remove the Trustee and the relief originally sought in relation to the sale of the

Property. It is common ground that the Respondents can no longer pursue the latter heads of relief. These issues can best be addressed after explaining why I decided at the end of the hearing to set aside leave in relation to those portions of the claim that related to the Trustee's dealings with the Property and to strike out the related portions of the Endorsement of Claim.

**Reasons: why it would have been an abuse of process to permit the Respondents to seek to impugn the decisions of the Jersey Court to approve the Trustee's decisions to market and sell the Property**

12. These issues were determined at the end of the hearing in circumstances where the Respondents' counsel did not have the temerity to attempt to formulate written legal opposition to the Applicants' Skeleton Argument. Three pivotal submissions which were advanced on behalf of the Applicants:

- (1) The Jersey Court clearly had personal jurisdiction over the Trustee and the competence to supervise the administration of a trust governed by Bermudian or any other foreign law;
- (2) although Bermuda and Jersey were both competent *fora*, Jersey was clearly the most appropriate forum;
- (3) Not only was the Jersey Court seized of the issues in controversy having made final orders in relation to the Property. The Respondents/Plaintiffs had now seemingly submitted to the jurisdiction of the Jersey Court as a matter of Jersey law, having challenged the jurisdiction of that Court unsuccessfully and allowed its appeal rights to expire.

13. The first submission was supported by various authorities, notably:

- *'Lewin on Trusts'*, 19<sup>th</sup> edition: "*a trustee may invoke the assistance of the English court to determine a question arising in the administration of the trust, even though the proper law of the trust is not English and the trustee himself is based abroad*" (paragraph 11-008);
- *Chellaram-v-Chellaram* [1983] 1 Ch 409 at 427B (Scott J): "*...the principle that the English court has jurisdiction to administer the trusts of foreign settlements remains unshaken. The jurisdiction is in personam, is exercised against the trustees on whom the foreign obligations lie, and is exercised so*

*as to enforce against the trustees the obligations which bind their conscience”;*

- The Jersey Court’s October 5, 2017 judgment in the present matter (at paragraphs 26-27): *“The Court is given jurisdiction over Jersey resident trustees under Article 5 of the Trust Law. It is a jurisdiction which is given over the Jersey resident specifically in its capacity as trustee of the foreign trust...we have no doubt that prior to the enactment of the Trusts Law, the Court had jurisdiction over Jersey resident trustees of foreign trusts, on the basis that its jurisdiction acts upon any person whom it finds in its jurisdiction...”*

14. The second submission was supported principally by *Spiliada Maritime Corp-v-Cansulex Limited* [1986] 3 All ER 843 (HL), where Lord Goff established the now uncontroversial principle that where there are two or more potential jurisdictions which are competent to decide a dispute and proceedings have been commenced in one of them, the party seeking to challenge the jurisdiction of the competent court must demonstrate that the competing jurisdiction is clearly the more appropriate forum.

15. The third submission was not challenged and appeared on its face to be not simply meritorious but compelling. It supported the following conclusory findings which formed the central basis for my November 28, 2017 decision:

- (a) it was inconsistent with the general public policy objection to a multiplicity of proceedings potentially leading to inconsistent findings for the Respondents to be seeking to litigate in Bermuda issues which the Jersey Court had been seized of before the present action was commenced and had already decided;
- (b) it would be an abuse of process for the Respondents to seek to re-litigate in Bermuda issues which had been determined against them by the Jersey Court following *inter partes* hearings in which the Respondents had participated;
- (c) it would also be inconsistent with comity for this Court to permit its processes to be used to undermine the exercise by the Jersey Court of its lawful supervisory personal jurisdiction over trustees resident within its jurisdiction. As the Jersey Court explained in its October 5, 2017 judgment setting out its reasons for assuming jurisdiction on July 10, 2017:

*“29. If the Jersey court were to refuse jurisdiction over a Jersey resident trustee of a foreign trust, to compel performance by that trustee of its*

*duties under that foreign trust, it could leave the beneficiaries of that foreign trust without a remedy. As Advocate Renouf said, it is fundamental to the good administration of trusts that the Court should exercise the personal jurisdiction it has over that Jersey resident trustee, just as this Court would expect a foreign court to compel a trustee in its jurisdiction to compel performance of its duties under a Jersey trust...*

*31. For the same reasons, we would expect the courts of Bermuda, for reasons of comity, to afford respect to the directions we have given to a Jersey resident trustee of a Bermud[i]an trust, in the same way that we would afford the same respect to directions given by the courts of Bermuda to trustees of Jersey trusts resident in its jurisdiction.”*

16. For these reasons I found that although the Respondents/Plaintiffs had made out a good arguable case for accessing the right to serve the Applicants/Defendants abroad via the Order 11 rule 1(1)(j) gateway:

- (1) Jersey was also a competent or available jurisdiction for the relevant claims, and the Applicants had established that Jersey was clearly a more appropriate forum and leave to serve out should accordingly be set aside; and
- (2) it would be an abuse of the processes of this Court for the Respondents/Plaintiffs having implicitly submitted to the jurisdiction of the Jersey Court to be permitted to re-litigate in Bermuda the questions of whether the Trustee should be permitted to market and sell the Property.

**Findings: should leave to serve out be set aside and the Writ be struck out as regards the application to remove the Trustee or merely stayed with liberty to apply?**

17. As I observed in the course of the hearing, it is impossible to avoid the distinct impression that the sole motivation behind the Respondents insisting on the present proceedings being stayed rather than dismissed altogether was to create the doubts about the Trustee’s right to sell the Property. These were doubts which Mr Mello QC was understandably keen to avoid.

18. Whether this action should simply be stayed to preserve the Respondents’ right to pursue an application to this Court in practical terms turns on the answer to the following question: is the position in relation to the removal application any different

to that in relation to the Property-related relief the pursuit of which it was conceded would amount to an abuse of process? The short answer to that question is that, on proper analysis, there is no or no material difference between the two limbs of the claim.

19. The main legal proposition which was advanced in support of maintaining the present action was that Bermuda was the “only” jurisdiction which could entertain the removal claim. This submission was misconceived. The E Trust does not contain an ‘exclusive jurisdiction clause’ in relation to trust administration matters corresponding to the clause under consideration in *In the Matter of A Trust* [2012] Bda LR 79 (at paragraphs 46-67). The mere existence and availability of the Order 11 rule (1) (j) gateway is immaterial to the appropriate forum question. Obviously, only this Court could grant relief under section 31 of the Bermudian Trustee Act 1975, which crucially provides as follows:

*“(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.”*

20. However, as the Jersey Court itself explained in its October 5, 2017 judgment, it has statutory jurisdiction over foreign trusts “*where the trustee is resident in Jersey*” (Trusts (Jersey) Law 1984, Article 5). Article 50 of the same law confirms that the Jersey Court’s jurisdiction under Part 4 of the Trusts Law applies to “*to the extent that the context admits...to a foreign trust*”. Article 51 confers a broad jurisdiction for a trustee to apply to the Jersey court “*for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the Court may make such order, if any, as it thinks fit*”. Moreover there is no exclusive jurisdiction clause in the E Trust deed. The Jersey Court in any event was satisfied that it had the inherent jurisdiction to remove Jersey trustees based on, *inter alia*, two important authorities which Mr Mello QC relied upon before this Court. The following passages from those two authorities are particularly instructive:

- ‘*Lewin on Trusts*’, 19<sup>th</sup> edition: “*It does not matter that the governing law of the trust is not English or that the trust property is not in England and Wales...the court, acting in personam, may make an order against the trustees requiring them to resign and to vest the trust assets in new trustees...*” (paragraph 11-007);
- *Chellaram-v-Chellaram* [1983] 1 Ch 409 at 432F-433A (Scott J): “*The plaintiffs claim for the removal of trustees and the appointment of new ones*



*is...an appeal to the inherent jurisdiction of the court...The identification and extent of those rights is a matter for the proper law of the settlement, but the manner of enforcement is, in my view, a matter of machinery which depends upon the powers enjoyed by the English courts...The exercise of the domestic power does not, in my view, depend upon whether the rights of the beneficiaries are enjoyed under domestic settlements or foreign settlements, or on whether the trust property is situate in England or abroad...except where rights conferred under the settlement are under consideration, the removal of trustees and the appointment of new ones is not, in my judgment, a matter to be governed by the proper law of the settlement. Nor, in my opinion, is it a matter to be governed by the law of the place where the administration of the settlement has taken place. It is, in my judgment, a matter to be governed by the law of the country whose courts have assumed jurisdiction to administer the trusts of the settlement in question.”*

21. Are the practical and factual characteristics of the removal claim materially different to the admittedly abusive Property-related claims? Again, the short answer is ‘no’. When the July 10, 2017 Jersey Court Order is properly understood, jurisdiction was assumed by the Jersey Court over both the Property and removal issues. As Mr Mello QC submitted in relation to the removal claim before this Court, the Jersey Court assumed jurisdiction over this issue on July 10, 2017 before the present action had even been commenced by ordering:

*“1. in respect of the Jurisdiction Challenge, declared that this Court has jurisdiction and is clearly the most convenient forum for the Representation.*

*2. approved the decision of the Representor not to retire from...the...Trust...*

*3. ordered that the Representor shall remain as trustee... until further order of this court...”*

22. The Jersey Court has clearly assumed jurisdiction over the Trustee both generally and in relation to the question of whether it should be removed in particular and has apparently made an interim decision that the Trustee should remain in office for the purposes of managing the sale of the Property.
23. At the ex parte hearing before me on July 20, 2017, the Jersey Court’s July 10, 2017 Order was not produced, apparently because it was not yet available. It was fairly disclosed that a *forum non conveniens* challenge might be raised by the Defendants/Applicants if leave to serve out was granted in favour of the

Plaintiffs/Respondents. Those challenges having been made and advanced at an *inter partes* hearing, it is impossible to discern any material difference between the status of the claims relating to the Property and those relating to the removal issue. Mr Adamson essentially relied on the distinction that the removal issue had not yet been finally determined, but that distinguishing factor carries little weight because:

- Jersey is clearly the most appropriate forum for the same reasons which appertain to the Property-related limbs of the present action;
- substantially the same policy objections to the risk of a multiplicity of proceedings and inconsistent decisions would arise if this Court were to assert jurisdiction in competition with the Jersey Court;
- the same policy objections to failing to afford comity to the decisions of the Jersey Court would arise if this Court were to assert jurisdiction over the removal claim.

24. The Respondents have identified no coherent (and legitimate) juridical advantages which they would gain from having the removal issue determined in Bermuda while it is obvious the Trustee would be disadvantaged in costs terms. It is also obvious that keeping the Bermuda proceedings alive would potentially undermine the efficacy of the Jersey Court's orders in relation to the Property by creating unfounded legal doubts as to the Trustee's authority to sell the Property under the proper law of the E Trust. In these circumstances I am bound to find that the further prosecution of the present action would be an abuse of the process of this Court. It follows that the Order of July 20, 2017 granting leave to serve out should be set aside as regards the removal of trustee head of relief as well and that the Writ should be struck out in its entirety.

25. I reserved judgment primarily to consider the propriety of departing from the traditional practice of staying rather than dismissing proceedings on *forum non conveniens* grounds. It is important to remember that the Applicants in their application rely upon what is for me the somewhat nebulous doctrine of *lis alibi pendens* as well as *forum non conveniens*. On reflection, this Court's inherent jurisdiction suffices to empower this Court to meet the needs of justice in the present case. In the unique factual matrix of the present case, the mere existence of the present proceedings would constitute a clear abuse of process because it would potentially undermine the efficacy of the Jersey Court's administration of the Trust whose Trustee is subject to the personal jurisdiction of that Court. Were the roles to be reversed and this Court were to be exercising its supervisory jurisdiction over Bermudian trustees in relation to a trust governed by Jersey law, this Court would

expect the Jersey Court to support rather than undermine our jurisdiction. In the highly internationalised offshore world, the role of comity and cross-border judicial cooperation, whether active or passive, carry greater public policy significance for the efficacy of Bermuda's courts. As I have observed writing extra-judicially:

*“It has long been recognised that the courts of one jurisdiction will be unable to deal effectively with civil and commercial litigation with an international dimension without assistance in some respects from the courts of other jurisdictions. These challenges are magnified for the subject jurisdictions where international business is a major pillar of their economies.”*<sup>2</sup>

26. For completeness I should add that to the extent that I have taken into account subsequent events after the making of the Ex Parte July 20, 2017 Order, those events have not been dispositive and have largely shed further light on matters which were relevant at the time of the ex parte hearing. Such events have only served to confirm that the Order ought not in the first instance to have been made. The present decision is in my judgment consistent with the following principles set out Supreme Court Practice 1999 paragraph 11/4/16 to which Mr Adamson referred:

*“When leave to serve out of the jurisdiction is properly given, it cannot be discharged simply because circumstances have changed, unless further evidence throws new light on what should have been a relevant consideration at the time leave was granted (I.S.G. Technologies v Guerin[1992] 2 Lloyd's Rep. 430).”*

## **Conclusion**

27. For the above reasons, having partially set aside leave granted ex parte to serve the Defendants/Applicants abroad and partially struck-out the Plaintiffs'/Respondents' Writ herein on November 28, 2017, the Defendants/Applicants are also entitled to corresponding relief in respect of the remaining limb of the present claim. The result is that the Ex parte Order dated July 20, 2017 is set aside altogether and the Generally Endorsed Writ is struck-out in its entirety. I will hear counsel if required on the terms of the final Order drawn up to effect to the present Ruling. Unless any party applies to be heard as to costs within 21 days by letter to the Registrar, the Applicants' costs of the present application shall be paid by the Respondents and taxed if not agreed.

---

<sup>2</sup> 'Cross-border Judicial Cooperation on Offshore Litigation: The British Offshore World', I. Kawaley, A. Bolton and R. Mayor (eds.), 2<sup>nd</sup> edition (Wildy Simmonds & Hill: London, 2016) page xxx.

Dated this 30<sup>th</sup> day of November 2017, \_\_\_\_\_

IAN RC KAWALEY CJ