



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: 28

IN THE MATTER OF THE HANOVER TRUST, THE DRESSAGE TRUST AND THE VULCANO TRUST

AND IN THE MATTER OF THE TRUSTEE ACT 1975

AND IN THE MATTER OF ORDER 85 OF THE RULES OF THE SUPREME COURT

REASONS FOR RULING

(in Chambers)

Date of hearing: April 18, 2013

Date of Reasons: May 3, 2013

Mr Keith Robinson, Appleby, for Appleby Services (Bermuda) Ltd. (“the Trustee”)

Introductory

1. On February 7, 2013, the Trustee applied for directions in relation to the Trusts (all established in Bermuda) by an Originating Summons which named the Settlor and principal beneficiaries as Defendants. The application was prompted by the fact that relations between the Trustee and the Settlor had broken down and the trusts were illiquid. It invoked the Court’s supervisory jurisdiction over Bermudian trusts.

2. On April 18, 2013, I gave directions for service of the Originating Summons herein on four overseas resident Defendants by air courier on the grounds that the character of the present action was such that no need to seek leave to serve out under Order 11 arose. The directions were sought by the Trustee by way of an Ex Parte Summons issued on March 27, 2013. Mr. Robinson presented a compelling and comprehensive submission that Order 11 did not apply to non-adversarial proceedings in respect of which this Court had jurisdiction as of right.
3. As this point is of relevance to practitioners in a forum in which trust applications represent a significant segment of civil cases dealt with by this Court, I now give reasons for this decision.

Previous case law

4. In a similar ex parte application in relation to a Trustee's action for directions from this Court, *Orconsult-v-Blickle et al*, Supreme Court Civil Jurisdiction 2007: No. 349 (unreported), Bell J held that Order 11 did not apply. Mr. Robinson properly disclosed that doubt was cast on the basis of that decision to the extent that counsel in that case relied upon an English decision (*Re Cliff* [1893] 2 Ch. D. 21) based on a different version of Order 11. The rule considered by the English Court in *Re Cliff* did not contain the following provisions found in our own Order 11:

“9 (1) *Subject to paragraph (2) and to Order 73, rule 7¹, service out of the jurisdiction of an originating summons is permissible with the leave of the Court.*

(2) *Where the proceedings begun by an originating summons might have been begun by writ, service out of the jurisdiction of the originating summons is permissible as aforesaid if, but only if, service of the writ, or notice of the writ, out of the jurisdiction would be permissible had the proceedings been begun by writ.*

5. Nor did the version of the rule considered in *Re Cliff* [1893] 2 Ch. D. 21 contain the following provision found in the Bermudian Order 11 rule 1:

“(2) *Service of notice of a writ in any place out of the jurisdiction is permissible without the leave of the Court if every claim made in the action begun by the writ is one which by virtue of an enactment the Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.*”

¹ Order 73 rule 7 concerns proceedings related to arbitration agreements.

6. Mr. Robinson also referred the Court to *In re Busfield* (1886) 32 Ch. D. 123 where leave to serve an originating summons out of the jurisdiction was refused at a time when the equivalent of Order 11 rule 9 of our Rules (set out above) did not exist in England and Wales.
7. I agreed that these cases were merely relevant as examples of how notice of proceedings which could not be formally served out of the jurisdiction could be given to the relevant parties overseas. They did not decide that Order 11 did not apply at all to applications for directions made by a trustee in non-contentious proceedings. As to the practical question of how an application for directions can be brought to the attention of an interested person overseas, Lindley LJ in *Re Cliff* [1893] 2 Ch. D. 21 at 29 held as follows:

“In my opinion, all that is necessary is that the plaintiff’s solicitor should write a letter to the person out of the jurisdiction and inform him that, if he does not make any claim, it will be assumed that he has no interest and the Court will distribute the fund accordingly. The Court can protect the interest of the absenter, if he has any which ought to be protected.”

Why leave for service of an originating summons out of the jurisdiction is not required for non-contentious applications by Bermudian trustees for directions relating to the administration of a trust

8. Mr. Robinson submitted that the character of an application for directions in relation to the administration of a trust was inherently incompatible with the process of seeking leave to serve the originating summons overseas, by analogy with a writ. I agreed. However, the one technical basis on which counsel based his argument was that even if leave to serve out was *prima facie* required under the rules applicable to writs, this Court had express statutory jurisdiction under section 9 of the Trusts (Special Provisions) Act 1989. As a result, leave to serve out was not required according to the express terms of Order 11 rule 1 itself, which provides in material respects as follows:

“(2) Service of a writ out of the jurisdiction on a defendant is permissible without the leave of the Court provided that each claim against that defendant made by the writ is a claim which by virtue of any enactment the Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court

or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.”

9. Section 9 of the 1989 Act clearly gives this Court jurisdiction to hear applications with respect to a trust, but in my judgment, Order 11 rule 1 (2) according to its terms is only engaged when the nature of the proceeding is an adversarial one involving a claim against a party resident abroad. Section 9 of the 1989 Act firstly provides as follows:

“Jurisdiction of Supreme Court

9 The Supreme Court has jurisdiction —

(a) where a trustee is resident in Bermuda;

(b) where any trust property is situated in Bermuda but only in respect of property so situated;

(c) where the administration of any trust is carried on in Bermuda, or

(d) where the Court thinks it appropriate.”

10. The effect of this statutory provision is to give this Court *in rem* jurisdiction over the matters described in section 9 of the Trusts (Special Provisions) Act 1989. This jurisdiction has a number of parallels under Bermudian statutory law. The most obvious examples are:

- (a) the jurisdiction conferred on this Court to, *inter alia*, appoint receivers in respect of, wind-up and reorganise companies under the Companies Act together with the regulatory jurisdiction conferred by acts such as the Insurance Act 1978;
- (b) the jurisdiction conferred by section 2 of the Administration of Estates Act in respects of the estates of deceased persons who either were ordinarily resident in Bermuda or who had property in Bermuda; and
- (c) the jurisdiction conferred by, in particular, sections 5 and 6(d) of the Bankruptcy Act 1989 in respect of debtors who have resided or conducted business in Bermuda.

11. The provisions of section 9 of the 1989 Act ought to be read with Order 85 of the Rules, which provide in salient part as follows:

“85/1 Interpretation

1 In this Order "administration action" means an action for the administration under the direction of the Court of the estate of a deceased person or for the execution under the direction of the Court of a trust.

85/2 Determination of questions, etc. without administration

2(1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

(2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions—

(a) any question arising in the administration of the estate of a deceased person or in the execution of a trust;

(b) any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;

(c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.

(3) ...

85/3 Parties

3 (1)...

(2) Notwithstanding anything in Order 15, rule 4(2), and without prejudice to the powers of the Court under that Order, all the persons having a beneficial interest in or claim against the estate or having a beneficial interest under the trust, as the case may be, to which such an action as is mentioned in paragraph (1) relates need not be parties to the action; but the plaintiff may make such of those persons, whether all or any one or more of them, parties as, having regard to the nature of the relief or remedy claimed in the action, he thinks fit.”

12. Who is made a formal party depends on the type of relief being sought. An application for directions by a trustee may need to be on notice to beneficiaries, but no need to formally serve the originating process on such persons will generally arise. Order 85 rule 3(2) is central to the practical questions of joinder and service but not to the question of whether or not leave to serve out is required. The answer to this conundrum can only be found by determining the jurisdictional scope of Order 11 itself.

13. I found that Order 11 and the need for leave to serve out only arises where an adverse claim is asserted against a foreign substantive defendant who may potentially query whether:

(a) the Court possesses subject-matter jurisdiction over the dispute under Order 11 rule 1(1); and/or

(b) whether Bermuda is the most convenient forum applying the common law rules on this topic developed in relation to Order 11 rule 4(2) which provides as follows:

“(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.”

14. Where this Court has jurisdiction under section 9 of the Act and a trustee merely seeks directions about the administration of the trust, Order 11 will not even potentially be engaged. For this reason leave to serve out was not required in the present case.

15. The result in relation to an adverse claim is the same only achieved by a somewhat different route. Order 85 rule 4 contemplates that relief in respect of a breach of trust may be granted in an action commenced by originating summons. A breach of trust claim brought by Bermudian trustees against a foreign defendant would be the sort of claim to which Order 11 would potentially apply. However, because of the impact of section 9 of the 1989 Act as read with Order 11 rule 1(2), leave to serve out would not be required as regards such an originating summons either.

Directions as to service

16. An originating summons does not generally have to be served personally. Order 65 provides:

“65/1 When personal service required

1 (1) Any document which by virtue of these rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these rules or by order of the Court is required to be so served.

(2) Paragraph (1) shall not affect the power of the Court under any provision of these rules to dispense with the requirement for personal service.”

17. Order 28 does not mandate personal service for an originating summons as Order 10 rule 1 does in the case of writs. The general rule for service within or without the jurisdiction appears to me to be that personal service within or without the jurisdiction will not ordinarily be required.
18. The greatest flexibility in terms of the way in which proceedings are brought to the attention of interested parties will likely exist in relation to applications for directions which are not likely to result in any adverse order being made against beneficiaries or other interested persons, be they named as parties or not. The position in relation to service abroad on defendants to a breach of trust claim may require more careful scrutiny. This sort of claim might give rise to the need to effect personal service of any originating summons on an overseas defendant in order to ensure that any resultant judgment is enforceable against the defendant in his domicile under applicable local rules of private international law.
19. The instant case was an application for directions in a non-adversarial originating summons action. It seemed clearly appropriate to direct that the proposed service might take place by courier on the Defendants’ last known addresses.

Conclusion

20. These are the reasons for my Order dated April 18, 2013 dispensing with the need for the Plaintiff Trustee to obtain leave serve to serve the Originating Summons on the Defendants out of the jurisdiction and directing that the Defendants could be served by courier at their last known addresses.

Dated this 3rd day of May, 2013 _____

IAN R.C. KAWALEY CJ