Neutral Citation Number: [2024] CA (Bda) 1 Civ

Civil Appeal No. 20 of 2021

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. ASSISTANT JUSTICE IAN KAWALEY
CASE NUMBER 2018: No. 40

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

IN THE MATTER OF THE X TRUSTS

Mr Simon Taube KC of counsel and Mr Thomas Fletcher of counsel and Ms Lilla Zuill, Zuill & Co., for D1, D5, D8, D9-D12 ("the B Branch")

Mr Brian Green KC of counsel and Ms Anna Littler of counsel and Mr Matthew Watson, Cox Hallett Wilkinson Limited, for D3 ("the A Branch")

Mrs Elspeth Talbot Rice KC of counsel and Ms Judith Roche, Conyers Dill & Pearman Limited, for the Trustees

Mr Keith Robinson and Mr MacKay, Carey Olsen Bermuda Ltd., for the Protectors

Application Determined on the Papers
Date of Ruling: 18 January 2024

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APPROVED RULING ON LEAVE TO APPEAL

CLARKE P:

1. In this case the parties referred to as "A and Others" (hereafter "the Appellants"), seek leave to appeal to His Majesty in Council from the final judgment of this Court dated 17 February 2023 (revised 23 February 2023). The facts and issues are well known to the parties and I shall not expend time summarising them

2. The Appellants contend that they are entitled to appeal as of right pursuant to section 5 of the *Appeals Act 1911* ("the Appeals Act") ; and, if that be not so, that we should grant leave to appeal as a matter of discretion. The opposing parties, referred to as" C and Others"(hereafter "the Respondents") deny that the Appellants are entitle to appeal as of right and submit that this is not a case in which we should grant leave as a matter of discretion,

3. Both sides have filed extensive written submissions, and the Trustees and the Protector have also filed limited submission in relation to particular matters. We have considered all of them.

4. Section 2 of the Appeals Act provides:

> ***"When appeal lies***
>
> *2 Subject to this Act, an appeal shall lie —*
>
> *(a) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of $12,000 or upwards or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $12,000 or upward;*
>
> *…*
>
> *(c) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to Her Majesty in Council for decision."*

5. The threshold of $ 12,000 (equivalent to something like $ 200,000) today is anachronistic. Not surprisingly this Court has sought to apply a restrictive interpretation to this section: see paragraphs [12] - [14] below.

6. In the present case the Supreme Court is concerned with proposals made by the Trustees of the X Trusts to partition all of the property of the Trusts (said to be worth upwards of £ 4 billion) between two branches of the family by allocating the bulk of it to the members of the A branch, now comprising 5 members, with the balance allocated to the members of the B branch, now comprising 14 members. The Trustees do not suggest that they can implement those proposals without the consent of the Protectors of those Trusts that have Protectors (which is almost all of them).

7. The issue before the Supreme Court and, on appeal, before us was as to the scope of the powers of the Protectors of the Trusts. The Trusts contain a provision in these or similar terms:

> "*2. Restriction on power to appoint capital*
>
> *The Trustees shall not exercise their power to appoint, distribute or pay any part of the Trust Fund to or for the benefit of any member of the Appointed Class or any Beneficiary without obtaining the prior written consent of the Protectorate, nor, if the Trustees' consent is required for any appointment of capital, shall they give their consent without the prior written consent of the Protectorate*."

8. At paragraph [20] of her judgment Gloster JA referred to the summons which led to the determination of the Supreme Court as seeking an answer to the following questions:

> "(*1) whether, on the proper interpretation of the relevant trust instruments, the role of the 16th and 17th Defendants as protectors of the trusts identified in Appendix A to the Originating Summons dated 21 February 2018 (the X Trusts) (or any of them) (save for the settlement known as [X Trust] numbered 365 in Appendix A to the Originating Summons) in exercising their powers to consent to the exercise of powers vested in the Plaintiffs (or any of them) is:*
>
> > *(a) to exercise an independent discretion as to whether or not to give consent to a proposed exercise of power by the Plaintiffs (as trustees of the X Trusts) (or any of them) which requires the protectors' consent, taking into account relevant considerations and disregarding irrelevant*

> *considerations so that the protectors might withhold their consent to a proposed exercise of power by the Plaintiffs even if the proposed exercise of power was an exercise of power which a reasonable body of properly informed trustees was entitled to decide upon (the latter being a relevant factor, but not the only relevant factor, for the protectors to take into account) [which the parties generally described, and I shall refer to, as the "**Wide Review Role**"]; or*
>
> *(b) to satisfy themselves that the proposed exercise of a power by the Plaintiffs (as trustees of the X Trusts) (or any of them) is an exercise which a reasonable body of properly informed trustees is entitled to undertake and, if so satisfied, to consent to the same [which the parties generally described, and I shall refer to, as the "**Narrow Review Role**"]."*

9. In our decision we decided, as had the learned judge, that the Narrow Review Role applied. The Appellants submit, and seek to persuade the Privy Council, that we were wrong. The Protectors have indicated, including at paragraph 11 in their written submissions in response to this Notice of Motion, that, if they did have the Wide Review Role, "*they would be likely to refuse their consent to a partition based on the Trustees' current approach*".

10. In my judgment, the Appellants have a right of appeal under section 2 on the basis that their appeal "*involves, directly or indirectly, some ... question …respecting property ...of the value of $ 12,000 or upwards*". The question, the answer to which divides the parties. Is whether the assets of the Trust can be distributed if the Protector is satisfied that the decision of the Trustees to make such a partition is one which a reasonable body of properly informed trustees could make; or whether the distribution proposed can only take place if the Protectors, themselves, exercise an independent discretion as to whether or not to give consent (taking into account relevant considerations and disregarding irrelevant considerations) so that the Protectors might withhold their consent to a proposed distribution by the Trustees even if the proposed distribution was something which a reasonable body of properly informed trustees was entitled to decide to make. It does not seem to me that a "*question ... respecting property*" can properly be limited so as to embrace questions as to ownership of or rights in property but not to embrace the question as how the property can

lawfully be partitioned or distributed[1], nor that it can be limited so as to apply only to property which is the property of the Appellants.

11. The Respondents submit that this appeal does not concern some claim or question to or respecting property of $ 12,000 or more. There is no dispute concerning the assets held on the X trusts. All that is disputed is the role of the Protectorate which has nothing to do with the value of the X Trusts' assets. I disagree: there is a dispute concerning the assets of the Trusts, namely whether or not they can only be partitioned following consent given by the Protectors exercising the Wide Review Role.

12. Reliance was placed on two recent cases. In *Sturgeon Asia Central Balanced Fund Ltd v Capital Partner Securities Co Ltd* (Civil Appeal No. 14 of 2017), Baker P noted that the $12,000 threshold in section 2 (a) of the Appeals Act was "*anachronistic*" and held that it should be "*restrictively rather than liberally applied*" so as not to deprive it of constituting a meaningful gateway for appeals as of right. On the substantive appeal this Court held that the participators in a fund were entitled to vote to terminate the fund and have the company wound up on just and equitable grounds. That was the issue and it was not concerned with the value of the company's property as such. Baker P held that the money to be realised in the liquidation was neither "*the amount of the matter in dispute"* nor was it "*the amount of a claim or question relating to property*", and that the economic consequences of the winding up were too indirect or remote to satisfy, and were not within the contemplation of, the test.

13. In *The Hong Kong and Shanghai Banking Corporation Ltd v NewOcean Energy Holdings Ltd* [2021] CA (Bda) 21 Civ this Court allowed HSBC's appeal and ordered that NewOcean be wound up on HSBC's petition and made further orders relating to the carrying out of the liquidation. In seeking leave "*as of right*", NewOcean relied on the fact that the petition debt exceeded US$70m, and that the total debts owed by NewOcean to bank creditors amounted to US$770.6 (at [7]), and submitted that the proposed appeal "*involves directly or, at the*

[1] I note that in *Becker v Marion City Corpn* [1977] AC 271 the Privy Council considered that the appellant to them had an appeal as of right when what was in issue was whether she should be permitted to subdivide her land for the purposes of sale. I recognize, of course, that she owned the relevant property and that the Appellants do not. The relevance of the case is the perhaps obvious point that a question whether property can lawfully be divided is a question respecting property.

lowest, indirectly some claim or question to or respecting property amounting to or of the value of more than $12,000, the question being whether or not the Court was right to grant a winding up order in relation to the Petition debt" (at [8]).

14. In my judgment I said this:

> "*I do not accept that this submission is well founded. The section is to be narrowly construed and it must, in my view, be held to apply if, but not unless, there is a claim in respect of some property to which the would-be appellant is, or claims to be entitled, or some question in respect of that property. No such question arises. The Petitioner's entitlement to the only relevant property – its chose in action against the Company – is not in question. A contrary conclusion would not constitute the application of a strict construction; would not, as it seems to me, be consistent with Sturgeon; and, if correct, would appear to mean that, in relation to all windings-up where the Petition debt exceeded $12,000, there was an appeal as of right".*

15. I do not accept that these decisions dictate that there is, in this case, no appeal as of right. The question in those cases was whether the Company should be wound up. Whatever decision was made on that issue would not, of itself, affect any property nor would it involve any determination as who owned any property or whether and in what circumstances it could lawfully be divided. I accept that my observation that there needed to be "*a claim in respect of some property to which the would-be appellant is, or claims to be entitled, or some question in respect of that property*" might be taken to indicate that the Appellants in the present case, who do not own and have no present right to the property of the Trusts should not be regarded as having an appeal as of right. But what I said was intended to distinguish between a claim or question respecting property and a claim such as a claim to wind up a company which was not of that character; did not address (and was not intended to address) the circumstances of the present case; and did not follow any detailed submissions as to the impact of the particular words now under consideration. Further the Respondents do have a claim, albeit conditional, and which the Appellants' dispute, to an entitlement to the Trusts' property in the sense that they claim that, if the Protectors, exercising the Narrow Role, are satisfied that the decision of the Trustees is one that they could reasonably make, they are bound to give their consent, as a result of which the distribution proposed by the Trustees will take effect. And there is a question concerning the property owned by the

Trustees, who are parties to the proceedings, namely whether or not it can be distributed by a decision of the Trustees to which the Protectors have to give consent if they properly fulfil the Wide Review Role.

16. I do not accept, as was submitted, that there is no dispute in the present proceedings regarding the beneficiaries' entitlement to the assets in accordance with the terms of the X Trusts. There is a dispute as to whether the beneficiaries are entitled to have distributed to them the assets of the Trust Fund when the decision to do so has not been made by a Protector fulfilling the Wide Review Role; and as to the meaning of the phrase. "*without the prior written consent of the Protector*"

17. In those circumstances it is not necessary to consider whether or not we should grant leave as a matter of discretion.

18. I would, therefore, grant provisional leave to appeal to His Majesty in Council and invite the Appellants to draw up an appropriate order.

KAY JA:

19. I agree.

GLOSTER JA:

20. I, also, agree.