In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010 No: 73

IN THE MATTER THE BERMUDA LONGTAIL TRUST

BETWEEN:

APPLEBY SERVICES (BERMUDA) LTD.

(as Trustee of the Bermuda Longtail Trust)

Plaintiff

-and-

(1) EDWARD KARL FURTAK

1st Defendant

(2) JENNIE LOUISE FURTAK

2nd Defendant

(3) COLLEEN NICOLE FURTAK

3rd Defendant

(4) SAMANTHA LAUREEN FURTAK (A MINOR)

4th Defendant

REASONS FOR RULING

(in Chambers)

Date of Ruling: July 11, 2014
Date of Reasons: October 11, 2014

Mr. Keith Robinson, Appleby (Bermuda) Limited, for the Plaintiff
Mr. D. Kessaram, Cox Hallett Wilkinson Limited, for the 1st Defendant
Mr. M. Smith, Smith & Co, for the 2nd Defendant
Ms. Lauren Sadler-Best, Trott and Duncan Ltd, for the Guardian ad Litem of the 4th Defendant

General Background

1. By an Ex Parte Summons dated July 16, 2012, the Plaintiff primarily sought, *inter alia*, an Order that "*directions may be given to the Plaintiff, as trustee of the Bermuda Longtail Trust ("Longtail Trust") as to what steps, if any, it should take with regard to the Costa Rican corporation ("Fairway Hasting") being an asset of the Longtail Trust*…". On July 26, 2014 I directed that the Plaintiff serve all Defendants save the 1st Defendant with said Summons on a confidential basis. On August 28, 2012, the Plaintiff, on the further hearing of the July 16, 2012 Summons, sought injunctive relief against the 1st Defendant in respect of Fairway Hastings ("the Fairway Hasting Application").

2. At the hearing on August 28, 2012, I granted an injunction in the following material terms:

> "*Until further order the First Defendant must not:*
>
> *(1) Whether by himself, his servants or agents or otherwise howsoever exercise, directly or indirectly, any of the powers of the President, or director of, the Costa Rican corporation, Fairway Hasting Group S.A., so as to:*
>
> *a. sell, transfer, charge, mortgage or in any other way deal with the assets, or any of them of Fairway Hasting Group S.A.;*
>
> *b. alter the composition of the board of directors of Fairway Hasting Group S.A.;*
>
> *c. transact any business of the board of directors of Fairway Hasting Group S.A. without the written consent of the Plaintiff.*"

3. On October 24, 2012, directions were ordered by agreement for the filing of evidence in respect of the Fairway Hasting Application. That application was listed for hearing on January 24, 2013, and three days before the hearing the Plaintiff filed its 'Outline Submissions'. The next day, January 22, 2013, the 1st Defendant's attorneys advised the Court that they would be seeking an adjournment on the basis of agreeing a revised timetable. A Consent Order was entered on January 24, 2013 (a) affording the 1st Defendant (and the other parties) further time to file evidence, (b) continuing the injunction and (c) ordering costs in the application.

4. A new hearing date was fixed for March 1, 2013. The 1st Defendant's Second Affidavit, according to the jurat sworn in Florida on November 7, 2012 but believed to have been sworn after January 24, 2013, was filed on February 8, 2013. He expressed conflict of interest concerns about the Trustee in light of its interest in defending itself in certain Ontario proceedings relating to the Trust. He also opposed their application as being unnecessary as he was willing to cooperate with the Trustees in respect of the Fairway Hasting matter. On March 1, 2013, on the Plaintiff's application, in large part due to representation issues as regards the 2nd-4th Defendants, the Fairway Hasting application was adjourned generally on terms that (a) the injunction was continued, and (b) costs were reserved.

5. On May 2, 2013, Mr. Delroy Duncan was appointed as Guardian ad Litem for the 4th Defendant (in place of her mother, the 2nd Defendant) at a hearing which the 1st Defendant did not attend. The Fairway Hasting Application was next heard on June 20, 2013 when directions were given for the filing of further evidence and costs were reserved. It was mentioned together with other applications on August 16, 2013, but adjourned with costs again reserved, for mention on August 29, 2013, with the injunction expressly continued. On the same terms the Application was adjourned for a ½ day hearing on August 29, 2013. On October 31, 2013 an agreement was contemplated so, on like terms, the matter was adjourned for mention to November 8, 2013.

6. On November 8, 2013 on terms that the costs of all parties should be paid from the trust fund of the Trust, it was consensually ordered that:

> "*1. All further proceedings on the Fairway Hasting Application be stayed except for the purposes of carrying into effect the terms scheduled to this Order and for that purpose the parties are to have liberty to apply.*"

Background to the July 11, 2014 Order

7. On January 24, 2014, the Plaintiff issued a Summons seeking "*specific performance in terms of paragraph 2 of the Schedule*" to the November 8, 2013 Order ("the Enforcement Summons"). Paragraph 2 of the Schedule simply provided as follows:

> "*The First Defendant will instruct the Costa Rican law firm, Pacheco Coto, to release and deliver the legal books of Fairway Hasting to the Plaintiff's Costa Rican attorneys, Arias and Munoz.*"

8. That Summons was initially heard on February 13, 2014 and adjourned for seven days with costs reserved. However, by consent on February 19, 2014, the Plaintiff's Summons was adjourned *sine die* with costs reserved. Clearly it was hoped that the

November 8, 2013 Tomlin Order would be complied with. It was subsequently, pursuant to the Plaintiff's May 15, 2014 letter to the Registrar, reissued returnable for May 29, 2014 when those hopes of compliance were dashed. On May 29, 2014, I gave directions for the filing of evidence and setting down of the January 24, 2014 Summons, and reserved costs. The Fourteenth Affirmation of Rory Gorman was filed in support of the Enforcement Summons on May 15, 2014. The 1st Defendant's Third Affidavit was sworn in the Isle of Man on June 12, 2014, and filed herein seven days later.

9. On July 11, 2014 after hearing counsel, I made an Order in the following terms:

> "
>
> *(1) The First Defendant is Ordered within 7 days from the date of this Order to instruct the Costa Rican law firm, Pacheco Coto, to release and deliver the legal books of Fairway Hasting to the Plaintiff's Costa Rican attorneys, Arias and Munoz;*
>
> *(2) The First Defendant is Ordered forthwith to take all necessary steps within his power to achieve the following composition of the Board of Fairway Hasting:*
>
> *(i) Nominees of the Plaintiff as President and Treasurer of Fairway Hasting;*
> *(ii) The First Defendant as Secretary of Fairway Hasting;*
>
> *(3) The costs of the Second and Fourth Defendants of the Enforcement Summons…be raised and paid from the trust fund of the Bermuda Longtail Trust;*
>
> *(4) The costs of the Plaintiff of the Enforcement Summons…be paid by the First Defendant to be taxed on the indemnity basis if not agreed and be paid forthwith;*
>
> (5) *The parties are to have liberty to apply.*"

10. At the conclusion of the hearing I indicated that I would provide reasons for my decision, which I now provide.

Legal findings

11. For completeness I should mention briefly the legal authorities which were placed before the Court, even though argument focussed mostly on factual matters. Mr. Robinson's reliance upon *Hollingsworth-v- Humphrey*, The Independent, 21 December 1987 (Court of Appeal), as vindicating his right to enforce the Tomlin Order in the manner proposed, was not challenged. In that case Fox LJ held as follows:

> "*It seems to me that under the terms of the Tomlin Order the only jurisdiction which he had in this action was to make an order for the purpose of carrying into effect the terms of the compromise.*"

12. The 1st Defendant submitted a binder of authorities which confirmed the Plaintiff's position that even if, which it disputes, it has been validly replaced as Trustee, it is nevertheless entitled to exercise a lien over Trust assets in respect of future liabilities. In this case it was common ground that the Plaintiff is a defendant in the Ontario Proceedings in its capacity as Trustee of the present Trust. However, Mr. Kessaram relied on various *dicta* which supposedly indicated that this lien attached only to assets in the Trustee's control. The clearest authority cited was *Wester-v- Borland* [2007] EWHC 2484 (Ch), where Norris J stated at paragraph 10:

> "*Nor is it controversial that the trustee has a right of lien over trust funds <u>in his hands</u> in support of that indemnity.*" [emphasis added]

13. However, this argument was unsustainable because, read in the light of other authorities, all that Norris J appears to have meant was that the lien attaches to trust funds under the trustee's control <u>prior to their transfer</u>. '*Underhill and Hayton : Law Relating to Trusts and Trustees*', 17th edition at paragraph 83.33 describes the trustee's lien as follows:

> "*A trustee may choose not to exercise his power of retention if satisfied that his interests are adequately protected. He may overlook some possible liability, wrongly assuming that liabilities of trustees attach to the holders of office from time to time. <u>Where he is replaced by new trustees his beneficial interest in the nature of a non-possessory lien continues to bind the trust assets</u> just like the interests of the beneficiaries, and affords him an independent right of access to the trust assets that is not dependent in any way upon either possession of the trust fund or the successor trustees' right of indemnity against the trust assets.*" [emphasis added]

14. Mr. Kessaram further orally argued that there was a difference between the existence of the lien and a trustee being able to transfer trust assets into its name. This argument also lacked substance on the facts of this case where (a) it seemed clear that the Trust (as opposed to the Trustee) was listed as the company's shareholder in the company's books, and (b) the conflict between the Trustee and 1st Defendant made it obvious that preventing the Trustee from gaining effective control over the Costa Rican asset would amount to refusing to recognise altogether the existence of the lien in relation to that asset. Most significantly, all that the Trustee was seeking to do at this juncture was to gain control of the books and records of the Costa Rican company for conservatory purposes.

15. Mr. Robinson relied on two authorities in support of his client's indemnity claim. In *X-v-A and Others* [2001] 1 All ER 490 at 493-494, [2000] EWHC Ch 121 (29th March, 2000), Mary Arden J (as she then was) held:

> "***Does the trustee have a lien over the trust fund for the liabilities to which it may be subject in respect of land held by the testator?***
>
> *This is the first question I have to decide. Counsel for the trustee referred me to a number of authorities, including Re Exhall Coal Co Ltd, Re Bleckley (1866) 35 Beav. 449, 55 ER 970, Stott v. Milne (1884) 25 Ch D 710, Re Beddoe, Downes v Cottam [1893] 1 Ch. 547, Re Pauling's Settlement, Younghusband v. Coutts & Co. (No.2)[1963] 1 All ER 857 and 48 Halsbury's Laws (4th ednreissue) para 785. These authorities show that a trustee has a lien over the trust fund for his proper costs and expenses and that these extend to an indemnity against future liabilities. (In addition, there is authority for the proposition that the trustee will be entitled to have proper protection from liabilities that he has incurred as a trustee before he retires as a trustee: see Re Brockbank (decd), Ward v. Bates [1948] 1 All ER 287 at 289, [1948] Ch 206 at 211 and 19(3) of the Trusts of Land and Appointment of Trustees Act 1996). The decision of Wilberforce J in Re Pauling's Settlement (No.2) is instructive. The question was whether the existing trustee should be replaced. The existing (among other things) trustee claimed that it would be deprived of the security of the trust fund for costs in respect of litigation against it as trustee. It also claimed that it would remain liable for possible future estate duty in respect of advances made to the children of the life tenant in the event of the life tenant dying within 5 years. Wilberforce J held that the trustee's right of indemnity extended to any costs awarded in its favour and to the possible liabilities for estate duty. In the circumstances, the Court declined to appoint new trustees until the situation was clarified.*
>
> *The lien extends to all the liabilities of the trustee as such.*"

16. The parties agreed that a trustee of a Bermudian trust disposing of all of the trust's assets to the trustee of Jersey trusts was entitled to an indemnity against future assets in *Orconsult-v-Blickle* [2008] Bda LR 41, [2008] SC (Bda) Civ (18 June 2008). In that case, I held:

> "***Factual findings: is Orconsult entitled to a secured indemnity in respect of future expenses?***
>
> *20. It is clear on the evidence that Orconsult in its capacity as Trustee of the Bermuda Trusts is a defendant to pending Swiss arbitration proceedings in respect of which it will incur future liabilities, the precise extent and scope of which are presently unclear.*
>
> *21. A draft Deed of Indemnity prepared on behalf of the Trustee was placed before the Court. As it appeared to me that the other proposed parties to the Deed had not had an adequate opportunity to consider it, I decline to approve its specific terms. That said, the approach of retaining a fixed sum out of the Trust assets to cover estimated future liabilities "to the extent required to meet the worst case on the basis of reasonable but not fanciful assumptions" is plainly appropriate as a matter of principle. If this approach is adopted, preserving the right to seek further indemnity if the retained sum is exhausted should be of academic interest only, albeit justifiable in principle.*
>
> *22. The concerns about Holger Blickle having this liability hanging over his head appear to me to be more artificial than real. But unless he formally releases his presently preserved claims to the trust assets, it seems only reasonable that he should offer some form of indemnity as is requested.*"

17. None of these authorities supported a finding that the Plaintiff's application should be refused on technical legal grounds. Consistent with this conclusion, counsel devoted most of the oral arguments to factual matters.

Factual findings

18. The Plaintiff initially filed the Fourth Robinson Affidavit sworn on January 22, 2014 in support of the Enforcement Summons. This exhibited email correspondence between the Plaintiff's Costa Rican attorneys and the Fairway Hasting attorneys instructed by the 1st Defendant which showed that despite the Tomlin Order being entered on November 8, 2013, the 1st Defendant had not given the agreed instructions by January 7, 2014, two months later. This was despite Appleby chasing Cox Hallett and forewarning of the present application being made if the instructions were not given, and the 1st Defendant's attorney confirming on November 26, 2013 that he had

reminded his client "*of his obligations under the Order.*" Just two days before the first return date of the Enforcement Summons, the 1st Defendant's Bermudian attorneys confirmed that Pacheto Coto had finally received instructions to release the books and records.

19. The reported provision of instructions by the 1st Defendant on February 11 2014, over three months after he agreed to be bound by a Court Order requiring him to do just that, proved to be a false dawn. Because Pacheto Coto, who had by then been well aware of the longstanding attempts by the Plaintiffs to procure the Fairway Hasting books and records, one week later for the first time revealed that it was contrary to their firm's policy to transfer books and records while the corporate address was still registered at their own address. This required the Plaintiff to provide Arias and Munoz with a proxy letter, and the Plaintiff's Costa Rican attorneys advised on April 23, 2014 that they were close to reaching an agreement for the transfer of the records with their local counterparts. This report proved to be a second false dawn.

20. Just over a week after the Pacheto Coto roadblock appeared to have been cleared, the Plaintiff was contacted by First Names (Isle of Man) Limited on April 29, 2014 forwarding a deed purportedly executed by the 1st Defendant on April 14, 2014 appointing Stavenger Limited as Trustee of the Bermuda Longtail Trust. This created a dispute as to who was the duly appointed Trustee which was used by Pacheto Coto as yet another reason to retain the books and records of Fairway Hasting.

21. As I indicated in the course of the hearing, only the most naïve court in the world would fail to construe those facts as demonstrating that the 1st Defendant had breached his obligations under paragraph 2 of the November 8, 2013 Tomlin Order. I did not find impressive the assertion made by the 1st Defendant (in his Fourth Affidavit) that in agreeing to that Order, he forgot that on April 21, 2011 he had requested the Plaintiff to resign as Trustee. The reality is that when the Order was made more than two years later, the Plaintiff had not yet been replaced and there was no indication that a replacement was being actively pursued. Without deciding this point, clause 18.3 of the Deed (upon which Mr. Kessaram relied) appeared to me in the context of clause 18 as a whole to arguably merit the following construction. Cessation of office (save for residual matters) occurs when a trustee is served with a resignation notice, but only where there is a continuing trustee or a replacement has been appointed.

22. Whilst I accepted that the recently surfaced dispute about who the Trustee was may well have complicated the issue of handing over the records in Costa Rica, I was unable to identify any substantial reason why any reasonable and reputable firm of lawyers or any reasonable and reputable 'new' trustee should object to the relevant records being transferred to the control of a reputable 'former' trustee, pending resolution of the dispute as to whether the Plaintiff has validly been replaced. It seems likely that the dispute about who the trustee is will be determined by this Court in any

event. The Plaintiff on June 9, 2014 applied to the Isle of Man High Court for an ex parte Order:

> "*a. restraining the Defendant from dealing in any way with any of the assets of the Bermuda Longtail Trust Limited without the Claimant's consent, in particular the shares in Fairway Hasting SA ("Fairway Hasting') and the land in Costa Rica owned by Fairway Hasting; and*
>
> *b. taking any steps in connection with the corporate affairs of Fairway Hasting other than with the Claimant's consent.*"

23. First Deemster and Clerk of the Rolls David Doyle granted this relief on June 12, 2014 granted the Plaintiff the relief sought. He held:

> "*30. I am persuaded that this court should assist the Claimant and the court in Bermuda and should grant the interlocutory interim relief requested. Any issue as to whether the Claimant has been validly removed as a trustee of the trust which is governed by the law of Bermuda should be dealt with in Bermuda by the courts there. It is appropriate for the status quo in respect of the assets of the trust to be preserved pending the determination of the disputed issues in the proceedings in Bermuda.*"

24. The status quo therefore was, both as a matter of Bermudian law as determined by this Court (which law governs the Trust) and Manx law (which governs the contending new Trustee) that the Plaintiff has sole claim to the books and records of Fairway Hasting.

25. Accordingly I accepted Mr. Robinson's submission that these difficulties should not be allowed to prevent this Court granting the Plaintiff the enforcement relief that it sought.

Summary

26. For the above reasons I granted the Order sought by the Plaintiff Trustee on its Enforcement Summons and ordered that the Plaintiff's costs of the application should be taxed, if not agreed, on the indemnity basis and payable by the 1st Defendant forthwith.

Dated this 11th day of October, 2014 _____

IAN RC KAWALEY