[2015] SC (Bda) 29 Civ (10 September 2014)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

IN THE MATTER OF ABC TRUSTS

REASONS FOR RULING

(in Chambers)

Date of hearing: August 18, 2014
Date of Reasons: September 10, 2014

Mr Keith Robinson, Appleby Global (Bermuda) Limited, for The Bank of N.T. Butterfield & Son Limited and Butterfield Trust Company Limited (the "Trustee")

Ms Louise Charleson, Cox Hallett Wilkinson Limited, for the 1st Defendant

Mr Jeffrey Elkinson, Conyers Dill and Pearman Limited, for the 2nd Defendant

Mr Timothy Marshall, Marshall Diel & Myers Limited, for the 5th Defendant

Introductory

1. On August 18, 2014, I approved the decision of the Trustees, which was supported by all beneficiaries before the Court save the 5th Defendant, to proceed to conclusion negotiations commenced some years ago with the onshore tax authorities about certain personal 'wealth' taxes which were potentially due from the Trusts and/or the beneficiaries.

2. The contested application by the Trustees for further directions in relation to broader approval sought for a momentous decision raised legal questions which are likely to be relevant in future cases. I set out below the legal reasoning which formed the basis

for my said decision. I have explained my assessment of the facts in a separate confidential judgment.

Findings: legal merits of the Trustees' application

Court's function in approving proposed exercise of Trustees' discretion

3. Mr. Marshall relied upon dicta from the Judicial Committee of the Privy Council's decision in *Marley-v-Mutual Security Merchant Bank and Trust Co.* [1991] 3 All ER 198 in support of the submission that (a) the Trustees' application involved a surrender of their discretion to the Court, (b) the Court should accordingly be put in possession of all material relevant to the exercise of that discretion, and (c) the Court's function is solely to determine what ought to be done in the best interests of the estate.

4. The first two limbs of that submission were controversial, although a text authority relied upon by the Trustees' counsel suggested that whether or not a surrender of discretion was involved, the Court had to be fully informed of all relevant considerations to a comparable extent: "*Lewin on Trusts*', 18th edition (Sweet & Maxwell: London, 2008) at paragraph 29-299. The 5th Defendant's counsel referred the Court to the following statement in that leading text:

> "*The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustee's powers is lawful and within the power and that is does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view…The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed…If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though, doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise.*"

5. Although I accepted the above statement of principles, I did not accept that *Marley-v-Mutual Security Merchant Bank and Trust Co.* [1991] 3 All ER 198 compelled this Court to find that in seeking the directions which the Trustees sought, they were surrendering their discretion to the Court. The Judicial Committee in that case, considering whether a contested proposed sale of part of the estate of the late Bob Marley should be approved, were primarily concerned with whether sufficient information had been placed before the Court to justify the proposed transaction. Mr. Robinson, citing more modern and direct authority, rightly characterised the application as seeking the blessing of the Court for a momentous decision. In *Public Trustee-v-Cooper*, [2001] WTLR 901, Hart J approved the earlier analysis of Robert Walker J (as he then was), in an unreported (and unnamed) Chambers judgment. Walker J listed four now famous categories of applications which a trustee might make for directions, the third of which was "*surrender of discretion properly so called*", applicable to situations where the trustees were unable to make their own decision. The present application clearly fell into the second:

> "*(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is in their powers…*"

6. Most recently, the four categories of Robert Walker J, adopted by Hart J in *Public Trustee-v- Cooper*, were affirmed by Hellman J in *Trustee 1 et al-v-The Attorney-General et al* [2014] SC (Bda) 52 Com (5 June 2014). In that case, also cited by Mr. Robinson, Hellman J concluded as follows:

> "*58. Lewin on Trusts, Eighteenth Edition, notes at para 29-297 that the judgment in Public Trustee v Cooper has been followed often enough on the distinction between category (2) and category (3) cases to establish the distinction firmly.*"

7. However, the Bermudian Courts have entertained 'category two' applications for many years. A prominent instance, relied upon by the Trustees' counsel, is Norma Wade-Miller's judgment approving the compromise of contentious trust litigation in *Re Thyssen-Bornemisza Continuity Trust* [2002] Bda LR 8. In that case, Wade-Miller J accepted the invitation of the trustees' counsel[1] to approach the application for approval by reference to the following four questions:

   (1) "*do the Trustees have the power to enter into the proposed compromise?*";

[1] Michael Driscoll QC.

(2) "*is the Court satisfied that the Trustees have genuinely formed the view that the compromise is in the interest of the …Trust and its beneficiaries?*";

(3) "*is the Court satisfied that this is a view at which a reasonable body of trustees could properly have arrived at?*";

(4) "*does the Court consider that any of the individual Trustees have any actual or potential conflict of interests and, if so, does it consider that this conflict of interests prevents the Court from approving the unanimous decision of the Trustees to compromise the litigation?*".

8. I was guided by this analytical approach in considering the Trustees' present application.

<u>The Trustees' power to negotiate on behalf of a beneficiary in respect of their personal tax position</u>

9. Mr. Robinson submitted that the Trustees could proceed to negotiate on a beneficiary's behalf, and discharge his personal liabilities by way of a discretionary advancement, without requiring his consent. The decision of the Jersey Royal Court (Deputy Bailiff Michael Birt-as he then was- and Jurats) in *Abacus (CI) Limited et al –v-Al Sabah et al* (2001) 3 ITELR 467 supports the general proposition that where a payment is fairly believed to be in the interests of a beneficiary, a trustee may discharge a third party debt over the beneficiary's objections. The Royal Court held at pages 483-484:

> "*In our judgment there is a difference between a direct gift or distribution and an indirect one…Direct payment clearly requires the concurrence of the donee and he therefore cannot be forced to accept the gift. But a payment to, say, a school to whom the donee owes school fees, requires no action by the donee. It can be effected simply by a payment by the donor directly to the school in settlement of the obligations of the donee…We accept, of course, that the cases where a trustee will exercise a power of advancement in favour of a beneficiary against the express wishes of that beneficiary will be very few. But we hold that there is power to do so…*"

10. It is doubtful whether this principle properly applies to situations where what is in issue is a question other than whether the Trustees should settle an undisputed liability which a beneficiary has already incurred. Whether or not a beneficiary who has expressly, in the context of trust administration proceedings, authorised a trustee to negotiate a settlement of contingent or prospective liabilities should be permitted to withdraw that authority raises legal questions beyond the narrow confines of the law

relating to the administration of trusts. In the event, as a result of a concession made in the course of the hearing, this question did not fall for determination.

Were the Trustees required to have regard to the wider social effects of the proposed settlement and to interests other than those of the beneficiaries?

11. Mr Marshall presented an argument which at first blush appeared to consist of a legally vacuous mix of politics and philosophy with considerable conviction and moderation. Rather than seeking to attack the traditional formulation of a trustee's duties head on, however, in effect he argued that the traditional view of what factors were relevant in considering where the best interests of the beneficiaries lay needed to be broadened to encompass emerging notions of good corporate citizenship. This meant the traditional approach of negotiating with a view to paying the least possible tax was no longer valid, as heretical as the 5th Defendant's position might initially seem.

12. In his Skeleton Argument, it was submitted that "*paying a demonstrably fair amount of taxation better ensures that the…family and the …Group of Companies are recognised as good citizens that contribute their fair share of taxes for the betterment of the communities in which they live, work and operate*" (paragraph 13). Mr, Marshall orally argued that modern values, driven by "Generation Y", not only favoured paying a fair share of taxes and a socially responsible approach to life, but also reflected the current inter-generational "*zeitgeist: the 'mood of an era,' the prominent tendencies and disposition that seem to set 'our time' apart from the past*": Karen Foster, '*What's Good about Generation Y*', '*Greater Good*', January 24, 2013.

13. No legal authorities were cited to explain how, if at all, these ideals impact upon the content and character of a trustee's duty to manage and preserve trust assets. In the present case, it was (it seemed to me) essentially common ground that paying a demonstrably unfair amount of tax could attract negative publicity if confidentiality was breached, and as a result negatively impact the interests of the Trusts, traditionally construing those interests in predominantly financial terms. Controversy centred on whether the Trustees were obliged to ensure that the terms of the proposed tax settlement were demonstrably fair from a community perspective, as opposed to from a trust/beneficiary perspective. I accepted Mr. Robinson's submission that the overriding duty of the Trustees is as described by Lord Jessell MR in *Speight-v-Gaunt* (1883) 22 Ch D 727 at 739:

> "*It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own…*"

14. This passage has more recently been approved at paragraph 34-02 of '*Lewin on Trusts*', although a higher standard of care than the ordinary man of business is

probably expected of a professional trustee, as counsel conceded. Brightman J observed in *Bartlett-v-Barclay's Trust Co. (No.1)*[1980] 1 Ch 515 at 534F:

> "*counsel for the defendant did not dispute that trust corporations…hold themselves out as possessing a superior ability for the conduct of trust business, and in any event I would take judicial notice of that fact.*"

15. Implicit in all of these judicial pronouncements is the notion that trust business is to be conducted in a business-like manner. And judicial notice can be taken of the fact that ordinary prudent businessmen seek to minimize business expenses, be they tax obligations or otherwise, and seek to enhance rather than diminish the value of their own assets.

16. It may be true that a few wealthy individuals or large corporations have in recent times, for idiosyncratic political or commercial branding reasons of their own, adopted a positive policy of paying more than the minimum tax due. But such cases reflect the exception rather than the current general rule. As far as trustees are concerned, moreover, it has long been recognised that a distinctive and more conservative business-like approach is required because trustees frequently have a duty not just to the beneficiaries of full age, but to children and the unborn as well. Looking at the nature of a trustee's duties more practically still, trustees are not private entrepreneurs 'playing' with their own money. They are managing trust assets for the benefit of others and have been entrusted with the management of the trust estate on the assumption that they will discharge their management duties in a prudent and precautionary manner.

17. As Lindley LJ observed in *In re Whitely* (1886) 33 Ch.D. 347, 355, in a passage approved by Brightman J in *Bartlett-v-Barclay's Trust Co. (No.1)*[1980] 1 Ch 515 at 531:

> "*…care must be taken not to lose sight of the fact that the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is*

supposed to be engaged in; and unless this is borne in mind the standard of a trustee's duty will be fixed too low; lower than it has ever yet been fixed, and lower certainly than the House of Lords or this Court endeavoured to fix it in Speight v Gaunt."

18. It is noteworthy that the 5th Defendant was unable to point to any distinctive features of the instruments establishing the present Trusts which entitled or required the Trustees to adopt the more philanthropic approach to business that she contended for. In the absence of a specially designed 'ethical' investment vehicle expressly modifying the Trustees' traditional duties so as to entitle them to have regard to social benefit, as part of an expanded notion of Trust interests, it seemed to me that a trustee's duty under Bermudian law could not sensibly be construed as requiring the Trustees to pay, or to expend trust assets investigating whether to pay, tax at a level above the minimum amount which appeared to be legally due, solely with a view to eliminating any risk of uninformed and irrational criticism of an objectively reasonable tax settlement.

19. The Trustees in the present case effectively conceded that it was consistent with the commercial interests of both the Trust and the Trustees to avoid a situation where the Trustees and/or the beneficiaries could be fairly accused of manifesting a socially irresponsible attitude to the payment of onshore taxes which were properly due. That was the driving motivation behind initiating the negotiations which have resulted in the proposed settlement. The Trustees' definition of the content and scope of their duties in this regard is entirely consistent with my own extra-judicial opinion that:

    "*…it is simplistic to imply that offshore commercial law operates in an ethically deprived legal zone….Bermudian offshore structures are formed in and regulated by a legal framework which aims to…ensure compliance with internationally recognised standards of commercial morality.*"[2]

Conclusion

20. Applying those principles to the facts of the present case, I found that in all the circumstances:

    (a) it would be an unreasonable way of expending trust assets to investigate the need to pay a further premium to ward off the risk of wholly unjustified criticism of a tax settlement which was:

        (i) manifestly hard-fought and negotiated on objectively credible terms; and

[2] '*Offshore Commercial Law in Bermuda*' (Wildy Simmonds & Hill: London, 2013), paragraphs 1.64, 1.69.

(ii) negotiated in circumstances where there appeared to be no obvious inequality of arms between the well-resourced Trustee and beneficiary team and an apparently well-resourced revenue authority team working on behalf of a stable and sophisticated State;

(b) the Trustees' decision to pursue the negotiations to their conclusion was based on their genuinely formed view that this course is consistent with the best interests of the Trusts and their beneficiaries as a whole;

(c) the said view was one which a reasonable body of trustees could properly have arrived at;

(d) the Trustees had no actual or potential conflicts of interest; and

(e) the Trustees had placed before the Court sufficient relevant information to support the findings in (a) to (c) above, without the need for any further enquiry.

Dated this 10th day of September, 2014 ______________________

IAN RC KAWALEY CJ