In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: 206
2015: 207

IN THE MATTER OF THE F TRUST

AND IN THE MATTER OF THE A SETTLEMENT

REASONS FOR RULING

(in Chambers)

Date of hearing: September 23, 2015
Date of Reasons: November 13, 2015

Mr Keith Robinson, Appleby (Bermuda) Limited, for the Plaintiffs

Mr Craig Rothwell, Cox Hallett Wilkinson Limited, for the 2nd and 3rd Defendants

The 1st Defendant did not appear

Introductory

1. By Originating Summonses issued on June 8, 2015 in each of the two related actions by the same Plaintiffs, three Trustees of the F Trust and the A Settlement ("the Trusts") sought Orders setting aside Deeds of Appointment and Retirement of Trustees executed in 2005 and 2008, respectively, to the extent that they appointed the 1st Defendant ("D1") as a Trustee. Each Summons invoked section 47A of the Trustee Act 1975 and/or the inherent jurisdiction of the Court.

2. On June 25, 2015, the first return date of the Originating Summons, the 2nd and 3rd Defendants were appointed to represent the interests of all adult, minor, unborn and unascertained beneficiaries. The Plaintiffs' substantive application was not in the event opposed. On September 23, 2015, I ordered in each case that;

> "*The Deed of Retirement and Appointment of Trustees…be set aside in so far as that deed appointed* [D1] *as a Trustee…(to the intent that for all purposes the appointment of* [D1] *as a trustee shall be treated as never having occurred)…*"

3. I now give reasons for that decision.

Factual findings

4. The F Trust was established in Bermuda with a corporate trustee in 1958 and the A Settlement was established in Bermuda with the same corporate trustee in March 1968. Individual trustees were subsequently appointed before D1, a British resident, was appointed in 2005 (by the 1st and 2nd Plaintiffs) and in 2008 (by the Settlor) as trustee of the F Trust and A Settlement respectively. The Settlor died in 2011.

5. The combined assets held by the Trusts are estimated to be worth in excess of $50 million. The 2nd Plaintiff deposed that he and the 1st Plaintiff appointed D1 as a trustee of the F Trust after another trustee died having regard to the wishes of the Settlor that at all times there should be at least three trustees. Despite some anxiety on the 2nd Plaintiff's part about the UK tax implications, neither UK tax advice nor any legal advice was sought. The 2nd Plaintiff believes that the Settlor obtained no advice before appointing D 1 as trustee of the Settlement three years later.

6. As regards the F Trust, the adverse UK tax implications were only immediate as regards income tax. However, more significantly, capital gains tax ("CGT") consequences did not bite until 2007, two years after the appointment. I was satisfied by evidence placed before the Court that at the time of the exercise of the power of appointment, public consultations in the UK on the proposed CGT changes which were brought into effect two years later were already in train. It was accordingly clear that had tax advice been sought prior to the appointment of D1 in 2005, the appointment would not have been made.

7. As regards the A Settlement appointment, made in 2008, the adverse tax consequences were immediate.

8. The Plaintiff Trustees subsequently made voluntary disclosure to HMRC (Her Majesty's Revenue and Customs) and met the assessed UK tax liabilities. They nevertheless now wished, quite understandably, to return the Trusts to their original tax status, namely outside of the ambit of the UK tax regime. In these circumstances, the Plaintiffs very properly accepted that in seeking to set aside the appointment of D1 *ab initio*, HMRC should be given notice of the present proceedings and an opportunity to appear in opposition to the relief sought.

9. On June 25, 2015, I directed that HMRC should be notified within seven days that should it wish to intervene it should do so by application no later than July 15, 2015. HMRC raised various queries about the present proceedings with the Plaintiffs' London Solicitors, Macfarlanes, and the time for HMRC to intervene and the effective hearing date of the Originating Summons were both extended until the effective hearing date of September 23, 2015 was eventually fixed.

10. The Plaintiffs' counsel placed the correspondence with HMRC before the Court so the Court could take into account the queries raised about the application even though HMRC had elected not to intervene and be heard.

11. I rejected the suggestion that no flawed exercise of the appointment power could be relied upon as regards the F Trust because at the relevant date no adverse CGT consequences immediately arose. As noted above, it was clear that any reasonably competent tax advisor in 2005 would have been likely to point out that D1 would likely be caught in the new legislative net at some point when proposals then under discussion were finalised and brought into legislative force.

Legal findings

12. The Plaintiff Trustees sought relief under section 47A of the Trustee Act 1975, enacted with effect from July 29, 2014 by the Trustee Amendment Act 2014. Mr Robinson referred the Court to the Explanatory Memorandum to the Trustee Amendment Act 2014 Bill, which crucially provides as follows:

> "*Clause 2 inserts a new section 47A in the Act to introduce the Rule in Re Hastings-Bass as it was understood and applied in England (and in other common law jurisdictions) in and prior to 2011. The new section 47A will confer a discretionary jurisdiction on the court to intervene in certain limited circumstances in relation to the exercise of a fiduciary power. Such discretionary exercise of power will be subject to the court's discretion with respect to equitable relief.*"

13. The Explanatory Memorandum to the Bill, the enactment of which brought section 47A into force, makes it clear that Parliament intended to give statutory force to the legal rules on setting aside the exercise of a fiduciary power before the English Court of Appeal decision in *Futter-v-HMRC and Pitt-v-HMRC* [2011] EWCA Civ 197.

14. Section 47A provides as follows:

"***Jurisdiction of court to set aside flawed exercise of fiduciary power***
47A (1) If the court, in relation to the exercise of a fiduciary power, is satisfied on an application by a person specified in subsection (5) that the conditions set out at subsection (2) are met, the court may—

(a) set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the court may think fit; and

(b) make such order consequent upon the setting aside of the exercise of the power as it thinks fit.

(2)The conditions referred to in subsection (1) are that—

(a) in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and

(b) but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power—

(i) would not have exercised the power;

(ii) would have exercised the power, but on a different occasion to that on which it was exercised; or

(iii) would have exercised the power, but in a different manner to that in which it was exercised.

(3)If and to the extent that the exercise of a power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred.

(4)The conditions set out in subsection (2) may be satisfied without it being alleged or proved that in the exercise of the power, the person who holds the power, or any adviser to such person, acted in breach of trust or in breach of duty.

(5)An application to the court under this section may be made by—

(a) the person who holds the power;

(b)where the power is conferred in respect of a trust or trust property, by any trustee of that trust, or by any person beneficially interested

under that trust, or (in the case of a purpose trust) by any person appointed by or under the trust for the purposes of section 12B(1) of the Trusts (Special Provisions) Act 1989;

(c) where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, the Attorney-General; or

(d) with the leave of the court, any other person.

(6)No order may be made under subsection (1) which would prejudice a bona fide purchaser for value of any trust property without notice of the matters which allow the court to set aside the exercise of a power over or in relation thereto.

(7)The jurisdiction conferred upon the court by this section may be exercised by the court in respect of fiduciary powers, whether conferred or exercised before, on or after the commencement date of the Trustee Amendment Act 2014.

(8)In this section—

‘

‘fiduciary power’ means any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person who holds the power; and

‘power’ includes a discretion as to how an obligation is performed;

‘person who holds the power’ includes any person on whom a power has been conferred, whether or not that power is exercisable by that person alone, and any person to whom the exercise of a power has been delegated.”

<u>Standing and temporal scope of section 47A’s application</u>

15. The Plaintiffs as trustees clearly had standing to make the application under section 47A (5) (b) of the Act.

16. It was also clear from subsection (7) that this new statutory jurisdiction may be engaged “*in respect of fiduciary powers, whether conferred or exercised before, on or after the commencement date of the Trustee Amendment Act 2014.*”

<u>The “fiduciary power” requirement</u>

17. The most important threshold substantive jurisdictional question was whether or not the power to appoint new trustees in each instrument was a “fiduciary power”. The jurisdiction conferred by section 47A can only be exercised, as specified by subsection (1), to set aside the exercise of a fiduciary power.

18. Mr Robinson rightly submitted that this Court had previously decided in *Von Knieriem -v- Bermuda Trust Company Limited* [1994] Bda LR 50 that the power to appoint and remove trustees was fiduciary in nature. Although this decision, the

soundness of which has never to my knowledge been questioned over the last 20 years, is often regarded as primarily concerned with the powers of protectors, the central power in issue was the power to appoint and remove trustees. The central finding of Meerabux J (at pages 12-13) on the nature of that power was as follows:

> "*Having considered the principles in Re Skeats' Settlement, as well as the scheme, the wording and all the circumstances of the Trusts I am of the view that the Protector's powers of appointment and removal of trustees do not go beyond this, that is, if the Protector exercises such powers he cannot exercise such powers for his own benefit for the reason that the powers involve a duty of a fiduciary nature.*"

19. The following passage from the judgment of Kay J in *Re Skeats' Settlement* (1889) 42 Ch. D 522 at 526 was cited by Meerabux J in *Von Knieriem* (at pages 16-17) and formed the basis of his decision on the character of the power of appointment issue:

> "*No case has been cited in which a person having a power appointing new trustees has appointed himself, and the appointment has been held to be valid by a Court of Justice. The question whether such an appointment is valid or not depends, I think, as has been said in argument, very much upon whether the power is to be treated as a fiduciary power or not. Now I take that question first. The ordinary power of appointing new trustees, under a settlement such as this is, of course imposes upon the person who has the power of appointment the duty of selecting honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform. He is bound to select to the best of his ability the best people he can find for the purpose. Is that power of selection a fiduciary power or not? I will try it in this way, which I offered as a test in the course of the argument. Suppose, as happens not infrequently, that trustees, under the terms of the deed of trust, are entitled to remuneration by way of annual salary or payment. Could the person who has the power of appointment put the office of trustee up for sale, and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration by way of annual salary or payment. Could the person who has the power of appointment put the office of trustee up for sale, and sell it to the best bidder? It is clear that would be entirely improper. Could he take any remuneration for making the appointment? In my opinion, certainly not. Why not? The answer is that he cannot exercise the power for his own benefit. Why not again? The answer inevitable. Because it is a power which involves a duty of a fiduciary nature; and I therefore come to the conclusion, independently of any authority, that the power is fiduciary power. The case cited before Lord Eldon seems expressly to confirm that view. Lord Eldon did treat it as a power in the exercise of which the appointor had a fiduciary duty to perform which he could not exercise in any way for his own benefit, and in exercising which he was bound to do the best in the interests of the*

cestuis que trust whose trustee he was appointed. I therefore come without any hesitation to the conclusion that this power is of a fiduciary nature."

20. Being guided by these judicial authorities, and the entirely consistent statutory definition of "*fiduciary power*" in section 47A(8), I had little difficulty in concluding that the relevant power of appointment of trustees in each of the instant cases was indeed fiduciary in character in the requisite statutory sense. Accordingly, any flawed exercise of such power was potentially eligible for relief under section 47A of the Trustee Act 1975.

Grounds or conditions for the exercise of the Court's jurisdiction under section 47A (1)

21. Subsection (2) of section 47A prescribes the grounds or conditions for exercising the jurisdiction conferred in subsection (1) to set aside the flawed exercise of a fiduciary power (to use the language of the headnote to the section). The conditions are the following:

> "*(a) in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and*
>
> *(b) but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power—*
>
> > *(i) <u>would not have exercised the power</u>;*
> >
> > *(ii) would have exercised the power, but on a different occasion to that on which it was exercised; or*
> >
> > *(iii) <u>would have exercised the power, but in a different manner to that in which it was exercised</u>.*" [emphasis added]

22. There was clear evidence of a failure to take into account financially significant factual and legal considerations which were relevant to the exercise of the power, namely the tax implications of D1's UK residence for the Trusts. The requirements of section 47A (2) (a) were clearly met. Mr Robinson submitted that it was equally clear that D1 would not have been appointed had the appropriate advice been sought and received.

23. I was satisfied that the present case might be said to fall within either subparagraph (b) (i) or (iii) of section 47A(2), although I preferred the view that this was a case

where the power of appointment would indeed have been exercised to fill the vacancy, but in a different manner by appointing a different trustee.

Factors informing the circumstances in which the Court will exercise its discretion to grant relief under section 47A

24. Section 47A (1) confers an unfettered discretion upon the Court to grant relief provided the threshold requirements or preconditions are met. Counsel provided the Court with a helpful illustration of a case with broadly similar facts: the tax implications of a trustee's UK residence were completely overlooked. In *Green-v-Cobham* [2002] STC 820, the English High Court considered the facts to disclose a clear case for *Hastings-Bass* relief. Parker J stated at page 828:

> "*I therefore conclude that this is a clear case for the application of the Hastings-Bass principle. In my judgment there is no real room for doubt on the evidence that had the then trustees of the Will Trust had regard to the possible capital gains tax consequences of the proposed appointment in favour of Camilla, they would not —and I stress would not —have gone ahead with it. What other course they might have taken is, I accept, not entirely clear. However, what is entirely clear, in my judgment, is that had the trustees directed their minds, as they should have done, to considerations of capital gains tax, they would not under any circumstances have made an appointment which gave rise to any significant risk that the Will Trust might thereafter become a United Kingdom resident trust for capital gains tax purposes. In this connection, I referred earlier to the substantial accrued capital gains shown in FIL's accounts for the year to 31 July 1989.*
>
> *In these circumstances it follows, in my judgment, that the* Hastings-Bass *principle applies in this case, and that the application of that principle requires that the court should interfere by declaring the 1990 Deed to be an invalid exercise of a trustee's power of appointment, and consequently void in its entirely. Accordingly, I so declare.*"

25. The broad scope of the *Hastings-Bass* jurisdiction was further demonstrated by reference to a case where tax advice was obtained but imperfectly followed with adverse consequences for the trust: *In the Matter of the Green GLG Trust*, Royal Court of Jersey, December 9, 2002. In that case, Deputy Bailiff Michael Birt (as he then was) opined as follows:

> "*30. Applying the principle to the facts of this case we are in no doubt that, in the light of our finding that the Trustee would not have made, and the protector would not have consented to, the appointments had they known of the possible capital gains tax consequences for the settlor caused by the amending legislation, we hold that the Court should declare that the four appointments of capital are void ab initio and we so declare.*"

26. I found it unnecessary to seek to formulate any *ad hoc* test for the exercise of this Court's unfettered statutory discretion even though this position may well change with time. For the time being, I was content to adopt Mr Robinson's practical and principled proposition, set out in his Written Submissions, that:

> "*...the application of the discretion provided for in section 47A should not be trammelled by the imposition of any particular 'test' but rather should be applied on the facts of each particular case. The circumstances in which the Court will consider it appropriate to intervene to correct a flawed exercise of a power could be varied and numerous and specific limits on the Court's jurisdiction by the articulation of any test could create injustice if it prevented intervention in unforeseen circumstances.*"

Conclusion

27. For the above reasons on September 23, 2015 I set aside the flawed exercise of the powers of appointment in relation to D1 in respect of the Trusts.

Dated this 13th day of November 2015 ____________________

IAN RC KAWALEY