



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 181 OF 2020 (IKJ)

**IN THE MATTER OF a settlement made by Deed of Trust dated 22 May 2000 (the "Trust")
AND IN THE MATTER OF the Trusts Act (2020 Revision) and/or GCR O. 85, r. 2**

BETWEEN

MERRILL LYNCH BANK AND TRUST COMPANY (CAYMAN) LIMITED

Plaintiff

AND

(1) ABC

(2) XYZ

Defendants

JTC (CAYMAN) LIMITED

Interested Party

IN CHAMBERS

Appearances:

Mr Adam Huckle of Maples and Calder on behalf of the Plaintiff

**Mr Andrew De La Rosa instructed by Colin Shaw & Co. on behalf
of the Representative for the 1st and 2nd Defendants ("D1" and
"D2")**

The Interested Party ("JTC") did not appear

Before:

The Hon. Justice Kawaley

Heard:

On the papers

Date of Submissions:

5, 8 March 2021

**Draft Judgment
Circulated:**

25 March, 2021

Judgment Delivered:

6 April 2021



HEADNOTE

Originating Summons-application for order substituting old trustee with new trustee-appointment of representative on behalf of beneficiaries whose location unknown-Benjamin order-risk or suspicion that trust assets consist of or include the proceeds of crime-whether Court of its own motion should impose conditions on appointment of new trustee-Trusts Act (2021 Revision) sections 10, 11.

JUDGMENT

Introduction

1. The present application was commenced by an Originating Summons dated September 7, 2020. Prior to this, by an Ex Parte Summons dated August 5, 2020, the Plaintiff applied for a Confidentiality Order which I granted on August 18, 2020 on the papers.
2. The Originating Summons sought directions for the Plaintiff to terminate the Trust or, alternatively, directions for the retirement of the Plaintiff as Trustee and the substitution of the Interested Party (JTC) as Trustee. Other relief sought included the appointment of a Representative for D1 and D2, who are the Settlor and primary beneficiary, and a second named beneficiary, respectively, of the Trust. A third named beneficiary is believed to be dead on the basis of the information referred to below.
3. Following a Letter Application dated November 23, 2020, on November 24, 2020 I gave directions for the hearing of the Originating Summons and ordered that:

“1. Colin Shaw ...be appointed as representative for the First and Second Defendants....”
4. It was not possible to contact either Defendant. Only discreet enquiries about their location had been made for fear of exposing them both to harm.
5. By letter dated February 24, 2021 to the Court, Ogier, on behalf of JTC, confirmed the latter's willingness to be substituted as Trustee provided the appointment was made under section 10 of the Trusts Act (2021 Revision) (the “Act”). The Plaintiff’s counsel applied for the Originating Summons to be heard on the papers on March 9, 2021.



6. Dealing with the application without an oral hearing seemed to me to be an appropriately proportionate way of dealing with the application. This was despite my concern that public policy concerns were raised by the unusual factual matrix which made it inappropriate to simply grant an Order in terms of the relief sought and not opposed.
7. Because the principles of open justice will likely require the publication of this Judgment at some point in the future, it has been prepared for convenience in anonymised form at the outset.

The Plaintiff's evidence

8. The Originating Summons was supported by the First Affidavit of Kim Remizowski dated January 22, 2021. The Trust was settled by Deed dated May 22, 2000 under which D1 appointed the Plaintiff as Trustee. The Trust assets comprise 100% of the shares in a Cayman Islands company, which holds an investment portfolio worth approximately US\$23.5 million. No distributions have ever been made to the beneficiaries.
9. The Trustee wishes to retire as it is winding down its trust operations in the Cayman Islands, having sold its business to JTC Group Limited, with which JTC is affiliated.
10. The Trustee last had contact with D1, the Settlor, in 2005. On April 27, 2006 and August 17, 2006, the Trustee filed suspicious activity reports (“SARs”) with the Cayman Islands Financial Reporting Authority (the “FRA”) based on concerns about a lack of information about the source of the Settlor’s wealth. The Trustee was never contacted by the FRA in relation to those SARs.
11. The Trustee engaged a business intelligence firm in London with a view to locating the Settlor and beneficiaries and obtained various reports (together, the “Reports”). These Reports understandably provided a combination of hypothesis and provable facts. However, the most significant conclusions which the Trustee appears to accept are the following:
 - (a) the Settlor is believed to be in internal exile in Ruritania, having been convicted and imprisoned for crimes of dishonesty, albeit the charges may have been politically motivated and that concerns exist about the extent to which the courts respected the rule of law at the time;



- (b) the Settlor's wealth may have emanated from both lawful and unlawful structures, with unlawful funds being placed into "offshore structures", as the Settlor was before conviction politically connected in a country internationally perceived as having serious corruption as well as human rights problems; and
- (c) making enquiries in Ruritania about the location of the beneficiaries "would risk placing sources and family members at harm".

12. Clause 5 of the Trust Deed provides:

"5.1 During the lifetime of the Settlor, the Trustee shall be entitled to compensation for its services on such terms as shall be agreed in writing between the Trustee and the Settlor."

13. Although the Plaintiff could retire and appoint a successor trustee under clause 6, the successor would have no entitlement to compensation absent an agreement with the Settlor who cannot be found.

JTC's evidence

14. The Affidavit of Michael Halsey dated November 5, 2020 explained that JTC was in negotiation with the Plaintiff in relation to the terms of the proposed Order appointing JTC as Trustee. Concern was very properly expressed about the initial proposal that JTC be restricted from making further investigations about the whereabouts of the beneficiaries.

The Representative's evidence

15. The First Affidavit of Colin Shaw dated March 3, 2021 was sworn by him as an experienced trust and estates practitioner on behalf of D1 and D2. He deposed:

"9. I have borne in mind the potential danger to the Trust's beneficiaries of attempts to make direct contact with them, and the absence of any contact by...the settlor of the Trust...with the Plaintiff since no later than 2005.

10. Based on all the materials in evidence, I have concluded that the proposed appointment of the Interested Party as substitute trustee (1) cannot be carried out without the assistance of the Court and (2) is in the best interests of those beneficiaries...whom I represent... I consider that it would also be appropriate



for the new trustee to review the position in the future, which could be in two to three years' time, in order to ascertain whether further inquiries might safely be carried out at that time.”

The Plaintiff's submissions

16. In the ‘*Skeleton Argument of the Plaintiff*’, Mr Huckle submitted that it was not possible to appoint a new trustee out of Court, and that although section 4 of the Act was potentially available, the Court was invited to appoint JTC as replacement Trustee. This was because:

“18.1 It may fairly be said to be ‘inexpedient, difficult or impracticable to do so without the court's assistance’ by way of an appointment entirely out of court and, since the Court's assistance would need to be invoked in any event (by way of confirming the availability of the Section 4 Power), it is more expedient to effect the change of trustees in one step (an order under section 10) than in three (a declaration that the Section 4 Power is available; a blessing of the exercise thereof by the Trustee in favour of JTC Cayman; and the subsequent exercise of the Section 4 Power out of court by the Trustee in accordance with the Court's blessing); and

18.2 The Trustee understands that JTC Cayman is concerned that, were it to be appointed under the Section 4 Power, there is no provision in the Trust Deed that would allow JTC Cayman to be remunerated as replacement trustee (or for the Trustee to provide for such remuneration). Such remuneration, which JTC Cayman would require in order to act as replacement trustee, could be provided for by the Court under section 11 of the Trusts Act following the exercise of the power under section 10 of the Trusts Act.”

17. On the basis that D1 and D2 should be treated as living, “albeit of unknown and unknowable whereabouts”, and the other beneficiaries dead, the following relief was primarily sought under paragraph 2 of the Originating Summons:

“19.1 A direction that the trust fund of the Trust should, pending further Order of the Court, continue to be held for [D1] and [D2], on the footing that both are alive, in accordance with...the trusts, powers and provisions of the Trust Deed;

19.2 A direction that no further enquiries need be made by the Trustee as to the whereabouts of [D1] and/or [D2]; and

19.3 An order under section 10 of the Trusts Act appointing JTC Cayman as sole trustee of the Trust in substitution for the Trustee and discharging the Trustee from the trusts, powers and provisions of the Trust.”



18. If the Court found that D2 was the sole surviving beneficiary, so that a bare trust had arisen in D2's favour, the Trustee would seek a confirmatory declaration to that effect. As JTC would not wish to be appointed trustee of a bare trust, approval would be sought for the Trustee to liquidate the Trust assets and pay the proceeds into Court.

The Representative's submissions

19. In the '*Skeleton Argument on behalf of the Representative of the First and Second Defendants*', the Representative supported the primary relief sought by the Plaintiff. Mr De La Rosa helpfully explained the English origins of the jurisdiction the Court was being invited to exercise:

"18. The origins and current scope of this jurisdiction under English law are described in Lewin on Trusts (20th ed. 2020) at sections 39-030 to 39-036. From the relatively short decision in Benjamin itself, in which an estate administrator was given leave to distribute an estate amongst living beneficiaries on the footing that a particular legatee had predeceased the testator, but without prejudice to a claim if evidence of his death at some time should be forthcoming, the approach of allowing a personal representative or trustee to act on a particular footing where facts cannot be conclusively established has been applied in a wider context.

19. The decision in Shiu Pak [N]in and HSBC International Trustee Limited appears to be the only reported instance of a Benjamin order being considered by a Cayman Islands court. In that case, Cresswell J described an order of this kind as one authorising trustees to be

'at liberty to distribute on a particular footing (the court does not decide that particular facts exist: such an order addresses the problem that the facts cannot be (or cannot practically be established),'¹ ...

20. ...In the present case, the particular 'distribution' proposed is not one amongst beneficiaries but only the transfer from a current trustee to a newly appointed trustee of the underlying trust assets. There are numerous first instance decisions in other English common law-based jurisdictions in which Benjamin orders have been made, including to facilitate the future administration of a trust², and its application is not limited to a final distribution amongst the beneficiaries."

¹ [2014 (1) CILR 173 at paragraph 131].

² *In re Triple A Trustees Limited* [2020] NZHC 1314.



Findings on general merits of application

20. Based on the submissions made and the material placed before the Court, I find that a sufficient case for granting the Order sought has been made out on the footing that D1 and D2 are both probably alive even though not contactable, and the other named beneficiary is dead. As far as appointing JTC and authorising the payment of their fees is concerned, the following statutory provisions clearly confer the requisite jurisdiction to grant this relief:

“Power of Court to appoint new trustees

10. (1) The Court may, whenever it is expedient to appoint a new trustee or trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

(2) The Court may make an order appointing a new trustee in substitution for a trustee who is convicted of a felony or an indictable offence, is a person of unsound mind, is a bankrupt or is a corporation which is in liquidation or has been dissolved.

(3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section gives power to appoint an executor or administrator.

Power to authorise remuneration

11. Where the Court appoints a corporation to be a trustee either solely or jointly with another person, the Court may authorise the corporation to charge such remuneration for its services as trustee as the Court may think fit.”

21. However, in my judgment the application raises public policy concerns which should be addressed through making further directions as to the future administration of the Trust.

Provisional findings: implications of the Plaintiff’s KYC concerns

22. The Plaintiff as long ago as 2006 filed two SARs with the FRA, which did not take any action of which the Plaintiff was aware in response to those filings. JTC is, on the face of it, entitled to rely on those filings. Presumably it is on this basis, i.e. that the Plaintiff has carried out the best possible checks and made the appropriate reports, that it is willing to be substituted as Trustee despite the fact that it cannot effectively carry out its own KYC source of funds checks.



23. It is important for the Court to independently assess these judgments which it is being asked to tacitly approve. In my judgment the various ‘intelligence’ Reports obtained by the Plaintiff over approximately 10 years provide strong grounds for suspicion that the Trust assets, transferred only five years before the Settlor was convicted of financial crimes, are wholly or partially the proceeds of crime. These suspicions are not extinguished by the fact that the conviction may have been politically motivated, because the Trust has been effectively abandoned in circumstances where it is at least implied (by sources in Ruritania) that the fruits of the relevant crimes were hidden in “offshore structures”. In fairness to the FRA, my view of the seriousness of the KYC concerns is based on information obtained by the Trustee after it filed the SARs.
24. The picture is somewhat clouded by the fact that it seems somewhat doubtful that the Ruritanian Government is likely to deploy international asset-tracing steps. The most obvious ‘moral hazard’ appears to be to the personal safety of the beneficiaries coupled with a tacit assumption that the apparent victims of political persecution should be allowed if at all possible to enjoy their rights as beneficiaries of the Trust. This seems to me to be the predominant view the Trustee and JTC have taken of these unusual facts.
25. On the other hand, were Ruritania to become a well-regulated State and track down the Settlor’s former assets here, questions would fairly be asked as to how this Court could have ignored the various proceeds of crime warning signals which are quietly flashing through the evidence in this case. This is evidence which the Plaintiff has very properly placed before the Court to demonstrate that it has not been wilfully blind to the relevant concerns. The material before the Court, albeit falling well below the threshold of tangible evidence, does not exclude the possibility that the Settlor may have been subjected to unfair treatment but that, at the same time, the Settlor's wealth may still represent the proceeds of crime.
26. Albeit in a contentious context where KYC concerns were being deployed as a sword, I recently held that if a litigant wished to have the benefit of undertakings provided by its opponent in lieu of an injunction, it should comply with the outstanding KYC requests. On an application by the defendant to be released from its undertakings because of non-compliance with this Court’s “AML Order”, I held in *Fortunate Drift Limited-v-Canterbury Securities Ltd*, FSD 227/2018 (IKJ), Judgment dated April 15, 2020 (unreported):



“51... It...was and ought to have been obvious that the AML Order was made not to satisfy Canterbury’s regulatory compliance concerns, but because the Court was not willing to confer the continued benefit of injunctive relief on FDL in circumstances where it was in breach of KYC/CDD requirements which would have applied in an ordinary commercial relationship.”

27. Here, drawing a very broad analogy, the beneficiaries are notionally inviting the Court to confer on them the benefit of a Court Order designed to secure the continuance of the Trust despite the fact that there are non-resoluble concerns about the provenance of the Trust assets. It is admittedly merely proposed that the new Trustee should preserve the assets and review the viability of seeking to contact the beneficiaries in no more than 3 years’ time. If contact is established, the KYC issues can be explored afresh. If not, presumably consideration will be given to terminating the Trust and paying the money into Court in any event.
28. Nonetheless, a significant dimension of the assessment the new Trustee will have to make about the future administration of the Trust is an analysis of future political trends in Ruritania and the long-term likelihood of the beneficiaries coming out of ‘hiding’ to openly benefit from the Trust. Relevant to such an assessment would be attempting to gain a clearer picture of how likely it is that the beneficiaries are entirely innocent victims of political persecution. It is possible that external affairs issues are relevant and that bilateral and/or multilateral treaty obligations are engaged. In my judgment, the future administration of the Trust raises public policy issues that the Attorney-General is best qualified to assess. I am not satisfied that this Court may properly leave it entirely to a private Trustee to form the requisite judgments which have to be made about the long-term continuance or termination of the Trust.
29. My provisional view is, subject to receiving supplementary submissions from counsel if they are so advised within 21 days, that I should (in addition to granting the Order sought) direct as a condition of appointing JTC that it should:
- (a) serve a copy of this Judgment together with a copy of the Order on the Attorney-General to enable the Attorney-General to decide whether he wishes to appear to address the Court on any public policy issues arising from this Judgment and the Order I propose to make and/or at the hearing of any future application for directions which the new Trustee may make; and

- (b) apply for further directions in relation to the future administration of the Trust before the end of 2022.

Conclusion

30. I appreciate that the new Trustee may possibly incur more costs in the short-term through engaging with the Attorney-General and seeking further directions within a shorter time-frame than it has proposed. JTC's proposed future analysis was limited to a narrower range of issues: the likelihood of the beneficiaries becoming traceable. In my judgment, whether the Trust continues beyond a review period should also be decided by reference to a more cogent analysis of the best available evidence as the likely provenance of the Trust assets themselves.



THE HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT