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IN THE HIGH COURT OF JUSTICE
PROPERTY TRUSTS AND PROBATE
LIST (ChD)
[2019] EWHC 3321 (ChD)

No. PT-2019-000273

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 20 November 2019

Before:

MR JUSTICE MORGAN

B E T W E E N :

PRAXIS IFM TRUSTEES (NZ) LIMITED

Applicant

- and -

ADRIANO RIVA & ORS

Respondents

MR J. MACHELL QC and MS BROWN (instructed by Burges Salmon) appeared on behalf of
the Applicant.

THE RESPONDENTS were not present and were unrepresented.

J U D G M E N T

MR JUSTICE MORGAN:

- 1 This is an application in relation to four trusts whose names are given in the heading to the order I will make. The application is by the trustee of those trusts in relation to an action where there are various defendants and the principal head of relief which I am asked to grant is against a Mr Zimmer, who will become the 11th defendant to these proceedings. The application has been made without notice to those affected by the order I am asked to make.
- 2 I was asked to hear this application in private and I was made aware of the existence of proceedings in another jurisdiction which are being heard in private and where orders have been made to preserve the privacy of the proceedings in that jurisdiction. I will not go any more deeply into what is happening in another jurisdiction and the orders which have been made and how they are to be interpreted, because I take the view that this is not an appropriate case, applying our ordinary principles, for this court in this jurisdiction to hear the matter in private. I should say, in case it matters to anyone who becomes aware of this hearing, that I was pressed very firmly and persuasively by counsel for the applicant to hear the matter in private and it was my decision rather than the applicant's decision which has led to the matter being dealt with in open court.
- 3 Turning, then, to matters relevant to the outcome of the application, I have indicated there are four trusts. I have indicated the applicant is the trustee of those trusts. The trusts are governed by English law and they have been described as discretionary trusts. There was a protector of the trusts, namely Mr Adriano Riva, who died on 13 April 2019. The trusts contain a provision for what might happen following the death of a protector. That provision enables an executor, an administrator or a personal representative of the deceased protector to appoint a replacement protector. What has happened is that the widow and the three children of the deceased protector have purported to appoint Mr Zimmer as a replacement protector. The question arises whether the widow and the three children of the deceased protector come within the words in the trust deeds "his executor, administrator or personal representative".
- 4 In presenting this application, Mr Machell QC (who leads Ms Brown) for the applicant has suggested three possible meanings that could be attributed to the words "his executor, administrator or personal representative". Perhaps the narrowest of the possible meanings is the first of the three, which refers to an executor, administrator or personal representative appointed by an English court.
- 5 The position taken by the widow and the three children of the deceased protector is that the two wills of the deceased are governed by Monegasque law and I am told that Monegasque law does not have a rule or a concept involving a personal representative of an estate. Instead, Monegasque law produces the result that, on death, the assets of the deceased vest immediately and automatically and jointly in the heirs of the deceased. It is said that the widow and the three children of the deceased are the heirs of the deceased and therefore the assets of the deceased have vested in them. That plainly does not satisfy the narrow reading of the phrase in the trust deed. Plainly on that position there has not been a personal representative appointed by an English court. I will next look at a slightly wider meaning of the phrase, is there someone who holds a foreign office with the legal characteristics equivalent to a personal representative appointed by an English court. I do not think at the moment that the widow and the three children would come within that either. Indeed, a slightly wider interpretation of the phrase would refer to a person who claims to represent

the estate of the deceased. That might or might not extend to the position of the widow and the three children.

- 6 What this means is that there is an issue, albeit raised by the trustee and not, I think, so far by anyone else, as to whether Mr Zimmer has been validly appointed as a replacement protector. Whether he is a protector validly appointed might matter because before today Mr Zimmer has indicated an intention to remove the existing trustee as trustee and to replace it with a different trustee. If Mr Zimmer is a validly appointed protector, he will have power to replace the existing trustee. If he is not a validly appointed protector he will not have that power.
- 7 In those circumstances, the trustee claims relief, the principal part of which is that the court restrains Mr Zimmer from acting as a protector and, in particular, from removing the present trustee. I am asked to approach this application applying *Cyanamid* principles relating to when the court grants an interim injunction.
- 8 I am satisfied there is a serious issue to be tried as to whether Mr Zimmer is a protector under these trusts. It also appears to be the case that damages are not an adequate remedy in relation to the dispute that I am concerned with, so it follows that whether I do or whether I do not grant this order is going to turn upon my assessment of the balance of convenience, perhaps combined with a consideration of the principles as to *quia timet* relief.
- 9 On my way to addressing those issues I should deal with a number of specific points which are properly put forward by counsel for the applicant as matters I ought to consider as they are matters that could be raised on the other side if the other side were represented at this hearing.
- 10 The first matter is the suggestion that the widow and children of the deceased protector will say there is no real doubt about the matter. I do not accept that. I am persuaded on the material before me that there is a serious issue to be tried on the relevant issue.
- 11 The next matter I am asked to consider is that two of the discretionary beneficiaries might well contend that the trustee is not motivated by securing the best interests of the beneficiaries, but is motivated by extraneous considerations. It seems to me that if objectively considered I am persuaded that it is appropriate in the interests of the trusts and the beneficiaries to grant the relief sought then it will not be necessary for me to separately consider an argument about the motive of the trustee. At any rate, the evidence that has been put before me does not cause me independently to be concerned about the motive of the trustee. I say nothing as to what the evidence will show when this matter comes back *inter partes*.
- 12 The next matter is the point that it would be open to a member of the deceased protector's family to come to this jurisdiction and obtain a grant of letters of administration with will annexed from the English court. That would then satisfy the reference to the personal representative of the deceased in the trust deed and that personal representative would have power to appoint Mr Zimmer as protector and so on. However, that is not the current position. Whether it will ever be the relevant position one does not know. When it becomes the relevant position (if that ever happens), the position will be different from today's position. It seems to me that I need to address the current position and not make predictions as to when the current position will be changed and in what direction it will be changed.

- 13 Not, I think, directly relevant to today's decision, the fourth point is a valid point, so far as it goes, showing that it is entirely right that Mr Zimmer be added as a party to these proceedings because of other issues raised by them.
- 14 The fifth point comes to this, that although Mr Zimmer has expressed an intention to remove the trustee he has not yet done so. It seems to me that this is relevant in two ways. One is whether I should make an order on an *ex parte* application. It is also relevant to an argument as to whether the *quia timet* principles are satisfied at the present time. It seems to me this is all about the risk of future events happening which the trustee says would be events causing difficulty as to the administration of the trust and therefore events which should be restrained by an order made at this hearing. I will start with *quia timet*, because I consider that the *ex parte* questions follow naturally from applying the principles as to *quia timet* relief.
- 15 This is certainly not a case where I can be persuaded that Mr Zimmer will definitely take steps to remove the trustee; he might or he might not. He has said that he intends to do so, although things have happened since he stated that intention, which might have caused him to pause. But there is a real risk that he will remove the trustee. I will come to the consequences of that when I consider the balance of convenience. If there is a real risk which, for reasons I will give, will cause difficulty for the administration of the trust, then the court should consider whether the right response to that risk is to intervene and protect the trustee and, indeed, the beneficiaries from that happening. I am satisfied that there is a sufficient risk to justify the trustee coming to court to seek the protection of the court. That way, the *quia timet* principles are to be applied in this case.
- 16 As to whether this is a proper case for an *ex parte* application, it is said that if Mr Zimmer is informed that there will be a hearing in three or four days' time at which the court will be asked to stop him from removing the trustee and that might provoke the very thing which the court application is meant to prevent. It is rather difficult to know what Mr Zimmer might think and might do. He is a professional trustee. A professional trustee would be well advised not to try to jump the gun in the way I have identified but, with some hesitation, I am persuaded that it is appropriate for the court to intervene at this *ex parte* hearing on the material before it. I am encouraged to do that because, so far as I am able at an *ex parte* hearing, I am satisfied that the matter has been very fairly laid before the court for its decision. If I felt that I was being kept in the dark as to highly relevant matters, my hesitation would have been very much greater.
- 17 Turning, then, to the last point raised, which is whether this application would have been better made by a beneficiary rather than by the trustee, I am directed to a clause in the trust deeds which certainly provides a disincentive to a beneficiary making an application of this kind, so that promotes the application of the trustee as the method which is most obviously suitable to bring this matter before the court.
- 18 So, I think with those points addressed in that way the ultimate question is where does the balance of convenience lie? If I grant the relief which is sought then for a period of seven days the trustee will undoubtedly remain in post and Mr Zimmer will be prevented from removing the trustee. On the material before me, I do not see that as creating prejudice or a risk of prejudice to those with an interest in this trust. If I do not grant the injunction and the risk I have referred to comes about, then Mr Zimmer will appoint a new trustee and there will immediately be a question as to who is the trustee of this trust. There will be a question as to what the current trustee can do and is under a duty to do. It is unsatisfactory from the

point of view of administering the trust that one does not know the answer to a basic question such as who is the trustee.

- 19 It seems to me that for the next seven days until the matter can come back *inter partes* the court should promote certainty by the order sought so that for that period it would be quite clear who is the trustee and this trustee will well understand what its powers are and what its obligations are. So, I am satisfied that the balance of convenience is in favour of making the order which is sought.
- 20 I have been given a draft order. I have discussed the terms of the order with counsel in the course of the hearing and I will make an order in accordance with the draft.

CERTIFICATE

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This transcript has been approved by the Judge