Neutral Citation Number: [2024] EWHC 1543 (Ch)

Case No: PT-2023-BRS-000070

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 20 June 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

SWISSINDEPENDENT TRUSTEES SA	**Claimant**
- and –	
(1) ROBERT SOFER **(2) TAMARA WOLPERT** **(3) JAY WOLPERT** **(4) LINDSAY PERLMAN** **(5) MARISSA SERDA** **(6) MATTHEW SHAYLE**	**Defendants**

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Richard Wilson KC and **James Weale** (instructed by **Weightmans LLP**) for the **Claimant**
Burges Salmon LLP for the **First Defendant**
The **Second to Fifth Defendants** were not represented and did not appear
Emilia Carslaw (instructed by **Wiggin Osborne Fullerlove LLP**) for the **Sixth Defendant**

Hearing dates: 30 October 2023

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 20 June 2024.

HHJ Paul Matthews :

Introduction

1. On 30 October 2023 I heard an application made by CPR Part 8 claim form by the claimant as trustee of certain trusts for the court's approval of a proposal to wind up those trusts and make final distributions of assets to beneficiaries. The claim form was issued on 5 June 2023. It was supported by the two witness statements of Andrew Bayles, a director and general counsel of the claimant, dated 10 May 2023 and 20 October 2023, This evidence was unchallenged, and, indeed, the claim was unopposed by any of the adult beneficiaries. The fourth and sixth defendants filed the only acknowledgments of service, each indicating no intention to contest the claim.

2. The matter was argued before me at an attended hearing by Richard Wilson KC and James Weale, for the claimant, and Emilia Carslaw for the sixth defendant, as representative of the minor and unborn beneficiaries of the trusts. The second to fifth defendants, adult beneficiaries of the trusts, did not attend and were not represented. There was no application for the hearing to be in private or for anonymisation of the parties' names.

3. At the end of the hearing, I announced my decision, which was to give the court's approval. I said I would give my written reasons in due course. This judgment contains those reasons. I am sorry for the delay in preparing them, caused by pressure of other work. But the decision was announced, and the order was made, at the time, and was to grant the application sought. Moreover, my reason for giving written reasons later was to provide, for the benefit of the then minor and unborn beneficiaries, an explanation of why the court decided that it was lawful for the claimant as trustee in effect to eliminate their interests. In the nature of things, this is something for the future rather than the present. So I hope that the long delay in providing reasons has not caused any inconvenience.

Background

4. I can take the background to the matter from an earlier judgment of mine in related litigation, *Swissindependent Trustees SA v Sofer* [2023] EWHC 12 (Ch):

> "5. Hyman Sofer was born in South Africa in 1918, though he subsequently settled in Australia, where he died. He had two children, Robert (the first defendant) and Tamara (the second defendant). Robert is married, but has no children. Tamara is also married, and has three adult children (the third to fifth defendants), and (as at March 2019) nine minor grandchildren. On 25 July 2006, when Hyman Sofer was 88 years old, he created a new trust structure to hold his wealth, replacing an existing trust structure that had been set up previously by an Australian law firm, and which pre-dated the involvement of the defendant as trustee.
>
> 6. In the new trust structure, set up by a different Australian law firm, Clayton Utz, there were five trusts in all. These were named the Jordi Unit

Trust, the Gabri Trust, the Puyol Trust, the Xavi Trust and the Valdes Trust. I was told that these trusts were named after footballers of the Barcelona Football Club. The [claimant] was trustee of all four trusts. A BVI company which Hyman Sofer controlled, Cilantro Holdings Ltd ('Cilantro'), acted as formal settlor, settling the sum of US$10 on the trusts of each trust, to which of course further assets would be added in due course.

7. The Jordi Unit Trust was essentially a holding vehicle, whose function was to hold the investments. The assets from the earlier trust structure were transferred to the new one. Beneficial entitlement to share in the trust fund which the Jordi Unit Trust held was divided into units, which were initially allocated to Cilantro. The other trusts were ultimately to hold the units in the Jordi Unit Trust for the benefit of the intended beneficiaries. I call these other trusts the 'beneficiary trusts'.

8. On 8 September 2006 Cilantro transferred certain of its units in the Jordi Unit Trust to the [claimant] as trustee of the Puyol Trust (and similarly in relation to the other beneficiary trusts). Subsequently, these units were substituted by other units, but nothing turns on that. It is accepted that ultimately each of the beneficiary trusts was entitled to one third of the value of the Jordi Unit Trust. The Valdes Trust was wound up in January 2009, and need not be mentioned further.

9. The original form of each of the beneficiary trusts was entirely discretionary. No person had a fixed interest. Nevertheless, at the time of creation, the Puyol Trust was apparently intended to benefit Robert and his wife, whereas the Gabri Trust and the Xavi Trust were apparently intended in the longer term to benefit Tamara and her husband on the one hand, and their children on the other. So Tamara's family would have twice as much as Robert's. However, the casual reader of the trust documents at the time of execution would not have thought so.

10. The terms of the three 'beneficiary' trusts provided for two classes of beneficiary, 'Specified Beneficiaries' and 'General Beneficiaries'. When the trusts were executed, the class of 'Specified Beneficiaries' consisted of the then youngest partner of each of two law firms, one in London, England, and the other in Calgary, Canada. The 'General Beneficiaries' were essentially the closest relatives of the Specified Beneficiaries (although certain other persons connected with those relatives were also General Beneficiaries, and there was also power to appoint further such beneficiaries). It goes without saying that neither Tamara nor Robert had any connection with the youngest partners in the law firms concerned.

11. However, the trustee of each trust had power, under clause Q1 of the terms of the respective trust instrument, to add further persons to the class of 'Specified Beneficiaries'. In relation to the Puyol Trust, that power was exercised by a deed of 23 August 2006 (*ie* less than one month after creation of the trust). This added Hyman Sofer as a Specified Beneficiary of the Puyol Trust, and thereby made Robert, Tamara and their respective issue General Beneficiaries of the trust.

[…]

16. In 2011, there was a dispute between Hyman Sofer and the Australian Taxation Office ('ATO') as to whether he was a resident of Australia for income tax purposes and whether he was liable to pay income tax in Australia on amounts paid from the Jordi Trust or accrued within it. This dispute was settled by an agreement dated 18 July 2012. This provided, inter alia, that Hyman Sofer would pay the ATO AUS$9,450,596.93 within a certain timescale, and (by clause 3.4) that, with limited exceptions, no further assessments or amended assessments would be issued to Hyman Sofer or any "Related entity at any time in relation to any income dealt with by this deed". For this purpose, the term "Related entity" included members of Hyman Sofer's family.

17. Clauses 3.6 and 3.7 of this deed, which (by clause 7.7) was expressed to be governed by the law of New South Wales, provided as follows:

> '3.6 The Commissioner acknowledges that the amount of the corpus of the Trust Estate at 30 June 2010, as set out in that statement, is AUD 59,245,591 before the recovery of accumulated accounting losses.
>
> 3.7 The Commissioner also acknowledges that any amounts that, in the future, are paid to, or applied for the benefit of the taxpayer or any of his Related Entities from corpus, that would otherwise be included in the assessable income of the taxpayer or that Related entity by virtue of paragraph 99B(1) of the ITAA 1936 (or any future provision of the ITAA 1936 that replaces that provision), will not be so included to the extent that the amounts are attributable to, or are expressed to be paid from, the Original amount.'

As I mention below, and as explained by the Australian tax lawyer Mr Ken Lord, in his opinion, these clauses establish in effect a tax-free corpus ('the Original Amount').

18. Following this settlement with the ATO, the claimant, pursuant to the powers in that behalf, but with "protector" consent, by a deed dated 8 October 2015 formally amended the trusts of the various beneficiary settlements. Before I come to these amendments, I will complete the narrative by saying that, on 24 March 2016, Hyman Sofer made his last will, and also a memorandum of wishes. In the latter document, he expressed the wish that one third of the tax-free corpus should go to each of the Gabri, Puyol and Xavi Trusts. On 8 July 2016 Hyman Sofer died, at the age of 97 years. In September 2016, having taken advice, the trustee determined that the balance of the Original Amount referred to in the ATO Settlement Deed as at 8 July 2016 was just under US$24 million, or about US$8 million per beneficiary trust."

5. In 2015, amendments were made to the beneficiary trusts under the powers of variation contained in them. they included the insertion of new clauses A3(1a) and A3(1b) into each trust. A problem arose because there was a difference

between the definition of "Corpus of the Trust Fund" in clause A3(1a) and the definition of the same term in the existing Clause S1(8a) of each beneficiary trust. This question of construction was dealt with by an application to the court, and, after hearing argument, I gave a decision on the matter. This is the judgment from which I have drawn the background material.

This claim

6. I turn now to the substance of the present claim. As I have said, Hyman Sofer died on 8 July 2016. His personal representative is the second defendant. The trusts provided for both 'Specified Beneficiaries' and 'General Beneficiaries'. At the time of Hyman Sofer's death, the second defendant was the "specified" beneficiary of the Gabri Trust, the first and third to fifth defendants were the "specified" beneficiaries of the Puyol Trust, and the third to fifth defendants were the "specified" beneficiaries of the Xavi Trust. The "general" beneficiaries of each trust were the issue of the "specified" beneficiaries.

7. There was a dispute between the first defendant and the claimant raising questions of possible breach of trust. But this dispute was settled by a confidential settlement agreement. There was also the construction question to which I referred earlier, but which has also now been resolved. The first to fifth defendants thereafter were concerned about the cost of continuing with the trust structure, and asked for funds to which they were entitled to be paid to them. By the time of the hearing before me, the majority of such funds had already been paid out. But a significant amount of value (about AUS$ 7.5 million) remained subject to the trusts.

8. The claimant's intention had in any event been to distribute all of the remaining assets to the specified beneficiaries by the end of 2026. However, the claimant now formulated a proposal to wind-up the trusts and distribute the remaining assets to the specified beneficiaries with immediate effect. The effect of this proposal would therefore be to bring forward distributions to the specified beneficiaries by up to 3 years. The minor (and unborn) beneficiaries would receive nothing. It was for the implementation of this proposal that the claimant sought the approval of the court.

9. The mechanism by which the claimant as trustee was to achieve this proposal had two stages. The first stage was to exercise powers of appointment in each trust so as to transfer the entirety of the discretionary entitlement to each specified beneficiary of the trust in equal shares, to write off all of the loans which had been made to the beneficiaries, and to pay each of the specified beneficiaries their entitlement in full. The second stage was to exercise the power in each trust to appoint the "Vesting Day", although in the case of the Jordi Unit Trust this power could be exercised only with the prior written approval of the legal personal representatives of Hyman Sofer. (The second defendant as such personal representative had already provided that "prior written approval".)

10. As I have said, none of the adult beneficiaries objected to the proposal. Nevertheless, there were a number of minor beneficiaries in existence who had no *entitlements* but were discretionary objects of powers of appointment.

Further such beneficiaries might come into existence in future. Obviously, neither of these classes could give consent or approval to the claimant's proposal. They were represented by the sixth defendant, whose counsel addressed me at the hearing.

Law

11. In *Public Trustee v Cooper* [2001] WTLR 901, Hart J referred to a judgment of Robert Walker J (as he then was) given in chambers in an unnamed case in 1995. It appears that that case concerned the question "whether the court in authorising trustees to pursue litigation was necessarily exercising its own discretion or was simply protecting the trustees in an exercise of their own". From that judgment Hart J quoted a passage which has since become very well known, at least amongst trust lawyers:

> "At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well).
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> (1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to … [He then gave an example].
>
> (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 within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.
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> (3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be

> resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential though it sometimes occurs. It may be that ultimately all will agree on some particular course of action or, at any rate, will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.
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> (4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court. I mention that fourth category, obvious though it is, for a reason which will appear in a moment."

12. In *Cotton v Brudenell-Bruce* [2015] WTLR 39, CA, Vos LJ (as he then was, and with whom Moore-Bick and Black LJJ agreed) referred to this "well-known categorisation of cases in which trustees may seek the approval of the court" with evident approval. He then said:

> "12. … These proceedings fell into the second of Robert Walker J's categories (see page 923 in *Cooper*), namely 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'. In *Cooper*, Hart J said at page 925 that the duties of the court in a category 2 case depended on the circumstances of each case, but that in that case, it had to be satisfied, after a scrupulous consideration of the evidence, of three matters as follows:-
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> i) That the trustees had in fact formed the opinion that they should act in the particular way relevant to that case;
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> ii) That the opinion of the trustees was one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at;
>
> iii) That the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.
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> 13. In *Richard v. Mackay* 4th March 1987, (1987) 11 TruLI 23 (but also later reported at [2008] WTLR 1667), Millett J said this as to the approval of the court at page 1671:-
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> > 'Where, however, the transaction is proposed to be carried out by the trustees in the exercise of their own discretion, entirely out of court, the trustees retaining their discretion and merely seeking the authorisation of the court for their own protection, then in my judgment the question that the court asks itself is quite different. It is

> concerned to ensure that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary reasonable and prudent trustees might act, 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. …
>
> It must be borne in mind that one consequence of authorising the trustees to exercise a power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong. Accordingly, the court will act with caution in such a case…' "

Discussion

13. The present claim fell within the second category of those set out in *Public Trustee v Cooper*. The proposal was one about which there was no doubt that it was within the trustee's powers, and the claimant as trustee had decided that it wished to exercise those powers, but the effect of implementing the proposal would be to bring the trusts to an end, and thus terminate any possibility of the minor and unborn beneficiaries benefiting thereunder. This could properly be regarded as a "momentous" decision, in the sense in which Robert Walker J intended it. The effect of approving the proposal would be, as Millett J said in *Richard v Mackay*, to deprive the beneficiaries of any future opportunity of complaining of the exercise of those powers as a breach of trust. The court should therefore be cautious.

14. The claimant submitted that this proposal was in the interests of the beneficiaries as a whole for a number of reasons. First, some of the specified beneficiaries appeared to be in genuine need of funds, and had asked that substantial sums be appointed to them from the discretionary trusts. Second, the beneficiaries to whom distributions would be made apparently intended to pass down their wealth to future generations. This meant that the minor and unborn beneficiaries, who might have derived benefit from the trusts on a discretionary basis in the future, were ultimately likely to benefit from the distributions proposed to be made. Third, there had been disputes as to the administration of the trusts, including hostile litigation. The continuation of the trusts would mean that further such disputes could arise in the future. Fourth, the costs of administering the trusts were substantial, and concerns about such costs had been raised by some of the beneficiaries.

15. The effect of the implementation of the claimant's proposal would be that the minor and unborn beneficiaries would have no further possibility of benefit under the trusts. As against that, there were two points to make. The first was that the claimant had already formed the intention of distributing the whole of the funds available to the specified beneficiaries on a discretionary basis by the end of 2026. Accordingly, the chances of any of the minor or unborn beneficiaries benefiting from an exercise of trustee's discretion were slim.

16. Second, and as I have said, the beneficiaries receiving distributions had stated their intention to pass their wealth down to future generations, so it might well

be that the minor and unborn beneficiaries of the next generation at least were no worse off. Nevertheless, being the subject of discretionary appointment by independent trustees is still different from being subject to the discretion of your own parents or grandparents.

17. Counsel for the sixth defendant prepared a confidential opinion giving a detailed analysis of the advantages and disadvantages of the proposed winding up from the point of view of the minor and unborn beneficiaries. I read that opinion. The sixth defendant through counsel pointed out correctly that the proposal would certainly not benefit the minor and unborn beneficiaries directly. Indeed, it would terminate any possibility of their benefiting from these trusts in the future.

18. On the other hand, their parents and grandmother would become richer, and it appeared to be the intention of those beneficiaries who received distributions to pass the wealth down to future generations. In the meantime, those parents and grandparent would be in a better position to assist in the upbringing of the minor and unborn beneficiaries. Accordingly, although the sixth defendant did not support the proposal, he did not oppose it either, "on the basis that there are unlikely to be lawful grounds to do so", as it "is to be effected by way of what appears to be a valid and rational exercise of the Trustee's discretion".

19. On the evidence before me, I was satisfied that the claimant had in fact formed the opinion that it should implement the proposal put forward. I was also satisfied that the opinion of the claimant was one to which a reasonable trustee properly instructed as to the meaning of the relevant trust provisions could properly have come. Lastly, I was satisfied that the opinion was not vitiated by any conflict of interest under which the trustee was labouring.

Conclusion

20. In this case, I was not deciding whether to approve an arrangement under the Variation of Trusts Act 1958. In such a case I would have to decide whether the arrangement was for the *benefit* of the class of beneficiaries concerned. But that was not my function here. I was concerned only to say whether this was a *lawful exercise* of the trustee's powers, which it had itself decided to exercise. The trustee was not surrendering its discretion to the court. In my judgment, taking into account the material before me and the reasons given by the claimant as trustee for implementing the proposal, I was satisfied that this was a lawful decision, and one to which the court should give its blessing.