

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

Cause No.: FSD 188 of 2017 (RPJ)

**IN THE MATTER OF A DEED OF SETTLEMENT DATED 1 OCTOBER 2003
CONSTITUTING THE T TRUST (THE "TRUST")**

**AND IN THE MATTER OF SECTION 48 OF THE TRUSTS LAW (2017 REVISION)
AND GCR ORDER 85, RULE 2**

BETWEEN

T CO

Plaintiff

AND

**(1) AA
(2) BB
(3) CC
(4) DD
(5) EE (A MINOR)**

Defendants

IN CHAMBERS

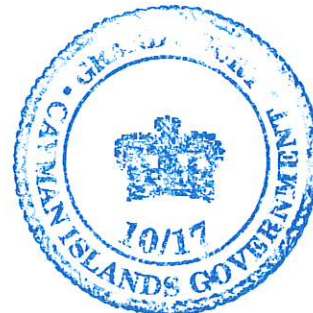
Appearances: Ms. Shelley White, Ms. Lucy Diggle and Mrs. Sarah Gavin of Walkers on behalf of the Plaintiff
Mr. Robert Lindley of Conyers Dill & Pearman on behalf of the Defendants

Before: The Hon. Justice Raj Parker

Heard: 6 February 2019

**Draft Judgment
Circulated:** 18 February 2019

Judgment Delivered: 26 February 2019



HEADNOTE

Section 48 Trusts Law (2017 Revision) - originating summons issued by Trustee seeking declarations - applications by beneficiaries who had commenced proceedings in Florida against different parties - strike out - Order 18 r.19 - inherent jurisdiction - abuse of process - case management stay - exercise of discretion and approach - only appropriate if very strong reasons outweighing disadvantages to applicant Trustee - analysis of nature of case in Florida proceedings and relief sought by Trustee in Cayman.

JUDGMENT

Introduction

1. Pursuant to an Order dated 1 December 2017 these proceedings are subject to strict confidentiality requiring, among other things, the parties, the Protector of the Trust to which these proceedings relate, and any identifiable property, to be referred to by alphabetical letters on the face of all court documents.
2. The Plaintiff Trustee (“TCo”) is a Cayman Islands licensed trust company and the sole trustee of the T Trust established by way of a deed of settlement dated 1 October 2003 (“the Settlement”) between AA as settlor and TCo.
3. The T Trust is governed by the laws of the Cayman Islands and the Settlement includes an exclusive jurisdiction clause in favour of the Cayman Islands in which the courts of the Cayman Islands are to be the “... *forum for the administration of this Trust*” see clause 2.2 of the Settlement.
4. All the defendants (AA-EE) are beneficiaries of the Trust (the defendants) and are US citizens.
5. AA, BB, CC and DD (together, “the AA Family”) brought a claim in the Florida court on 11 August 2017 against FLCo which is a sister company based in Florida of TCo, (with the same parent company and in the same group,) and its Managing Director Jo Ann Englehardt (“JE”). The Complaint alleges breach of fiduciary duty, inducement and



negligent misrepresentation. Damages are sought for alleged losses suffered in connection with the purchase and maintenance of certain life insurance policies which were purchased and/or transferred into the T Trust.

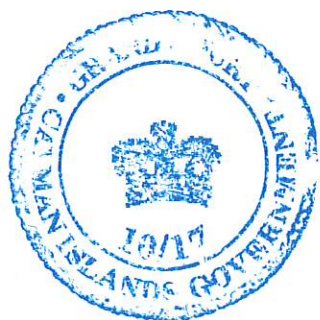
6. The Complaint is dated 11 August 2017 and was filed with the circuit court of the 15th judicial circuit in and for Palm Beach County Florida (“the Florida proceedings”).
7. On 11 September 2017 TCo issued an originating summons under *section 48 of the Trusts Law (2017 Revision)* (the "section 48 application”) as a consequence of the Florida claim, seeking advice and direction from this court in respect of the alleged acts and omissions in the Florida proceedings which, it argues, concern its purchase and management of the life policies.
8. By a summons dated 19 January 2018 the AA Family seek an order pursuant to *GCR* O.18, r.19 and/or the inherent jurisdiction of the court that the originating summons should be struck out as an abuse of process of the court and in the alternative an order that the section 48 application be stayed pending the determination of the Florida proceedings.
9. The Florida proceedings have not been brought against TCo, which is not a party to them and no claim or allegation is made directly against TCo in those proceedings.
10. However, the allegations in that claim are said by TCo to concern the administration of the Trust and in particular the purchase and administration of the life insurance policies which it says involves TCo and entitles it to the relief it seeks from the Cayman court.

Factual background

11. There has been litigation between the parties to date concerning the proper forum for the resolution of the AA Family's claims which the defendants initiated in Florida.



12. Following the issuing and attempts at service of the section 48 application by TCo, the AA Family commenced proceedings in the US courts contesting the validity of service of the originating summons (the "foreign service applications"), as well as in the Cayman Islands.
13. TCo sought an injunction from this court restraining the defendants from prosecuting the foreign service applications.
14. I gave judgment on 13 March 2018 refusing TCo's application and declaring that there had been valid service on a beneficiary in Missouri, but not in respect of the other defendants.
15. TCo appealed and by a Consent Order dated 25 October 2018 the appeal was allowed, recording an agreement between the parties that the exclusive jurisdiction clause in the Settlement conferred exclusive jurisdiction on the courts of the Cayman Islands to determine the Trustee's section 48 application, and providing for the foreign service applications to be dismissed in the US courts. The jurisdiction and service points were thereby dealt with by consent in relation to the s.48 application and it continues.
16. Meanwhile FLCo and JE applied unsuccessfully to dismiss the Florida proceedings on the basis that the defendants had not joined TCo and that the proper forum to resolve the AA Family's claim was the Cayman Islands. At a Florida court hearing on 23 April 2018 the court also dismissed the arguments made by FLCo and JE that the Florida proceedings should be stayed pending determination of the Cayman proceedings, or for arbitration, or struck out as a 'sham pleading'. The Florida proceedings therefore also continue.
17. By consent on 26 November 2018 the parties also agreed that TCo's application in the Cayman court to restrain the defendants from prosecuting the Florida proceedings and from commencing any further proceedings in any other jurisdiction save for the Cayman Islands in respect of the administration of the Trust, be withdrawn.



18. The result of this is that there are two parallel sets of proceedings, the first in time being the Florida claim and then the section 48 application in the Cayman court brought by TCo which was issued as a consequence and by design to have matters determined in Cayman that concern TCo's purchase and administration of the relevant policies.
19. The defendants now apply to strike out or to stay the Cayman s.48 application pending the determination of the Florida proceedings.

Contentions of the parties

20. Mr Robert Lindley appeared for the defendants. He submitted that to issue the section 48 proceedings in Cayman a month after the commencement of the Florida proceedings was an unnecessary 'knee jerk' reaction by TCo. The Florida proceedings do not concern TCo or the administration of the T Trust by TCo. The nature of the Florida proceedings and the relief sought by the defendants is against FLCo and JE and is distinct from and does not encroach upon the matters TCo wishes to have determined in Cayman.
21. There are no allegations against TCo and by making its premature and unnecessary application TCo has acted in an 'untrustee like' manner which will waste the Trust assets in costs and is unnecessary and duplicative. TCo's application should be struck out as an abuse of process.
22. Alternatively, it should be stayed pending the determination of the Florida proceedings as otherwise there is a significant risk of prejudice to the defendants in terms of wasted costs to the T Trust fund in the event that the claim in Florida is successful. Further there would be a duplication of issues because TCo would seek to argue matters relating to the purchase of the policies in the section 48 proceedings in Cayman at the same time that such issues are determined in the Florida proceedings, with the risk of inconsistent findings of fact.



23. Ms Shelley White appeared for TCo. She submitted that the Trustee had properly invoked the jurisdiction of the court pursuant to *section 48 of the Trusts Law (2017 Revision)*. The Trustee is seeking declarations in respect of clearly defined and delineated aspects of its management and administration of the T Trust. It is in the best interests of the T Trust that the Trustee should be entitled to obtain declarations on the matters concerning its administration that are being called into question by the defendants in the Florida proceedings.
24. She submitted that the Trustee is not a party to the Florida claim which will not be dispositive of the issues raised in the originating summons. These are matters which the parties have agreed can only be determined by the Cayman court. The Trustee's application is not an abuse of process and no benefit would be achieved in staying the section 48 application.

The Law

Section 48 of the Trusts law (2017 Revision)

25. This provides that “*Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate... ”.*
26. The court has a wide power to give direction on any question concerning the management or administration of the trust fund or assets upon the application of a trustee. No boundaries have been set by the courts as to the different circumstances in which a Trustee may apply and for orders to be made as the justice of the case merits. It is a remedial jurisdiction - see *A & Ors v Rothschild* [2004-2005] CILR 485 per Smellie CJ at para 42.



27. Whilst a declaration is a discretionary remedy which will not be granted on abstract questions or hypothetical facts, it will be made on the specific facts of the specific case and after proper evidence and argument has been put before the court - see *re Ojeh* [1992-93 CILR 348] per Smellie J (as he then was) applying Megarry VC in *Malone* [1979] Ch.344.
28. In *Ojeh* criticism was made of the trustees in relation to disclosure. Smellie J did not regard the possibility that a court in Europe could subsequently take a different view as an obstacle to dealing with the trustees' application to the Cayman court on its merits. It appeared to him to be:

".... even more appropriate that the trustees should be allowed to present their claims for a declaration to the court of this jurisdiction where the trust is domiciled and where the laws govern. If on the evidence before me it appeared that the trustees had done only what was appropriate and could reasonably be expected of them by way of providing information to the beneficiaries, in accordance with Cayman law, then the trustees should have a declaration of this court to that effect".

Strike out

29. **GCR** Order 18, rule 19(1) provides:

"Striking out pleadings and indorsements (O.18, r.19)

- 1) *the court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-*
- a) *it discloses no reasonable cause of action or defence, as the case may be; or*
 - b) *it is scandalous, frivolous or vexatious; or*
 - c) *it may prejudice, embarrass or delay the fair trial of the action; or*



d) *it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*”

30. The process of the court must be used in good faith and properly and must not be abused. The court will prevent the improper use of its machinery and will in a proper case summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. The categories of vexation and abuse are not closed and depend on the relevant circumstances: see *Kalley v Manus* [1999 CILR 566] at p 574.
31. The defendants rely on grounds 1(b) and (d) on the basis that the application has been brought to ‘thwart’ the Florida proceedings in circumstances where it is unnecessary and premature.

Stay

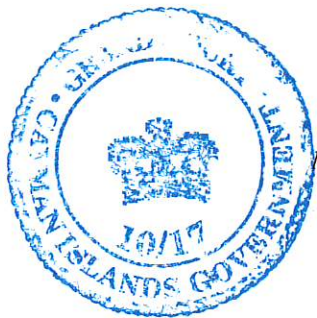
32. The matter was argued by Mr Lindley on the basis of an application for a case management stay, not a stay on the ground of *forum non conveniens*.
33. The court would only order a temporary stay of proceedings on this basis where there were very strong reasons for doing so and the benefits which are likely to result from doing so clearly outweigh any disadvantage to the Plaintiff - see *Oriental Knowledge* (unreported, CICA 16 of 2018) and *CIGNA* [2012 (1) CILR 55] and *AHAB* [2010] (2) CILR 289.

Analysis

34. It is necessary to assess the evidence concerning whether, as Ms White submitted, the claims made in the Florida proceedings intimately concern the administration of the T Trust by TCo, or whether as Mr Lindley submitted, they were distinct from the matters sought to be raised in the section 48 application.



35. To do this I have reviewed the first affidavit of AA dated 18 January 2018 and her second affidavit dated 20 March 2018 filed on behalf of the defendants. I have also reviewed the eighth and eleventh affidavits of Ms Stirling for TCo dated 9 March and 23 November 2018 and her lengthy and comprehensive first affidavit dated 13 December 2017: (Stirling 8, 11 and 1 respectively).
36. AA's evidence is to the effect that the Florida proceedings do not relate to the administration of the Trust by TCo. Rather it relates only to alleged misrepresentations and inducement made by FLCo and JE relating to the purchase of the life policies which have caused loss to the defendants. Those questions are being determined by the Florida court and TCo does not need to defend itself or seek declaratory relief in relation to them.
37. TCo is not involved in the Florida proceedings. The factual enquiry in relation to the alleged misrepresentations and inducements concern Florida residents and entities, and the Florida proceedings are distinct from and do not encroach upon the Cayman section 48 application.
38. In her second affidavit AA gives a detailed account of the family's dealings with FLCo and JE in respect of the establishment of the T Trust and the purchase and management of the policies. She emphasises the role of FLCo and JE, as the family perceived matters, and their communications and dealings with them. The picture painted is that FLCo was much more than a conduit for TCo from the defendants' point of view and JE was the family's trusted adviser and the "guardian" of their assets.
39. They had no dealings with TCo concerning the management of the policies from 2004 to 2015 - see paragraph 26. She states that there was only a minimal role for TCo with respect to the AA family trust and that the policies were purchased by TCo as a result of the family relying on FLCo and JE's representations and advice - see paragraphs 35 and 38.



40. Ms Stirling who is a director and senior vice president of TCo maintains that with the exception of one policy which was held by another trust before the T Trust was created, TCo purchased all the life policies as an asset of the T Trust following careful consideration and extensive discussion with the AA family and advisers as part of estate and tax planning - see paragraphs 45 to 76 of Stirling 1. Notwithstanding any alleged breaches by FLCo and JE as alleged in the Complaint, all claims relating to the purchase of the policies can only be made against TCo.
41. From paragraphs 77 to 252 she gives a very detailed account of the administration of the Trust 2004 - 2008, the purchase and sale of property in 2009, the repayment of the first policy loan, the non MEC policies, the restructuring of the policies, the monitoring of the performance of the investments and numerous related matters.
42. It is clear from her evidence that: TCo purchased the life policies in accordance the terms of the Settlement; TCo is the beneficiary of the policies in its capacity as sole trustee of the T Trust; it was TCo's ultimate decision to purchase the policies and FLCo and JE had no decisive influence over it; FLCo has never owned the life policies or acted as a trustee of the T Trust; there has never been a contractual relationship between FLCo and the defendants in connection with the creation and ongoing administration of the T Trust.
43. She also maintains that FLCo acted only as a conduit for requests and information between the AA family and TCo for convenience to the AA family, because of its location. This is contested by the defendants and it is not necessary for me to resolve this point.
44. I accept Ms Stirling's detailed explanation as to why the various allegations in the Florida proceedings relate to the management and administration of the T Trust and why she considers that the allegations made in the Florida proceedings "*go to the heart of the administration of the T Trust.*"



45. This is because, as she explains, all decisions concerning the life policies were made in the Cayman Islands by TCo. It was TCo which purchased the life policies and is the beneficiary of them as Trustee of the T Trust which it administered and managed, whatever discussions took place in Florida.
46. TCo does not seek a declaration in general terms approving its discharge of duties. The relief sought is specific by reference to matters alleged in the Florida proceedings which concern TCo. She addresses at paragraphs 298-332 the specific declarations sought from the Cayman court pursuant to the s.48 application by reference to the matters alleged in the Florida Complaint.
47. Ms Stirling also sets out in Stirling 8: the relevant paragraphs in the Complaint that she says concern the management and administration of the T Trust; why the substance of the matters alleged has caused TCo to make the section 48 application by reference to the specific paragraphs (298-332) in Stirling 1; and the relevant paragraph in the originating summons on which TCo seeks the court's advice and directions.
48. The particular matters that are raised in the Florida claim that concern the Trustee in its management and administration of the Trust are:
- (a) The purchase of the life policies;
 - (b) The decision to obtain the AA first policy loan;
 - (c) The decision not to make optional payments to the non-MEC policies;
 - (d) The ongoing decision to retain the life policies;
 - (e) Monitoring of the underlying investments; and
 - (f) The decision to seek specialist advice as to the restructuring of certain of the life policies.
49. I have concluded, having reviewed this evidence and the Complaint that the matters alleged in the Florida proceedings clearly involve certain acts or omissions by TCo in relation to the purchase and maintenance of the life policies.

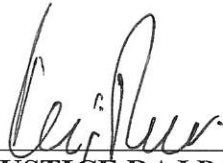


50. The parties have agreed that this jurisdiction is the proper forum for the adjudication of the defined matters raised in the section 48 application. This leads to the conclusion that TCo is entitled to seek directions pursuant to the S.48 application and is entitled to have the matters outlined at (a) to (f) above, which involve its acts or omissions concerned with the purchase and management of the life policies, examined by this court pursuant to Cayman law.
51. There are matters raised in the originating summons concerning the management and administration of the T Trust which will *not* be disposed of in the Florida proceedings because TCo is not a party. There are likely to be different legal issues and causes of action to consider. In my view it is in the best interests of the T Trust as a whole that these matters are ventilated in the Cayman court as the parties have agreed. It is not premature or inappropriate to have brought the s.48 application in these circumstances and is not an abuse of process or vexatious.
52. There is no great advantage in ordering a case management stay when the Trustee wishes to obtain the relief to which it is entitled and to progress the action. There is no compelling reason advanced by the defendants to stay the Cayman proceedings at this stage which outweigh the disadvantage to TCo of such an order.
53. The Florida proceedings do not involve the same parties, nor the same legal issues and causes of action. Decisions from the court in Florida and Cayman will not be a mirror image of each other and so there is a reduced risk of direct inconsistency. There may be some interconnected facts but TCo is not bound by the outcome of the Florida proceedings in so far as they concern TCo and does not participate in them. The issues raised in the section 48 application will not be resolved by the Florida proceedings and TCo remains entitled to the relief it seeks from this court.



Conclusion

54. The AA Family's applications to strike out TCo's originating summons and to stay the s.48 application pending the determination of the Florida proceedings are dismissed.



**THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT**

