

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

CAUSE NO. FSD 175 OF 2019 (IJK)

IN THE MATTER OF a Deed Constituting The Tan Kim Choo Family Scholarship Trust dated 21 October 2002 made between Tan Kim Choo as Settlor and HSBC International Trustee Limited as Trustee establishing a trust known as The Tan Kim Choo Family Scholarship Trust, as amended by a Deed of Appointment of Beneficiary dated 21 August 2009 (the "**Trust**")

AND IN THE MATTER of the Trusts Law (2018 Revision, as amended) and GCR Order 85

BETWEEN

HSBC INTERNATIONAL TRUSTEE LIMITED

Plaintiff

AND

- (1) TAN POH LEE
- (2) TAN POH HUI
- (3) TAN BOON THIEN
- (4) TAN POH YEE
- (5) JCTW
- (6) JCZM
- (7) TJ K
- (8) TJR
- (9) TYT
- (10) TZH



Defendants

IN CHAMBERS

Appearances:

Ms Rachael Reynolds and Mr William Jones, Ogier, on behalf of the Trustee

Mr Sebastian Said, Appleby, on behalf of the 6th Defendant (a minor) and the Unborn

Before: The Hon. Justice Kawaley

Heard: 22 November 2019

Date of Decision 22 November 2019

**Draft Judgment
circulated:** 16 January 2020

Judgment delivered: 22 January 2020

HEADNOTE

Application by trustee for Beddoe relief in relation to defence of Singapore proceedings seeking to terminate Cayman Islands trust-surrender of discretion to Court-conflict of interest-approach to application-role of Court

REASONS FOR DECISION

Introductory

1. The Plaintiff in this matter is the Trustee of a trust known as the Tan Kim Choo Family Scholarship Trust, which was settled on 21 October 2002 (the “Trust”). The Trust is governed by Cayman Islands law and this jurisdiction is also the forum for administration of the Trust.
2. By an Originating Summons dated September 11, 2019, the Trustee applied for, *inter alia*, Beddoe relief because on 10 May 2019, the 3rd Defendant in these proceedings issued proceedings against the Trustee in the Singapore High Court in proceedings HC/S471/2019 (“Singapore Proceedings”) seeking to terminate the Trust. On October 16, 2019 at an initial hearing, in addition to granting certain declaratory relief (for the reasons explained in an unreported Ex Tempore Judgment of that date), the following pertinent directions were made:

“1. Mr Sebastian Said of Appleby (Cayman) Ltd. ("Mr Said") is appointed as the guardian ad litem to represent the interests of the Sixth Defendant in these proceedings.

2. Mr Said is appointed to represent all persons who may become beneficially interested in or under the Trust in right of their being the issue of the First Defendant, the Second Defendant, the Third Defendant or the Fourth Defendant.

...

10. The Plaintiff is authorised to challenge the Proceedings on grounds of forum non conveniens as a preliminary issue and, in the alternative, invite the Court in Singapore to direct that the Courts of the Cayman Islands shall act as an auxiliary court for the purposes of determining any questions falling



within paragraph 5 above.

11. Insofar as may be necessary before further directions can be obtained from this Court, the Plaintiff is authorised to:

- a. submit to the jurisdiction of the court in Singapore;*
- b. defend the Proceedings; and*
- c. abide by the orders made in the Proceedings.*

12. The Plaintiff has liberty to apply for further directions in respect of the Directions.”

3. On November 22, 2019, I granted the following principal relief on the Trustee’s Originating Summons:

“1. The Plaintiff, in its capacity as trustee of the Trust, should not: (i) make the distribution sought by Tan Boon Thien in the Proceedings, (ii) terminate any part of the Trust, (iii) resign as trustee of the Trust.

2. The Plaintiff is authorised, until further order, to:

- a. submit to the jurisdiction of the court in Singapore;*
- b. defend the Proceedings; and*
- c. abide by the orders made in the Proceedings.”*

4. That relief was granted against the background set out in the third recital to the Order:

“AND UPON the Court remaining of the view that the Plaintiff has properly and reasonably surrendered its discretion and sought the directions of the Court in respect of whether: (i) it should make the distribution sought by Tan Boon Thien in the proceedings brought by him in the High Court of the Republic of Singapore, with Cause No. HC/Sum 2427 of 2019 (the



'Proceedings'); (ii) it should terminate any part of the Trust; and (iii) it should resign as trustee of the Trust (collectively, the **'Directions'**)

5. These are the reasons for that decision.

The November 22, 2019 ex tempore summary decision

6. At the end of the substantive hearing of the Originating Summons, I made the following summary decision:

- "1. The Trustee in this case seeks directions pursuant to paragraph 9 of the Originating Summons on (i) whether it should make the distributions sought by Tan Boon Thien in the Singapore proceedings, (ii) whether it should terminate the trust and (iii) whether it should resign.*
- 2. The directions are sought against the background of the proceedings brought by Tan Boon Thien in Singapore seeking to compel the trustee to distribute the overwhelming majority of the trust fund at his direction.*
- 3. The trust is a discretionary trust and the primary beneficiaries are the grandchildren of the settlor. It is clear that the distribution sought would be a momentous decision and one which, in the absence of universal beneficiary assent, would require the trustee to have sufficient information to justify making.*
- 4. The dispute between the beneficiaries is between Tan Boon Thien and his sisters, who violently oppose the distribution.*
- 5. The representative before the court, Mr Said, on behalf of the unborns and the Sixth Defendant, has strongly opposed the making or approving of a decision by the trustee to make the distribution.*
- 6. Ms Reynolds addressed the court fully as to why this is a category 3 case within the categories explained in Public Trustee v Cooper and explained the difficulties that the Trustee has in exercising its discretion because breach of trust claims are asserted in the Singapore proceedings against the Trustee and therefore it is not possible for the Trustee to fairly or certainly decide on what course to take.*
- 7. For fuller reasons I will give later, I would answer all of the questions raised in paragraph 9 of the Originating Summons in the negative. The Trustee's position in declining to make the distribution is entirely rational and supported by copious amounts of documentation. There is no reason*



why any part of the Trust should be terminated and equally no reason why the Trustee at this point should resign.

8. *One outstanding matter from the hearing in October is the question of whether the Trustee should be authorised to continue to defend the substantive proceedings. I do grant the Trustee liberty to do that, in circumstances where the Singapore court has decided to hear the forum challenge and substantive issue in Singapore together.*

9. *Clearly the usual costs order should be made.”*

The Factual Matrix

10. The 3rd Defendant is the son of the Settlor, the late Tan Kim Choo, and the 1st, 2nd and 4th Defendants are the daughters of the Settlor. The Defendants whose names have been anonymised are the grandchildren of the Settlor, and are all either young adults or minors. Prior to the Settlor suffering a stroke in August 2015, the Trustee consulted with him in relation to the administration of the Trust. Thereafter, an unseemly dispute arose pitting the son against the daughters for control over their father and his affairs. So far as the Trustee was concerned, initial attempts were purportedly made by the Settlor to liquidate the Trust assets based on requests which did not appear to recognise the true legal status of the Trust. This internal family dispute in 2016 resulted in the Trustee receiving conflicting reports about the Settlor’s capacity to manage his affairs.
11. On or about May 25, 2018, the Trustee received for the first time from the 3rd Defendant’s Singapore solicitors, LVM Law Chambers LLC, a copy of a Power of Attorney dated September 27, 2016, purportedly executed by the Settlor in favour of the 3rd Defendant. This was inconsistent with another Lasting Power of Attorney purportedly executed by the Settlor on October 21, 2016 and previously forwarded to the Trustee under cover of a November 1, 2016 by another set of solicitors, MG Chambers LLC, acting on the Settlor’s behalf. The Settlor died on August 29, 2018.
12. The present application was informed not just by this antecedent dispute and the more recent Singapore Proceedings, but also by the particularities of the Trust Deed and related key documentation. Two aspects of the Trust deed were highlighted by Ms Reynolds in the course of argument. Firstly, the Trust is what might be described as a standard discretionary (and irrevocable) trust. Clause 5 critically provided:



“(a) The Trustee shall stand possessed of the Trust Fund and the income thereof UPON TRUST and with full power from time to time and at any time before the Vesting Date by resolution to appoint pay or apply the whole or any part of the Trust Fund and the income thereof for the advancement maintenance education or benefit of all such one or more to the exclusion of the other Beneficiaries and in such proportions or manner and upon such other terms and conditions as the Trustee shall in its absolute and uncontrolled discretion deem appropriate...”

13. Secondly, the Third Schedule provided as follows:

“‘Beneficiaries’ means and includes the following:-

(a) Settlor’s grandchildren (herein referred to as ‘Primary Beneficiaries’); and

(b) Settlor’s children (herein referred to as ‘Secondary Beneficiaries’).”

14. The Settlor’s wishes were most importantly recorded in two of three such documents. Firstly, Trustees Minutes signed by the Settlor and dated October 22, 2004 provided as follows:

(a) paragraph 2 noted the Trustee might if it considered it “advisable or beneficial” consider the investment advice of the Settlor during his lifetime and thereafter limit the scope of investments to certain “fixed income instruments”;

(b) paragraph 3 expressed the “general intent” of the Trust as being the establishment of two sub-funds, one for the primary benefit of the Settlor’s grandchildren and the other for the primary benefit of the Settlor’s wife.

15. By a Letter of Wishes dated January 11, 2007, the Settlor modified his earlier wishes in light of the death of his wife. According to paragraph 4, Sub-Fund B was now viewed as being for the benefit of the 1st Defendant (the elder daughter) although the funds *“may be used for the construction of T-Tower”*. If she predeceased the Settlor, the 1st Defendant’s remaining share would be for the benefit of the Settlor’s son-in-law, save that the funds *“may only be used for construction of T-Tower”* [emphasis added]. Paragraph 4, Sub-Fund A (e) provided: *“None of my four children shall have the right to influence the Trustees on the investments and distribution decisions on*



sub-Fund A. They may only make the necessary inquiries.” Prior to the Settlor’s capacity becoming subject to doubt after his stroke in 2015, his wishes might somewhat simplistically be summarised as follows:

- (a) one part of the Trust was for his grandchildren and his children had no right to interfere with the Trustee’s management of that part of the Trust Fund;
- (b) the other part was for the benefit of the 1st Defendant and may be used for the construction of T-Tower.

16. On December 8, 2018 in Malaysia, the 3rd Defendant was appointed as *administrator pendente lite* of the Settlor’s estate under a 2016 Will the validity of which is disputed by the 1st, 2nd and 4th Defendants. That instrument purportedly disinherited the Settlor’s three daughters. On February 2019, the 1st Defendant obtained an interim injunction (a) staying the December 8, 2018 High Court of Kuala Lumpur Order and (b) freezing estate assets including accounts held by the Trustee pursuant to the Trust from the Court of Appeal of Malaysia (the “Malaysian Injunction”). For present purposes, the most significant relief sought in the Singapore Proceedings commenced in October that same year was a mandatory injunction compelling the Trustee to distribute the Trust assets and terminate the Trust based, *inter alia*, on the allegation that the Trustee was liable for breach of fiduciary duty in failing to comply with the 3rd Defendant’s previous requests in this regard. Dealing with the Singapore Proceedings raised the following critical challenges for the Trustee:

- (a) could the Trustee properly decide for itself whether or not to defend the Singapore Proceedings when it was alleged that resisting the Singapore plaintiff’s claims constituted a breach of fiduciary duty?
- (b) could the Trustee properly admit the claim in circumstances where to do so would very arguably be both:
 - (i) at odds with the Trustee’s duties under the Trust (which defined the grandchildren as “Primary Beneficiaries”), and
 - (ii) in violation of the Malaysian Injunction?



- (c) could the Trustee in light of the modest value of the Trust Fund find a way of mitigating the risks of depleting the Trust assets on costly litigation?
17. It should be noted that roughly 75% of the Trust assets had been notionally allocated to Sub-Trust B, which the Settlor wished to be for the primary benefit of the 1st Defendant and funding the construction of T-Tower. Unsurprisingly, her position in a nutshell was that there was “*no basis for TBT to demand that the Trust fund be paid to him solely*”¹. The Trustee’s investigations suggested that the T-Tower’s construction had been completed some time ago and that the building is leased to an entity owned or controlled by the 3rd Defendant.
18. As far as the Singapore Proceedings are concerned the position prior to the substantive hearing of the Beddoe application on November 22, 2019 was that the Singapore Court (Aedit Abdullah J) had given directions on October 23, 2019 for a hearing of the Trustee’s stay application and the 3rd Defendant’s injunction application to take place on December 2, 2019. The Trustee through its Singaporean solicitors made without prejudice settlement proposals with a view to resolving the dispute. However, the dispute remained extant on November 22, 2020.
19. It was against this background that the Trustee sought directions as to the stance it should adopt in relation to the Singaporean Proceedings, with its counsel addressing the facts and the relevant law by adopting a neutral stance on the merits of the substantive application.

Legal findings: principles governing surrender of discretion

20. Ms Reynolds submitted that the present application was governed by the following principles relating to an application for directions in relation to which the Trustee wished to surrender the exercise of its discretion to the Court. In *Public Trustee-v-Cooper* [2001] WTLR 901, Hart J famously cited with approval *dicta* of Robert Walker J (as he then was) in an earlier unreported (and unidentified) Chambers judgment describing four categories of application that a trustee would typically make for directions. The third category was described as follows:

“(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 ...”

¹ Email to Trustee dated November 19, 2019.



21. Reference was made to *In the Matter of X Trust* [2012] JRC 171 (WJ Bailhache QC, Deputy Bailiff, as he then was) [2012] JRC 171² as illustrating the correct approach for the Trustee to take in relation to a Category 3 application. This decision supported the following key principles:

- (a) where a trustee is faced with the need to consider exercising a discretion in a way which is either adverse to or consistent with its personal interests, a conflict of interest arises which makes it impossible for the discretion to be properly exercised; and
- (b) on such an application, the trustee should remain neutral “*its only role being to ensure that all matters are appropriately drawn to the Court’s attention*”; and
- (c) if a trustee is directed to defend hostile litigation, it is appropriate for the trustee not to personally be at risk in relation to the costs of such litigation³.

22. These conclusions were also supported by ‘*Lewin on Trusts*’, Nineteenth Edition, at paragraph 27-082. I also accepted the accuracy of paragraph 27-083 of *Lewin*, which explains the role of the Court when trustees surrender their discretion as follows:

“Where the trustees surrender their discretion to the court, it acts in their place by giving directions. In doing so, the court will act as a reasonable trustee could be expected to act having regard to all the material circumstances and is not bound by the wishes of any beneficiary. The court has, however, no greater powers than the trustees have either under the trust instrument or under the general law.

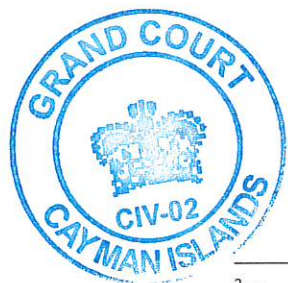
Findings: exercise of discretion by Court

23. Ms Reynolds in her submissions explained the Trustee’s refusal to comply with the 3rd Defendant’s demands for payment out of most of the Trust assets to him as based on the following main grounds:

- (a) having regard to the relevant Letter of Wishes, there was no need to support T-Tower as construction was now complete;
- (b) the 1st Defendant strongly opposed the 3rd Defendant’s requests;

² Paragraphs 4-5.

³ Paragraphs 5, 36.



- (c) the grandchildren of the Settlor were the main beneficiaries of the Trust;
- (d) there was conflicting evidence about the capacity of the Settlor when he executed the Power of Attorney upon which the 3rd Defendant relied;
- (e) the Malaysian Injunction purportedly froze the Trust assets and prevented their disposal.

24. Mr Said only formally represented one of the two minor grandchildren because the 3rd Defendant purported to be representing his own son. Nevertheless since the grandchildren of the Settlor were “*Primary Beneficiaries*” and it seemed possible that further grandchildren may yet be born, the interests he represented were very significant indeed. Mr Said submitted that it was appropriate for the Court to accept the surrender of the Trustee’s discretion because there was a “*clear conflict*”. As regards whether the Trustee should make the requested distribution, terminate the Trust and/or resign as Trustee, the directions sought pursuant to paragraph 9 of the Originating Summons, Mr Said submitted that the answer was “no” to each question. This was because:

- (a) the 3rd Defendant’s proposed distribution fell outside the Letter of Wishes;
- (b) the distribution would exhaust the Trust Fund and it was unclear that it was needed in any event for the reasons asserted by the 3rd Defendant, whose credibility was suspect;
- (c) the Malaysian Injunction was by itself sufficient to justify the Trustee refusing to comply with the 3rd Defendant’s distribution demands;
- (d) there was no justification for terminating the Trust or for the Trustee to resign.

25. In my judgment it was clear that no reasonable trustee would accede to the 3rd Defendant’s requests which appeared to be based on a fundamental misconception about the character of an irrevocable discretionary Cayman Islands trust. To the extent that it was appropriate to consider the relevant Letter of Wishes without being bound

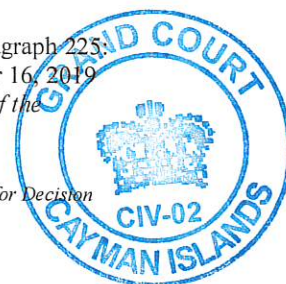


by it⁴, as Ms Reynolds rightly pointed out, it was seriously arguable that the proposed distribution fell outside of the parameters of the Settlor's wishes. This was because the Letter of Wishes requested that the relevant assets be held in Sub-Fund B for the 1st Defendant's benefit, and it was at best unclear that the distribution was sought to fund the construction costs which were 'authorised' to be defrayed out of the notional Sub-Fund B. More importantly still, terminating the Trust and distributing the bulk of its assets to the 3rd Defendant was obviously wholly at odds with the best interests of the Settlor's grandchildren, the "*Primary Beneficiaries*" under the Trust.

26. I found that there was "*good reason*" for the Trustee surrendering its discretion to the Court and that it was appropriate for the Court to accept that surrender in the particular circumstances of this case. Ms Reynolds acknowledged that, ideally, the Court would have heard from the beneficiaries and not in substance from the Trustee at all. Because the key beneficiaries were not before the Court, she rightly submitted that it was appropriate for the Trustee to adopt a more active role in the application while merely seeking to present the law and facts in a neutral manner.
27. The Trustee was subject to a timetable in the Singapore Proceedings which required the filing of submissions by November 25, 2019 and participate in a hearing on December 2, 2019. In these circumstances I saw no need to revisit my decision of October 16, 2019⁵ not to adjourn these proceedings for an undefined period to enable the 3rd Defendant to participate herein. I was referred to evidence filed by the 3rd Defendant herein as plaintiff in the Singapore Proceedings which largely reflected a misunderstanding on his part as to the duties of the Trustee under the Trust. He assumed the Trustee had previously followed his late father's instructions and was now required to comply with his wishes as Executor.
28. Another consequence of the directions ordered in the Singapore Proceedings after the hearing before me on October 16, 2019 was that the Trustee's initial strategy, of first challenging the jurisdiction of the Singapore Court and only submitting to the jurisdiction on the merits of the injunction application if that challenge failed, had fallen away. Both the Trustee's forum challenge and the 3rd Defendant's injunction application were listed to be heard together, presumably for case management reasons designed to achieve expedition and avoid a multiplicity of hearings and resultant delay. This meant that the Trustee, if intending in substance to contest the Singapore Proceedings, had to decide not simply to challenge the jurisdiction but submit to the jurisdiction of the Singapore Court as well.

⁴ *Re Shiu Pak Nin and HSBC International Trustee Limited* [2014(1) CILR 173] (Creswell J) at paragraph 225.

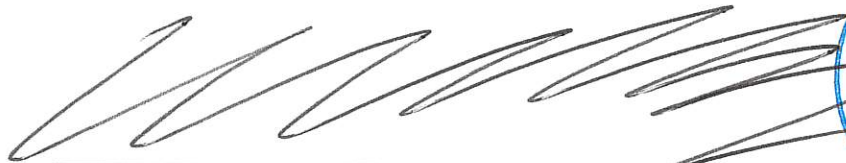
⁵ *Re The Tan Kim Choo Family Scholarship Trust*, FSD 175 of 2019 (IKJ), Judgment dated October 16, 2019 (unreported), paragraph 8: "*It is well established that the trustee is entitled to take serious account of the settlor's wishes and it is...the better view that they are bound to do so.*"



29. It followed that exercising the Trustee's discretion on its behalf and having regard to its duties under an irrevocable discretionary trust, the appropriate response to the Singapore Proceedings was for the Trustee not to:
- (a) make the distribution sought by the 3rd Defendant in the Singapore Proceedings;
 - (b) terminate the Trust; and
 - (c) resign as Trustee.

Conclusion

30. For the above reasons, I granted the *Beddoe* relief sought by the Trustee and exercised the Trustee's discretion by making the directions summarised in paragraph 3 above.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

