

IN THE GRAND COURT OF THE CAYMAN ISLANDS

Cause No: 296/94

IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 20 JULY 1976 (KNOWN AS THE CONTINENTAL FOUNDATION)

AND IN THE MATTER OF A MEMORANDUM OF AGREEMENT DATED 7 OCTOBER 1982 (KNOWN AS THE AALL FOUNDATION)

BETWEEN: BRIDGE TRUST CO. LTD

PLAINTIFF

AND: (1) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS 1ST DEFENDANT

(2) EVEN WAHR-HANSEN 2ND DEFENDANT

(3) COMPASS TRUST CO. LTD 3RD DEFENDANT

(4) TRANSWORLD TRUST COMPANY 4TH DEFENDANT

(5-73) AALL TRUST & BANKING CORPORATION LTD.

AND OTHERS 5TH TO 73RD DEFENDANTS

(74) EIKLAND AS 74TH DEFENDANT

APPEARANCES:

Plaintiff – Bridge Trust Company Limited

Counsel Mr. Ali Malek, Q.C.
Mr. Christopher Tidmarsh, Q.C.

Instructed by Ms. Sara Collins-Francis of Walkers

2nd Defendant – Even Wahr-Hansen

Counsel Mr. Jules Scher, Q.C.
Mr. Philip Brook-Smith, Q.C.

Instructed by Mr. Graham Ritchie of CARD

3rd Defendant – Compass Trust Company Limited

Counsel Mr. Geoffrey Vos, Q.C.

Instructed by Mr. Nigel Clifford of Hunter & Hunter

74th Defendant – Eikland

Counsel Mr. Tom Lowe

Instructed by Ms. Cherry Bridges of Ritch & Conolly

Before: Hon. Justice Henderson

Heard: November 26, 2003

RULING

The third defendant, Compass Trust Company Limited (“Compass”), has applied for leave to amend its Re-amended Defence to the Counterclaim of the second defendant, Even Wahr-Hansen, the Administrator of the estate of Anders Jahre (“the Estate”).

This action was commenced by the plaintiff, Bridge Trust Co. Ltd. (“Bridge Trust”) by Originating Summons in 1994. By its Summons, it sought to resolve questions that had arisen concerning the validity of the trusts of the Continental Foundation (“CF”) declared in 1976; the validity of the trusts of the Aall Foundation (“AF”) declared in 1982; and “whether the assets vested or purportedly vested in the plaintiff as trustee of the [AF] are held upon the trusts declared therein (if valid) or on some other trusts and if so what trusts.” Bridge Trust is the trustee of the AF.

Although Compass has been given and exercised a right to standing in this trial, its pleadings to date have not included any prayer for relief. Compass has not, and still does not wish to, advance any affirmative claim to the assets in issue. It represents the estate of Thorleif Monsen, the ostensible transferor of 8,000 shares in Continental Trust Corporation Inc. (“CTC”) to Robert Slatter, trustee of the CF. The assets derived from these shares were settled by the CF upon the AF in 1982; Compass accepts that the latter was a valid settlement. Since Mr. Monsen executed that settlement in 1982 as an Advisor to the CF, Compass does not assert a claim to any financial interest in the outcome of the present litigation.

The requested amendment is:

AND THE THIRD DEFENDANT Counterclaims for the following Declarations that:

1. Thorleif Monsen was the legal and beneficial owner of 10,000 shares in CTC (the „CTC Shares”) on or before 9 November 1976 when 8,000 of such shares (the “Trust Shares”) were transferred to Mr. Robert Slatter as trustee of the Continental Foundation.
2. The assets deriving from the Trust Shares were validly settled on the trust of the Aall Foundation on or about 8 October 1982.
3. In any event, the Estate of Mr. Anders Jahre (the “Estate”) is not entitled to make any claim to the CTC Shares or to the assets derived therefrom because:
 - a. The Estate has to rely upon its own illegal acts in relation to the CTC Shares in order to make good such a claim.
 - b. The Estate’s claim is an abuse of the process of the Court as a result of the manner in which it obtained and used documents obtained from Dr. Hank McKinnell in breach of the Confidential Relationships (Preservation) Law (1995 Revision).
 - c. Any claim would be an indirect claim to recover tax by the Norwegian revenue authorities;
 - d. The Estate is estopped from asserting such a claim and/or its claim is barred by laches.

FACTUAL BACKGROUND

The first two questions posed by the Originating Summons have now been resolved. The Privy Council has determined conclusively that the trusts of the CF declared in 1976 are void and this Court, in a decision from which no appeal was taken, has determined that the trusts of the AF declared in 1982 are valid. This trial has been devoted only to answering the third question.

CTC was incorporated in Panama in 1989 as Pankos Operating Company S.A.. For most of its corporate life, Mr. Jahre was its President and controlled its affairs. He repeatedly denied owning any of its shares, which were in bearer form. The Estate says that he was, at all material times, the true owner of the beneficial interest in those shares. When Mr. Monsen transferred the 8,000 shares to the CF in 1976 he did so, it is argued, as a nominee or agent for Mr. Jahre. By the time of the transfer, the 8,000 shares represented 80% of those that had been issued.

The other 20% were redeemed by CTC and the proceeds were transferred to Harmon Corporation, a company controlled by Mr. Monsen. The intention, until Mr. Jahre's death, was to settle these proceeds of the 20% block upon New World Trust, a trust established in 1979 with objects wide enough to benefit Mr. & Mrs. Jahre. However, within a few months of Mr. Jahre's death, Mr. Monsen instructed that the shares of Harmon Corporation be held to the order of Forrester Holdings Ltd., a company controlled by Monsen. Thus, it is alleged that Mr. Monsen misappropriated the 20% shareholding.

Because of the invalidity of the trusts of the CF, the Court was asked to determine (in answer to the third item in Bridge Trust's prayer for relief) that the assets derived from the 80% shareholding are now held upon resulting trust for the true owner of the beneficial interest in them at the time of transfer to the CF. The Estate says that a consideration of the circumstantial evidence it has marshaled will lead to the inference that the beneficial owner was Mr. Jahre.

The case advanced by Bridge Trust (which, by agreement, represented the interests of charity as well as those of the trustee in this proceeding) is that Mr. Monsen was the beneficial owner. He acquired the beneficial ownership, likely by gift, from Mr. Jahre at some time prior to the transfer to CF. Since the supposed transfer from Jahre to Monsen was (insofar as the evidence reveals) without consideration, a presumption arises that Mr. Monsen held the shares on resulting trust for the benefit of Mr. Jahre. This, however, is a presumption which can be rebutted by evidence that the transferor intended to divest himself of the beneficial interest and that, says Bridge Trust, is the proper inference to be drawn from the evidence.

One of the circumstances which the Estate points to as demonstrating that Mr. Jahre retained the beneficial interest in the 80% block of shares is his apparent intention concerning the other 20%. The Estate says that, while Jahre clearly intended to place 80% of the shares at the disposal of charity, he intended the remaining 20% to provide for a "short term solution", primarily the support of his much younger wife after his death. Since Mr. Monsen was also made to appear as the transferor of the 20% shareholding, the Estate argues that it is unlikely, given Mr. Jahre's intended use for that asset, that he intended to transfer beneficial ownership to Mr. Monsen without consideration. Given the further

likelihood that all 10,000 shares were placed at Monsen's disposal at the same time, the Estate says this is powerful evidence supporting its case on the 80% question. This position was pleaded and advanced by the Estate in opening argument.

Compass was given standing in this proceeding. It elected to play an active role. Compass has alleged in its Amended Defence that Mr. Jahre transferred all 10,000 shares to Mr. Monsen with the intention that the latter should take the beneficial ownership. It has not, until the present application, made any prayer for relief, contenting itself with saying (in paragraph 6.2 of its Amended Defence) that Bridge Trust is entitled to a declaration that it holds the 8,000 shares on the trusts of the AF. An order of this Court on July 23, 2001 directed that any party who has not served a pleading asserting a claim to the assets by a certain date "will be deemed to have abandoned" any such claim.

After several days of trial, Bridge Trust and the Estate succeeded in reaching a settlement. One of the terms of that settlement agreement is an assignment from Bridge Trust to the Estate of any claims the Estate might have against Compass or other parties for breach of trust. Although a final decision has not been made, Mr. Sher says that the Estate will likely commence a breach of trust action against a number of parties relating to the fate of the 20% shareholding after it was placed at the disposal of Mr. Monsen. In argument, Mr. Sher promised to commence this fresh action, if he does so at all, in this Court by around the end of April, 2004.

Shortly after the compromise, the Estate and Bridge Trust concluded a settlement with the 74th defendant, Eikland AS, the only party not yet mentioned which took an active role in the proceedings. Since the only three parties who have asked for relief (in the form of declarations) from this Court have now compromised their claim, this trial would, in ordinary circumstances, be at an end.

When Compass learned, after the settlement between Bridge Trust and the Estate but before the Eikland compromise, of what was in the wind, it put the other parties on notice that it would seek leave to amend so as to assert, for the first time, its entitlement to a declaration. The requested declaration is not

confined to the issue of beneficial ownership of the 8,000 shares; it would require the Court, and the parties, to address the separate but related issue of the fate of the proceeds of the 2,000 shares.

APPLICABLE LAW

The principles governing amendments are well established and not in issue.

The overriding principle is that an amendment ought to be made “for the purpose of determining the real question in controversy between the parties”: per Jenkins L.J. in *G.L. Baker Ltd. vs. Medway Building and Supplies Ltd.* [1958] 1WLR 1216 at 1231; [1958] 3 ALL ER 540 at 546; and see *Grand Court Rules, 1995* (revised), O.20, R.8(1). The only limiting factor is the question of prejudice; where the amendment would pose a serious risk of prejudice to another party which cannot be readily alleviated by an adjournment or other measures, it may be refused. Thus, as Lord Griffiths observed in *Ketteman vs. Hansel Properties Ltd.* [1987] AC 189 at 220, there is a distinction to be made between amendments which serve to clarify the issues already in dispute and those that advance a new claim or defence. Inevitably, the Court must decide the question of prejudice after considering all of the circumstances in which the parties find themselves at the time the request is made.

ANALYSIS

Compass says that the requested amendment will introduce no new issues. The Estate cannot complain that it is taken by surprise. Questions of fact concerning the beneficial ownership of the 20% block of shares have been pleaded by the Estate and referred to by it in some detail in its opening address. Beneficial ownership of the 80% block has always been an issue. The Estate’s case on the latter question is fully ready to proceed. Beneficial ownership of the 20% block is so closely interrelated with the issue for which the Estate has already prepared that no prejudice will be caused by trying these two questions together. As far as the 80% shareholding is concerned, Compass reminds the Court that the requested declaration simply reiterates what other parties have placed in issue earlier.

This submission somewhat overstates the closeness of the two issues. It is true that Mr. Jahre likely disposed of all of the shares at the same time; it does not necessarily follow that his intent regarding beneficial ownership was the same in each case. The Estate's case on beneficial ownership is entirely circumstantial; I am not convinced that the evidence upon which it relies and the arguments it wishes to make regarding the 80% block are so thoroughly similar to what it would wish to advance concerning the 20% block that (as Compass argued) a one week adjournment would permit it to be ready. I accept Mr. Sher's argument that the Estate had a legitimate expectation that this trial would be focused upon beneficial ownership of the 8,000 shares. That expectation was shared, until now, by all other parties. To move the focus now to the 20% block would cause a subtle but substantial change in how the case should be approached. Given that the amendment request comes very late in the day, that suggests that the preferable course is a fresh proceeding.

By settling with Bridge Trust, the Estate has obtained access (provided for in the settlement agreement) to some additional documentary evidence and at least one witness of some significance – Mr. Robert Slatter, trustee of the CF and involved in many of the relevant events after Mr. Jahre's death. This new evidence may well assist the Estate in establishing its claim. It will take the Estate some time to marshal the evidence, consider its significance, and make any further disclosure that is necessary. I do not think it reasonable to assume that that could be accomplished in as little as one week. There is a suspicion, and I put it no higher than that, that Compass perceives a tactical advantage in pressing the present case forward before the Estate has had time to digest the new material.

Compass says that it has already joined issue with the Estate on the question of beneficial ownership of both the 80% and the 20% interests. It claims to be entitled to litigate that issue to a conclusion.

I agree with Mr. Sher that this misconceives the position. A party to civil litigation has no right to select a particular issue of fact from the pleadings and insist that it be decided. Factual allegations in pleadings are meaningful only insofar as they support a legal entitlement to the relief claimed. Until now, Compass

has not claimed any relief at all. If the trial were to proceed, the Court would decide such factual issues as are necessary to enable it to determine what, if any, relief should be granted. While it is very likely that I would have decided the question of beneficial ownership in relation to the 80% shareholding, it is far from certain that I would have come to any conclusion at all on beneficial ownership of the 20% block. The fact that both the Estate and Compass placed beneficial ownership of the 20% block in issue does not, by itself, mean that either party is “entitled” to a decision on that question. If Compass had wished to ensure a decision on the question of beneficial ownership of the 20% shareholding, it should have requested the amendment it now seeks several months earlier.

Mr. Vos has cited no authority for the proposition that a court is obliged to decide a particular question of fact over the objections of one party but at the insistence of another which has pleaded it. The proposition is without merit.

Compass has already alleged in its Defence that the Estate’s claim is barred by laches and estoppel. It has also pleaded that the claim should fail because the Estate is forced, in pleading and proving its case, to rely upon illegal acts by Mr. Jahre. A final affirmative defence pleaded by Compass is that the claim by the Estate, in reality, is an attempt by the State of Norway to gather in taxes, penalties and interest owed to it by the Estate. In other words, it is a thinly disguised attempt to enforce a foreign revenue law in the Cayman Islands.

As long as the Estate carried the burden of showing that Mr. Jahre never divested himself of beneficial ownership, these affirmative defences would be considered in the usual manner when Bridge Trust and Compass presented their defences to the Estate’s claim. If the amendment is granted, that position is reversed. Compass now claims a “negative declaration” to the effect that the Estate is precluded, by virtue of one or more of the affirmative defences, from advancing its claim. The Estate no longer seeks any declaration in the present proceeding. The burden of proof and persuasion would therefore fall upon Compass. It would have to present its case first. In addressing the affirmative defences, it would necessarily have to set out the Estate’s case and then show how one or more of the defences stands as

a bar to success. That requires anticipating arguments that the Estate may choose not to make and evidence it may decide not to lead. In a case of this complexity, the potential for confusion and disorder is obvious.

I take the current state of the law to be well summarized by Lord Woolf, M.R., in *Messier-Dowty Ltd. and another vs. Sabena SA and others* [2000] 1 WLR 2040(CA) as follows:

While negative declarations can perform a positive role, they are an unusual remedy insofar as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and vice versa. This can result in procedural complications and possible injustice to an unwilling “defendant.” This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful to do so.

Also see *The Declaratory Judgment*, third edition, Woolf and Woolf, London, 2002 at page 193 ff.

Is it “useful to do so” here? I have already said that the Estate will require a greater period of preparation time for a recast trial than the one week offered by Mr. Vos. If Compass succeeds in obtaining a negative declaration, the relief is of no immediate use to them in this proceeding. It might, depending on its form, prevent the Estate from advancing the threatened breach of trust claims in a future proceeding. This is not a case where the unwilling defendant has threatened, in general terms, to sue Compass in some unnamed jurisdiction at some indeterminate point in the future. It has promised to bring its breach of trust claim in the Cayman Islands by approximately the end of April, 2004. Given that the Estate would be entitled to a substantial adjournment if the amendment is granted, I doubt that there would be a dramatic saving in time or costs.

On November 21, 2003, while the parties were concluding their settlement negotiations, the Court of Appeal in Norway issued a judgment which concludes that Mr. Jahre was the “actual” owner of the CTC shares at all material times. The Court of Appeal concluded that Mr. Jahre never transferred the beneficial ownership of those shares to Mr. Monsen. Compass was not a party to the Norwegian proceeding; Forrester Marine Limited, an entity alleged to be closely related to Compass, was.

Compass says that if the amendment is not allowed the Estate will derive a juridical advantage because it can, in a later proceeding, plead an issue estoppel on the question of beneficial ownership. That point would not be open to the Estate in the present action (Compass says) because the Norwegian proceeding was commenced after the present one.

The question of whether the Norwegian decision is capable of giving rise to an issue estoppel involves several subsidiary issues of some complexity which were not canvassed thoroughly on the present application. It is unclear whether the Estate can derive any juridical advantage from pleading an issue estoppel arising from litigation in Norway between different parties (who may or may not be the “privies” of the Estate and Compass) commenced after the present action. In any event, since Compass and its advisors were well aware of the Norwegian litigation, they must be taken to have shouldered an intentional risk that a settlement of the present action (which Compass, because it had asserted no claim, would be powerless to prevent) might give rise to an issue estoppel.

Much the same thing can be said about cost.

Compass complains that it will incur very substantial wasted costs if the action does not proceed. I am inclined to the view that a great deal (perhaps most) of the preparatory work done by Compass will prove to have been necessary in any event for the threatened breach of trust action. In the present action, Compass deliberately assumed a stance supportive of Bridge Trust; while wishing to advance some of its own evidence and arguments, it saw no need to claim any relief for itself. It must be taken to have foreseen that, if the other three active parties were to settle, the action would be at an end. That being so, Compass can be said to have assumed the risk that the trial would conclude in circumstances it could not control.

ORDER

For these reasons the application for leave to amend is dismissed.

I award to the Estate its costs of this application, to be paid by Compass.

Dated this 1st day of December 2003

Henderson, J.
Judge of the Grand Court