14.8.09

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 555 OF 2008

BETWEEN:

(1) HELMSMAN LIMITED
(2) THE HOTHAM TRUSTEE COMPANY LIMITED

Plaintiffs

- and -

THE BANK OF NEW YORK TRUST COMPANY (CAYMAN) LIMITED

Defendant

Appearances: **Mr. Robert Ham Q.C. &**
Mr. Carlos de Serpa Pimentel of
Appleby for the Plaintiffs/Respondents

Mr. Simon Taube Q.C. instructed by
Ms. Lindsay Luttermann of Walkers for the
Defendant/Applicant

Before: **Hon. Justice Henderson**

Heard: **June 11, 2009**

GRAND COURT CAYMAN ISLANDS

RULING

1. This application is for a stay of proceedings on the ground that the action should be tried in England. I must consider whether a forum clause in 2 trust deeds assigns exclusive jurisdiction to the courts of that country and, if not, whether it is the most appropriate forum in any event.

Facts

2. The action is for damages for breach of trust in relation to three settlements over which the Defendant, the Bank of New York Trust Company (Cayman) Limited ("BNY Cayman") was trustee: the Beverley settlement, the Howden settlement, and the London settlement. BNY Cayman was the sole trustee of the Beverley and Howden settlements from June, 1999 until February, 2005 and trustee of the London settlement from March, 2000 until November, 2002. The First Plaintiff, Helmsman Limited, is a Bermudian company and now the sole trustee of the Beverley and Howden settlements. The Second Plaintiff, the Hotham Trustee Company Limited, is an English company and now sole trustee of the London settlement. The action is essentially a claim in negligence arising from the alleged failure of BNY Cayman to

supervise adequately the investment of the trust funds by the investment manager (BNY in New York) and by the investment advisor (Mr. Howard Parker), who was resident in Florida at all material times.

3. The settlor of all three trusts, Mr. Malcolm Healey, resides in England. Mr. Parker had been his investment advisor for a considerable period of time.

4. The relevant terms of the Beverley and Howden settlements are substantially identical. In each case, the proper law of the settlement is the law of England and Wales. Clause 3(2) of each deed provides:

> "The forum for the administration of this Settlement shall (subject and without prejudice to any change made under the power conferred by paragraph 5 of the Second Schedule in the forum and administration of this settlement) be the courts of England and Wales."

Shortly after its own appointment, BNY Cayman appointed BNY in New York as investment manager and custodian. Mr. Healey appointed an English accountant, Mr. Grocott, as protector. In 2001 Mr. Timothy Wheldon, a solicitor, was appointed as protector.

Mr. Grocott in turn appointed Mr. Parker as the investment advisor; in practice, it appears that Mr. Parker was the primary source of investment advice.

5. The alleged investment losses (which exceed U.S. $68 million dollars for the Beverley and Howden settlements) are said to have resulted from investments in "tech stocks at the time of the so called dot com bubble" in the early years of this decade. The plaintiffs claim that BNY Cayman adopted a "passive or inert stance" and failed to monitor the activities of the investment advisor and the investment manager. There is no allegation that BNY Cayman's employees or officers in the Cayman Islands were themselves involved in the investment decisions.

6. The London settlement was on different terms. It is governed by the law of the Cayman Islands and its forum of administration is this Court. In practice, the process for deciding upon and managing investments was similar to the regime described above.

Issues

7. There are two issues:

I. With respect to the Beverley and Howden settlements, do the courts of England and Wales have exclusive jurisdiction? and

II. Is England the more appropriate forum for the trial of the action?

Issue 1: Exclusive Jurisdiction

8. BNY Cayman says that clause 3(2) of the Beverley and Howden settlements (quoted above), construed properly, confers exclusive jurisdiction on the English Court to adjudicate disputes between it and the beneficiaries. Since Helmsman, the successor trustee, is claiming on behalf of those beneficiaries it cannot stand in a better position than the beneficiaries themselves. Since the proper law of the settlements is English law, the English Court would, in the absence of any jurisdiction clause at all, have had non-exclusive jurisdiction as the forum for administration. If clause 3(2) was intended by the settlor to confer only a non-exclusive jurisdiction on the English Court, its presence would be otiose. Therefore, to give effect to the clause, it must be viewed as intended to confer an exclusive jurisdiction upon the English Court: see *Dicey, Morris & Collins on the Conflict of Laws*, 14th edition, at paragraph 12 – 092. This conclusion is reinforced by the use of the word "shall", which is usually but not invariably used to convey a mandatory direction. In June 1999 (when the Beverley and Howden settlements came

into existence) the clause would have been understood in this way because the English Court would accept jurisdiction even against a foreign trustee where "the claim is brought to execute the trusts of a written instrument being trusts that ought to be executed according to English law and of which the person to be served with the writ is a trustee ... ": English *Rules of the Supreme Court,* Order 11, Rule 1(1) (j).

9. Clause 3(2) does not, on its face, confer jurisdiction on the English Court over any and all claims related to the trusts; rather, it makes that Court the "forum for the administration of" the settlements. Can an action for breach of trust by negligent failure to supervise investment decisions brought by the current trustees against a former trustee be characterized accurately as a question of administration of the trusts?

10. This is not a question which has received much judicial consideration. I have been referred to two decisions – *Koonmen v. Bender et al* [2007] WTLR 293 (Jersey Court of Appeal) and *Green et al v. Gernigan et al* 2003 BCSC 1097 – in which the court accepted, without analysis, that the phrase has application to any

dispute arising under a trust. There is much to be said, however, for the following view of Professor Paul Matthews, expressed in "*What is a Trust Jurisdiction Clause?*" [2003] JLR 232, that the phrase in its ordinary meaning does not extend to contentious breach of trust litigation:

> "21. …The 'forum for administration' of a trust is a quite different concept from an exclusive jurisdiction for the resolution of disputes (whether arising from trusts or otherwise). The administration referred to here is not intended to include contentious breach of trust litigation. On the contrary, it is concerned with aspects of the administration of the trust which, for one reason or another, require the assistance of the court. These might well include trustees seeking to clarify the true construction of the trust terms (for example whether they might invest in such and such an investment), or trustees seeking a direction as to whether they might safely distribute assets when there are contingent claims from third parties still in the air, whether they should disclose trust documents or information to beneficiaries, or whether they should take or defend legal action against third parties (so called 'Beddoe' applications). Indeed, it might even involve an application to remove a trustee from office and appoint another. This is the 'domestic jurisdiction' of the Chancery Court, which under the old Rules of the Supreme Court 1965 in England was represented by the provisions of Order 85. The predecessor of that Order itself was introduced in order to avoid the need in every case to have a full action to administer the trust – a so-called 'administration action'. This jurisdiction – usually, but not invariably, invoked by the trustees – continues today in England. A similar jurisdiction exists in Jersey and, for that matter, in Guernsey.
>
> 22 Hence, the phrase 'forum for administration' referred directly back to the nineteenth century (and earlier) idea of the court which would take on the administration of the trust if need be. The most usual forum for that, of course, was the

> forum of the proper law. So strictly there was no need to state the forum for administration. And it is doubtful that selecting a different forum from that of the proper law could require the trustees to seek directions only from the nominated court. But such an administration action was in effect procedural rather than substantive. It was a means of dealing with matters of administration and construction. It was not – could not be – used to deal with breach of trust issues, characteristic of the kind of hostile trust litigation for which an exclusive jurisdiction clause might be needed. So there could not be any suggestion that this 'forum for administration' was automatically intended also to be the exclusive jurisdiction for the resolution of contentious disputes involving beneficiaries. As the leading cases in England show, that was an entirely different question, resolved – in the days before the adoption of *forum non conveniens* as a part of English law – by a straightforward application of the ordinary rules of national jurisdiction. In England and other common law countries this depended initially on where the defendants were to be physically found, and a similar rule was originally applied in Jersey. Thus it mattered who the defendants were. They might or might not have been the trustees, but the important point to notice is that it is the plaintiffs who would have had to make that decision, and they would probably not have been the trustees. Accordingly, the use of the phrase 'forum for administration' could not, with respect, support the interpretation placed on clause 1 by the Court of Appeal."

Order 85 Rule 1 of the English Rules of the Supreme Court defines an "administration action" as an action "for the administration … under the direction of the court of a trust." Rule 2 makes specific reference to the types of relief available in an administration action including: the resolution of "any question arising in … the execution of a trust"; the resolution of any question regarding the

composition of a class of beneficiaries; any question as to the rights of an individual beneficiary; an order to a trustee to furnish and verify accounts; an order requiring a trustee to pay money into court; an order directing a trustee to do or abstain from doing a particular act; and an order approving any sale or purchase by the trust. Conspicuous by its absence from this list is any reference to a claim for damages for breach of trust or negligence.

11. Rule 4 does say that "in an administration action … the court may … grant any relief to which the plaintiff may be entitled by reason of any breach of trust, willful default or other misconduct of the Defendant …". Viewed in context, this provision confers an entitlement to deal with breach of trust claims in the course of providing the sort of relief described in Rule 2 and within the framework of a properly constituted administration action and is not an endorsement of the right to bring a free standing breach of trust claim under Order 85. Rule 4 also states expressly that the power to grant relief in relation to a breach of trust is without prejudice to the court's jurisdiction to order that the act be reconstituted as a writ action. A breach of trust action like the

present one which raises potentially complex issues about investment strategy would likely be converted into a writ action.

12. In the result, I find it unnecessary to decide whether the language of clause 3(2) was intended by the settlor to dictate the forum for a breach of trust action after the administration of the trust (by the trustee Defendant) had come to an end. That is because the plaintiff trustees, who have always had the power to change the forum for the administration of the trusts "at any time or times" (see paragraph 5 of the Second Schedule), have now elected to change the forum for administration to the Cayman Islands. This was done on November 25, 2008 just one day before the writ in the present action was issued. Clearly, the intent of the change was to pre-empt the very argument I am now considering.

13. BNY Cayman refers in its written argument to this act as a "purported change" and says it cannot operate retrospectively so as to clothe this Court with jurisdiction over the trusteeship of BNY Cayman which ended over four years ago. No authority is cited for this proposition. It seems to me to raise the same question, albeit viewed from a different angle. If a breach of trust action against a

previous trustee by a current trustee is, indeed, one which must be tried in the forum for administration of the trust, I see no reason why a trustee currently charged with that administration should be prevented from exercising the discretion it has been given to change the forum for the resolution of such disputes. On the other hand, if (as I suspect) Professor Matthews is correct and a breach of trust action is not an aspect of the trust administration at all, then the change of forum on the eve of this litigation has no effect for present purposes. In either event, the result is the same: BNY Cayman can obtain no assistance on this issue from the clause.

14. The plaintiff trustees do not argue that their recent selection of the Cayman Islands as the forum for administration gives to this Court exclusive jurisdiction over the present action.

15. For the reasons given above, I am satisfied that clause 3(2) cannot now be viewed (even if it could have been so viewed in the past) as assigning exclusive jurisdiction to the English Court. The result is that there is no Court with exclusive jurisdiction over this dispute and I must turn my attention to the question of which is the most appropriate forum.

Issue II: Is England the most appropriate forum?

16. BNY Cayman has been served with proceedings within the Cayman Islands and jurisdiction is therefore founded here as of right. The question, then, is whether BNY Cayman (which bears the burden of persuasion) has satisfied me that England is "clearly or distinctly" the more appropriate forum: *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] 1 AC 460 (HL) at page 477.

17. BNY Cayman has no presence at all in England. Its parent company is located in New York but neither party has suggested that New York is a more appropriate forum.

18. The plaintiffs and current trustees are located in Bermuda (the trustee of the Beverley and Howden settlements) and London (the trustee of the London settlement). The plaintiffs, however, consider that the Cayman Islands is the only appropriate forum.

19. The proper law of the trusts resulting from the Beverley and Howden settlements is the law of England and Wales; with respect

to the London settlement, the proper law is the law of the Cayman Islands. BNY Cayman argues that this is a factor supporting its contention that the most appropriate forum is the English Court. It says that that court may take judicial notice of the legal principles governing the Beverley and Howden trusts (which is true) and that this court would have to receive expert evidence on the subject from English solicitors (which I doubt). Foreign law is always a question of fact and must be proved by evidence like any other fact. However, the Cayman Islands is a British Overseas Territory, English law was received here some considerable time ago, and in most areas our law differs very little from that of England and Wales. I doubt that a trial judge in the Cayman Islands would view English law as "foreign law" and require that it be proved as a fact. That has not been the practice here. With respect to the London trust, the proper law of the trust is that of the Cayman Islands. If, as BNY Cayman seems to suggest, the English Court cannot take judicial notice of the law in a British Overseas Territory then expert evidence on Cayman law would have to be tendered in any proceeding in England.

20. A number of the witnesses are located in the United States. Relevant documents are also to be found there. The settlor lives in England but it is not clear that he has any relevant evidence to give. The protector, Mr. Wheldon, is resident in England. Mr. Dally, a director of BNY Cayman at the material time, is resident in the Cayman Islands. On balance, it seems to me that the most important witnesses and documents will be found in the United States. The convenience of the witnesses is not a factor which argues strongly for conducting the proceeding either in England or in the Cayman Islands.

21. As I said above, the forum for administration of the Beverley and Howden trusts was, during the entire time of BNY Cayman's trusteeship, the Court in England. The London settlement, whose forum for administration has always been the Grand Court of the Cayman Islands, has suffered only about 10 percent of the total investment loss. BNY Cayman has agreed to permit the dispute concerning the London settlement to be tried in the English Court together with that concerning the Beverley and Howden settlements in order to avoid a multiplicity of actions. To an extent, it would be natural and appropriate for the Court which was

charged with the administration of the trusts during the relevant period to be the arbiter of a claim that the trusts were breached at that time. The force of this argument is much diminished, however, by the fact (as was conceded during argument) that no question involving any of the trusts was ever referred to the English Court while BNY Cayman was trustee.

22. BNY Cayman says that it wishes to claim contribution or indemnity from Mr. Howard Parker under the *English Civil Liability (Contribution) Act* of 1978. That would permit all of the liability issues to be decided within a single proceeding. It seems that such a course might not be open to BNY Cayman if the trial is conducted in the Cayman Islands. Proceeding in that way in England would only be of help to BNY Cayman if any resulting judgment is enforceable in the State of Florida, where Mr. Parker resides. I have expert evidence on the law of the State of Florida in affidavit form before me from two attorneys who practice there. It appears from this evidence that an English judgment against Mr. Parker would not be enforceable in Florida unless he can be taken to have submitted to the jurisdiction of the English Court. BNY Cayman's expert asserts that he has done so by agreeing to serve as

investment advisor to the settlements at a time when the forum for administration of two of the settlements was the English Court. The general rule is that an agreement to submit to the jurisdiction of a foreign court must be express and cannot be implied: *Dicey, Morris & Collins on the Conflict of Laws* (14th edition), volume I, paragraph 14 – 072. Nothing in the deeds of settlement amounts to an express agreement to attorn to the jurisdiction of the English Court. Clause 3(2) embodies an agreement by the trustees to submit questions of administration to that court but it is not suggested that Mr. Parker was entitled to participate in the process directly. Any question involving investment strategy would have had to have been submitted by Mr. Parker to the trustee which would then, if it was so minded, have submitted the question to the English Court for resolution. It is therefore questionable whether an English judgment against Mr. Parker would be enforceable in Florida and, consequently, questionable whether BNY Cayman will derive any juridical advantage from the transfer of this action to the English Court.

23. There is one way in which the law of England and the law of the Cayman Islands differ in relation to choice of the most appropriate

forum: the question of public policy. In the Cayman Islands, the Court may take public policy considerations into account when deciding *forum non conveniens* issues: *Telesystem International Wireless Incorporated et al v CVC/Oportunity Equity Partners et al*, 1 August 2002, C.A.; *KTH Capital Management Ltd* [2004-05] CILR 213 (Smellie, C.J.); *in Re Cairnwood Global Technology Fund Ltd*, 17 May 2007 (Foster J); and *TCB Creditor Recoveries Ltd v Arthur Andersen LLP*, 1 August 2007 (Levers J). BNY Cayman was and is licensed to conduct business in the Cayman Islands and is regulated by the Cayman Islands Monetary Authority. There is a significant public policy concern to be addressed when it is alleged that a Cayman Islands trust company has committed a breach of trust by failing to carry out its fiduciary obligations. The natural forum for the trial of such a claim is the Grand Court of the Cayman Islands. It is appropriate in the general case that breaches of trust said to have been committed here are adjudicated upon by our courts. This is by no means an overwhelming consideration; if there is a substantial reason to favour a transfer of this action to the English Court, domestic public policy would not prevent that. However, in a case such as the present, where neither forum can clearly and obviously be said

to be the natural one, the public policy interest is sufficient to tip the scales against the applicant.

24. I find that BNY Cayman has not discharged its obligation of persuading me on the balance of probabilities that the English Court is a more appropriate forum for the trial of this action. The application is dismissed.

Dated this 14th day of September, 2009

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT – CAYMAN ISLANDS