26-6-09

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 555 OF 2005

BETWEEN	**TASARRUF MEVDUATI SIGORTA FONU**	**PLAINTIFF**
AND	**1. MERRIL LYNCH BANK AND TRUST COMPANY (CAYMAN) LIMITED ("MLBTC")** **2. KAFFEE LIMITED** **3. BARLA FINANCE LIMITED** **4. CUNUR CASH LIMITED** **5. MEDRO LIMITED** **6. YAHYA MURAT DEMIREL**	**DEFENDANTS**

CONSOLIDATED BY ORDER DATED 30 MARCH 2007 WITH

CAUSE NO. 80 OF 2007

BETWEEN	**TASARRUF MEVDUATI SIGORTA FONU**	**PLAINTIFF**
AND	**1. MERRIL LYNCH BANK AND TRUST COMPANY (CAYMAN) LIMITED ("MLBTC")** **2. KAFFEE LIMITED** **3. BARLA FINANCE LIMITED** **4. CUNUR CASH LIMITED** **5. MEDRO LIMITED** **6. YAHYA MURAT DEMIREL**	**DEFENDANTS**

IN CHAMBERS
THE 8TH, 9TH, 10TH AND 26TH JUNE 2009
BEFORE CHIEF JUSTICE ANTHONY SMELLIE

APPEARANCES: Mr. Stephen Moverley Smith QC and Mr. Christopher Russell of Ogier for the Plaintiff

Mr. Colin McKie and Mr. Stephen Alexander of Maples and Calder for the 1st to 5th Defendants

Mr. Nigel Meeson QC, Ms. Linda DaCosta and Mr. Stephen Leontsinis of Conyers Dill and Pearman for the 6th Defendant

RULING

1. The Plaintiff ("TMSF") applies as a judgment creditor of the 6th Defendant ("Mr. Demirel"), seeking the appointment of receivers by way of equitable execution over specified "properties" of Mr. Demirel in the Cayman Islands, together with related relief.

2. The specified "properties", described also as legal choses in action, and which are the focus of the proposed receivership, are the absolute and unfettered right or power in Mr. Demirel to revoke two Cayman Islands trusts.

3. TMSF seeks directions mandating the revocation of the Trusts and orders to allow the Receivers to take possession of the assets of the trusts (worth about US$27 million) and thus to apply them in large partial satisfaction of its judgment for about US$30 million.

BACKGROUND

4. The judgment which TMSF seeks to enforce is one given by this Court on 22 May 2007 on TMSF's application for summary judgment and which, in turn, enables TMSF in this jurisdiction to recover a judgment debt for US$30 million earlier obtained against Mr. Demirel in Turkey.

5. TMSF separately in this action also has a proprietary claim against most of the funds in the trusts. That claim has been postponed in favour of this attempt at recovery by way of equitable execution of its summary judgment. The proprietary claim is premised on the allegation that the trust funds represent in substantial amount (save for US$2.5 million), the proceeds of a fraud committed by Mr. Demirel in Turkey and upon which the Turkish judgment, and hence this judgment, are based. The allegations of fraud are still being contested by Mr.

Demirel in Turkey although for present purposes the Turkish judgment (and the summary judgment which recognises it) are to be regarded as final and conclusive, the appellate process in Turkey against the Turkish judgment having been exhausted.

6. The trusts in issue are the Dolphin and Mana trusts ("the Trusts") of which the first Defendant ("MLBTC") is the trustee. The settlor of both Trusts is Mr. Demirel. The assets of the Trusts are held through Cayman companies, the shares of which are held by MLBTC via a nominee company, Fairfield Nominees Limited.

7. The ultimate aim of the receivership by way of equitable execution would be to take control of the trust companies and the funds (in value of about US$27 million) which they own and to pay those funds over to TMSF.

8. It is, however, common ground between the parties that the Trusts are duly and validly constituted under Cayman Islands law and there is, as yet, no proven basis for treating them as containing the proceeds of the alleged fraud.

9. The trust deeds by which the Trusts were created are in identical terms. Paragraph 2 of Schedule IX in relation to each Trust, provides that the Trust may be revoked, amended, varied or altered in any manner whatsoever from time to time by Mr. Demirel by deed delivered to MLBTC.

10. Thus, Mr. Demirel has the absolute unfettered right to revoke the Trusts, unrestrained by any fiduciary obligations and regardless of the interests of any beneficiaries.

11. TMSF's primary argument is that this unfettered right of Mr. Demirel's is a power which is to be regarded as property of Mr. Demirel, capable of being the subject of the appointment of a receivership.

12. TMSF's further argument is that the powers and rights of revocation are choses in action, being forms of option to determine the Trusts and, as such, are deemed by the Interpretation Law to be property. Thus, they are capable of being vested in and exercisable by Mr. Demirel's receivers by way of equitable execution.

13. It must be immediately acknowledged that in the circumstances presented here, the forms of relief sought, that is, the treatment of powers of revocation (over duly and validly constituted trusts) as property, and as amenable to being taken on receivership by way of equitable execution; would be unique and unprecedented.

14. Nonetheless, TMSF says that it is precisely because of the uniqueness of the circumstances, where TMSF – itself a lawfully constituted judgment creditor – would not be able to recover its debt owed by Mr. Demirel by legal means, that it should be able to call upon this Court to exercise its equitable jurisdiction to ensure that its judgment is not defeated.

15. While MLBTC as trustee remains neutral, Mr. McKie on its behalf sought to assist the Court by legal arguments. Mr. Meeson QC on behalf of Mr. Demirel adopts and supports those arguments. They are to the effect that Mr. Demirel's powers of revocation of the Trusts are not, in the absence of some statutory provisions so defining them (as one might expect in the Trusts Law), to be regarded as the same as property. The difference between powers and property is long established at common law and in all of the decided cases in which a power

(typically a general power of appointment under a trust or will) has been equated to property, the decisions turned upon a statutory provision.

16. Cases of this kind have arisen quite often in the bankruptcy context, where the bankrupt was bound by statute to exercise his general power of appointment over property for the benefit of his creditors as a whole. And the case authorities on receivership seem to go only so far as to allow for appointment over a beneficiary's receipts from a trust – none appears to go so far as to force the exercise of a power of revocation vested in him as settlor, but not as beneficiary.

17. This lack of precedence could not, of course, preclude the equitable jurisdiction to appoint a receiver, if the power of revocation is indeed property of the debtor over which the appointment can be made but, for which purpose, no legal process exists.

18. Mr. McKie (supported by Mr. Meeson QC) also submitted that while it is clear that an option to determine may be regarded as a chose in action (as it is capable of being enforced by legal action), nowhere do the case authorities consider that a power of revocation, indeed any power, is a chose in action, let alone that a power of revocation is in the nature of a contractual option, that it would be "a leap too far" for this Court to so conclude, in the absence of clear statutory provision to that effect.

19. As a further indication of the sheer innovativeness of the application, Mr. McKie also observed that what is really being sought of the Court, is that the Receivers be appointed to exercise the powers duly vested in Mr. Demirel – a form of delegation of his powers – not in actuality, a vesting of any property that he has.

RECEIVERSHIP BY WAY OF EQUITABLE EXECUTION

20. The principles which guide the Courts in making such appointments have very recently been the subject of detailed consideration by the Court of Appeal in England in ***Masri v Consolidated Contractors International Company SAL [2008] 2 Lloyds Rep 128.***

21. The modern jurisdiction is statutory, derived from Section 37(1) of the Supreme Court Act 1981. This provides that the Court may by order grant an injunction or appoint a receiver in all cases in which it appears to the court just and convenient to do so. The jurisdiction conferred on the English High Court by Section 37(1) is also conferred on the Grand Court by virtue of Section 11(1) of the Grand Court Law (2006 Revision). The procedure is prescribed by Grand Court Rules Orders 30, 45 and 51. Order 30 provides generally for the appointment of receivers and Order 45 provides generally for the enforcement of money judgments by the appointment of receivers. Appointments of receiverships by way of equitable execution are guided by the rules of Order 51.

22. This equitable jurisdiction which originated in the Courts of Chancery, became merged into the general jurisdiction of the Court after the Judicature Act of 1873 and has therefore taken the form of statutory expression ever since. The appointment nonetheless remains an equitable form of relief and should only be made in circumstances where the common law is unable to reach the property over which it is "just and convenient" that a receivership should be appointed.

23. An analysis of the nature of the jurisdiction may begin by considering the effect of the receivership order.

24. Receivership by way of equitable execution is summarised in Snell's Equity 31st Ed. by McGhee, para 17-25 as follows:

> "***A judgment creditor normally obtains satisfaction of his judgment by execution at common law, using the writ of fieri facias , attachment of debt and, formerly, in the case of land, the writ of elegit. There were cases, however, where the creditor could not levy execution at law owing to the nature of the property, the principal case being where the property was merely equitable, such as an interest under a trust or an equity of redemption*** [(citing Anglo-Italian Bank v Davis (1878) 9 Ch.D. 275)].
>
> ***Another example was a covenant of indemnity or other chose in action of which the debtor has the benefit, but which could not be reached by attachment*** [(citing Bourne v Colodense Ltd. [1985] 1CR 291 applied in Maclaine Watson & Co. Ltd. v International Tin Council [1989] Ch. 253, both of which dealt with equitable execution of rights to indemnity)].
>
> ***In order to meet this difficulty, the Court of Chancery evolved a process of execution by way of appointing a receiver of the equitable interest, and if necessary supplemented this by an injunction restraining the judgment debtor from disposing of his interest in the property.***
>
> ***This process was not "execution" in the ordinary sense of the word but a form of equitable relief for cases where execution was***

not possible [(citing In Re Sheppard (1889) 43 Ch.D. 131 cf. Re Pope (1886) 17 QBD 743)].

The effect of such an appointment "is that it does not create a charge on the property, but that it operates as an injunction against the judgment debtor receiving the income" [(citing Stevens v Hutchinson [1953] Ch. 299 at 305 per Upjohn J)], ***or dealing with the property to the prejudice of the judgment creditor*** [(citing Re Marquis of Anglesey [1903] 2 Ch. 727)].

The jurisdiction is discretionary, and save in respect of interests in land, will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution [(citing Manchester v Liverpool District Banking Co. Ltd. v Parkinson (1888) 22 QBD 173; Morgan v Hart [1914] 2 KB 183; Maclaine Watson & Co. v International Tin Council (above, [1989 Ch. 253 at 271)].

It is not sufficient that appointing a receiver would be more convenient [(citing Harris v Beauchamp Bros [1894], 1 QB 801)]. ***Although the court's power to appoint receivers is now conferred by statute in general terms, these principles continue to be applied*** [(citing Harris v Beauchamp Bros. above, at p. 810)].

25. Because of the greatly increased scope of statutory powers (eg: for the making of charging orders over beneficial interests in land and for attachment of earnings) the appointment of a receiver by way of equitable execution is said to be rarely

necessary nowadays. See Notes to Rules of the Supreme Court Order 51/1/2 1999 Edition.

26. In the exercise of the modern jurisdiction it is therefore important to understand its original limits. As Lindley LJ explained in ***Holmes v Millage*** ***[1893] 1 QB 551, 555:***

> ***"The only cases of this kind in which Courts of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only....It is an old mistake to suppose that, because there is no effectual remedy at law, there must be one in equity."***

27. This dictum recently received the expressed approval of the English Court of Appeal in ***Masri*** (above) per Lawrence Collins LJ at paragraph 137:

> ***"Section 25(8) of the Judicature Act 1873 (and so also section 37(1) of the Supreme Court Act 1981) did not enlarge the power of the Court to make orders for the appointment of receivers by way of equitable execution. The post-Judicature Act authorities are binding authority for the proposition that, as a result, a receiver by way of equitable execution cannot be appointed over future debts":*** (citing with approval ***Holmes v Millage*** (above) and disapproving of Soinco v Novokuznetsk Aluminum Plant [1998] QB 406 to the contrary effect).

28. Lawrence Collins LJ did go on however, to explain that the jurisdiction is not "ossified" but permits of gradual and incremental improvement, as suggested by

the incremental improvements to the modern, wider and more general injunctive powers themselves. So that, he continued (at para. 184):

> ***"In my judgment*** (addressing the specific issue then before the Court of Appeal) ***there is no reason why in 2008 the court should not exercise a power to appoint a receiver by way of equitable execution over future receipts from a defined asset. There is no longer a rule, if there ever was one, that an order can only be made in relation to property which is presently amenable to legal execution…."***

29. This approach was not inconsistent with settled authority. It was however necessary to distinguish some earlier cases, in particular ***Holmes v Millage*** (above), which specifically precluded appointments, not over all future income, but over a man's future salary.

30. The result was in ***Masri*** an order appointing receivers to receive all amounts due (present or future) to the judgment debtor relating to proceeds of sale of the oil concession which was the subject matter of the dispute.

31. If a ready analogy were to be found within the present case, it would be limited to an appointment over any income, present or future, due to Mr. Demirel as a beneficiary of the Trusts.

32. ***Masri*** is therefore no authority for the first of the two propositions here; that is: that a receivership may be appointed over a power of revocation of a trust so as to bring about its revocation and the revesting of its assets in the settlor, in circumstances where the settlor has evinced no intention to do so himself and further, for the purpose of applying those assets as property of the settlor towards the satisfaction of his judgment debts.

33. If, however, the power of revocation is to be regarded as a chose in action which is unavailable for legal, but which may be available for equitable execution, ***Masri*** is authority for the proposition that the jurisdiction may well extend that far. At para 173:

> ***"To the extent that*** (the earlier) ***cases support a principle that equitable execution is only available in relation to assets which are liable to legal execution, they are undermined by the second group of authorities, including Bourne v Colodense ([1985] 1CR 291) which is binding on this court, and which establish that a receiver may be appointed in respect of a claim to an indemnity and that consequently the jurisdiction is not limited to choses in action which are available for legal execution."***

34. ***Bourne v Colodense*** dealt with a union member's right to be indemnified by his union against the costs of legal proceedings and the right of the successful opposing party to recover those costs against his union by reliance on the member's indemnity – a chose in action – by the appointment of a receivership by way of equitable execution over it.

35. This is the premise of TMSF's further argument here – that the power of revocation is in the nature of property, specifically a chose in action, over which a receivership by way of equitable execution may and should be appointed.

THE NATURE OF THE POWER OF REVOCATION

36. The distinction between a power and property is fundamental and is a longstanding proposition at common law. As Fry LJ stated in ***Re Armstrong; Ex Parte Gilchrist*** ***(1886) 17 Q.B.D 521, at 531-532:***

"No two ideas can well be more distinct the one from the other than those of "property" and "power....A "power" is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his "property" than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are "they property".

In one sense, no doubt, they may be called the "property" of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not "property" within the meaning of that word as used in law....

...when the equitable doctrine of trusts was reconstituted after the passing of the Statute of Uses [(1535 27 Hen. 8. C.10)], the Courts of Equity recognised the capacity of certain persons to declare trusts by deed or will, and thus to mould or modify the existing trusts of property. This capacity, however, was only a power to do something; it might result in property, but it was not property at all. These are powers of the same kind as that with which we are now dealing – powers to modify either existing legal uses or existing equitable trusts. I repeat that such powers

are no more property than a power to do any act which an individual may do."

37. On this analysis (and further analysis of the doctrines applicable to a married woman's estate) Fry LJ concluded (in keeping with Bowen LJ and Esher MR) that separate property of the married woman in the case before the Court of Appeal did not include – in the context of the Married Women's Property Act 1882 – a general power of appointment by deed or will of which she was the donee but which she had not exercised. Thus, she could not be compelled, as an adjudged bankrupt, to execute a deed exercising such a power in favour of her trustee in bankruptcy and in defeasance of the vested interest of her son as remainderman in default of the exercise of her power of appointment.

38. This conclusion was reached notwithstanding that the Bankruptcy Act 1883 (as did earlier Bankruptcy Acts) contained a definition of "property" as including "powers of appointment which a bankrupt could exercise for his own benefit." Thus the case turned upon the different meaning of "property" to be ascribed to the Married Women's Property Act 1882, which contained no such special definition.

39. Nothing in the case law since then can be regarded as conclusive authority for the proposition that, absent such specific statutory definition, general powers (whether of appointment or revocation) are tantamount to property. This is although it must be recognised that commentary in at least one long-standing and authoritative text book - Sugden on Powers 8th Edition 1861 at p 394 – is to the effect that where the donee of a truly general power can appoint the subject matter

of the power to himself, he has "an absolute disposing power" over the subject-matter property; and consequently, the law regards the donee as the effective owner of that property, such that no failure to exercise the power of appointment can be regarded as having avoided the power for being in breach of the rules against perpetuity. In that sense, Sugden comments (at page 396) that *"to take a distinction between a general power and a limitation in fee* [(an estate in fee simple absolute)], *'is to grasp at a shadow whilst the substance escapes'"*.

40. That the writer of the text may have meant to equate a general power of appointment to property only for the specific purposes of the instant discussion on the rule against perpetuity in relation to estates in land, may be borne out by the following earlier passages from the text:

> "Powers before the statute [(the Statute of Uses 1535)] were,...mere directions to the trustee of the legal estate how to convey the estate; in truth they were *future* uses to be designated by the person to whom the power was given...(at para 27 p 17).
>
> ...Powers after the statute [(of Uses)] still remained as mere rights of designation which bound the conscience of the trustee, and the estates to be created by force of them were still clearly *future or contingent uses.* But when a power was executed, as the person in whose favour the appointment was made became vested with the use, he instantly gained the legal estate by force of the statu*te."(at para 28 p 18)*

41. This discussion on the effect of the Statute of Uses upon estates in land deeming them to be legally vested once a power of appointment was exercised in favour of the appointee, is of course, still entirely consistent with the modern trust concept by which trust property remains vested in the trust until a valid and effective appointment out from the trust is made. The use was, it is to be remembered, the precursor to the modern trust and the primary purpose of the Statute of Uses was to render uses in land legal estates in order to make them liable to feudal dues.

(see The Law of Real Property, Megarry and Wade 1st Edition 1957 Stevens & Sons, London pp 150 – 167).

42. Both before and after the Statute of Uses, Sugden explains in the foregoing passages that powers were not to be equated to property – they were and remained "mere rights of designation".

43. This distinction between "power" and "property" is even more clearly recognised at pp 186-187 of the Sugden text by the cases cited and discussed there.

44. Nothing from these passages in Sugden serves as authority for a proposition that property held upon a valid trust may be regarded as one and the same as general power of appointment over that property – let alone a power of revocation – and by which it might be appointed away from the trust against the will of the donee of the power.

45. The trust cases in which the Courts have disregarded the settled common law distinction between power and property appear to have been cases in which statute defined property as including unexercised general powers of appointment.

46. The two leading modern cases in this area are ***Clarkson v Clarkson and Others [1994] BCC 921 (C.A.)*** in the bankruptcy context and ***Melville v Inland Revenue Commissioners [2001] EWCA Civ. 1247,*** in the taxation context.

47. In ***Clarkson v Clarkson and Others,*** even while concluding that the power of appointment there over the proceeds of an insurance policy which had been settled on trust did not come within its meaning; Hoffman LJ declared that section 283(4) of the Insolvency Act 1986 extends the meaning of property, for the purposes of determining what constitutes a bankrupt's estate, to include assets which are the subject of a general power of appointment.

48. He so concluded by reference to what he regarded as the plain words of the statute (at p 931 letter B).

49. In so doing he was understandably critical of the earlier conclusion reached in ***Re Matthieson*** ***[1927] 1 Ch. 283*** by the Court of Appeal, that the assets subject to a bankrupt's general power of appointment under a trust did not form part of his property for the purposes of sections 38 and 42 of the Bankruptcy Act 1914 despite the apparent meaning in section 38(2)(b) to the contrary. At page 931A Lord Justice Hoffman harkened to Sugden's syllogism (at p 396, above) when he said:

> ***"I think that even at the time this was quite a remarkable decision. Lord St. Leonards in his book Powers (8th Ed., 1861):*** (that is: Sugden on Powers (above)) ***said:***
>
> > *"To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes."*

50. That observation of Hoffman LJ is relied upon by Mr. Moverly-Smith QC as authority for the proposition that the modern view is that a general power is to be equated with property. I do not consider that Hoffman LJ could have meant so wide a proposition given the narrower context of the bankruptcy legislation with which he was dealing. Any such wider connotation, even if intended, would properly be regarded only as obiter dictum.

51. In ***Melville v Inland Revenue*** (above) the question was whether a general power of appointment exercisable by the settlor over property comprised within a trust settlement was "property" within the meaning of section 272 of the Inheritance

Tax Act 1984. If so, the power would be taken into account, on the death of the settlor, as part of his estate for inheritance tax purposes.

52. The Revenue's opposing argument was that the value for tax purposes of assets transferred *inter vivos* by the settlor to the trusts, was to be calculated undiminished by any value to be ascribed to the power as property, said to have been retained by the settlor and argued on his behalf as going to form part of his estate.

53. The matter was resolved by reference to the specific statutory meaning of "property" as including "powers" given in the legislation.

54. In his judgment delivered on behalf of the Court of Appeal, Peter Gibson LJ explains the significance of the statutory definition in these terms: (at para H page 411):

> ***"Finally I must refer to section 272. This extends the ordinary meaning of "property" by an inclusive definition, providing (so far as is relevant): "In this Act, except where the context or otherwise requires... "property" includes rights and interests of any description....".*** (Emphasis supplied)

55. And at p412 G-H, in approval of the reasoning of the learned judge below (Lightman J); in these terms:

> ***"The judge commenced his consideration of the arguments by looking at the meaning of the terms "property", "rights" and "interests" and the authorities relating thereto. It is unnecessary for me to rehearse the judge's review of the authorities because the judge's conclusion on this point is not challenged.***

The Judge said [2000] STC 628, 634 para 13:

> *"In summary, whatever the technical meaning of the word "property", it seems to me that the terms 'property, "interest" and "right" are capable of embracing a general power of appointment <u>depending on the legislative context,</u> for they are terms capable (as is such a general power) of embracing anything which is capable of producing value, being realised and turned into money, and a general power is capable of exactly this: it may be exercised to vest property in the appointer and it may be released for valuable consideration. <u>Whether the words do bear this meaning in section 3(1) of the 1984 Act must depend upon the legislative scheme and purpose of the 1984 Act."</u>*
>
> (emphases supplied)

56. It will be plain from the foregoing that, as in the case of <u>***Clarkson***</u> (above), in <u>***Melville v Inland Revenue***</u> the treatment of a power as being the same as property was an extended meaning – contrary to the common law as reviewed in <u>***Ex Parte Gilchrist; In re Armstrong***</u> (above) – and permissible only as a matter of the statute.

57. This general proposition – that a power will be equated to property for tax purposes only where statute so declares – was recognised by the Judicial Committee of the Privy Council more than a century ago: <u>***Commissioner of***</u>

Stamp Duties v Stephen [1904] A.C. 137. In the judgment of their Lordships delivered by Lord Lindley the proposition is clearly stated (at p 140):

> ***"The distinction between a person's own property and property which is not his own, but which he can dispose of by will in any way he pleases by virtue of a power conferred upon him, is well established. Such last-mentioned property is not his own in any proper sense; and even if he executes the power by his will, no probate duty is payable upon that property unless such duty is made payable by a statute so worded as clearly to comprehend it. A statute imposing duty on a testator's property generally is not sufficient for this purpose."***

58. While Lord Lindley goes on to recognise and explain the difference between a general power of appointment (one to be exercised in the unfettered discretion of the donee of the power) and a special power (to be exercised by the donee only for the benefit of the person or class of persons specified) his judgment, which decided the question as it related to a special power, affirmed the general proposition in declaring that stamp duty was not payable in respect of property appointed under either power in the absence of clear words in the statute imposing the duty."

59. Other instances of the extended statutory meaning of "property" are to be found in Cayman Islands legislation.

60. Section 2 of the Bankruptcy Law (1999 Revision) defines "property" in terms substantially the same as section 436 of the Insolvency Act 1986 (UK):

> *"Property" includes money, goods, things in action, land and every description of property real or personal, also obligations,*

easements and every description of estate, interest and profit present or future, vested or contingent, arising out of or incident to property as above defined."

61. This is the same meaning given to the term "property" by section 3 of the Interpretation Law (1995 Revision).

62. Importantly, even while this definition includes (in both statutes) "things in action", it is arguable that the Bankruptcy Law does not regard this definition as including powers. This is apparent from the necessary further extension of the meaning of "property" given in section 100 (similar to section 283 (4) of the U.K. Insolvency Act 1986) in these terms:

> *"The property of the debtor divisible amongst his creditors and vesting in the Trustee (and in this Law referred to as the property of the debtor) shall comprise –*
>
> *(a)* [(all property as defined in section 2 as vested in the debtor upon the declaration of provisional bankruptcy and so vested also in the Trustee-in-Bankruptcy under section 37)];
>
> *(b) the capacity to exercise and to take proceedings for exercising all such <u>powers in or over or in respect of property</u> as might have been exercised by the debtor for his own benefit at the commencement of the bankruptcy, or at any time previous to his discharge;"(emphasis added).*

63. Thus while "property" of a bankrupt at the stage of provisional bankruptcy for the purposes of sections 2 and 37 does not included "powers in or over or in respect of property", for the purposes of the ultimate distribution of the property of a bankrupt to his creditors and for the vesting in his trustee-in-bankruptcy for purposes under section 100, such powers are included.

64. So too under the Wills Law (2004 Revision) section 22 (the equivalent of the Wills Act 1837 (UK), section 27), it was deemed necessary to provide that the

property of a testator shall extend to property over which he may have a general power of appointment, in order to ensure that such property would be caught by a general devise or bequest in his will.

65. No such provision exists in relation to property which may be made the subject of a general power of revocation of a trust. One might expect to find such a provision in the Wills Law, if such an unexercised general power of revocation were capable of conveying property by general devise or bequest as part of the estate of a testator. Despite its development over hundreds of years, such a concept appears not to have emerged as part of the law of succession. This is also despite section 37 of the 1837 Act (section 22 of the local Law) providing that a general devise of a testator of real estate which a testator may have power to appoint "in any manner he may think proper" shall be construed as being the testator's property. On the contrary, it appears that powers of revocation are not within the meaning of property under the Wills Law. There is judicial pronouncement to this effect: In ***Re Brace, Welch v Colt** [1891] 2 Ch. 671;* it was held that a general devise or bequest in a will did not operate as an exercise of a power vested in a testator to revoke existing trusts and appoint other trusts, except, it seems, where the gift would otherwise be inoperative; as in that latter event, the general power to appoint would then be restored upon the revocation of the inoperative gift.

66. In this case North J relied upon, among other cases, the earlier dictum of Romilly MR in ***Palmer v Newell** [1855] 20 Beav. 32 at 38* that:

> ***"...although a will does, by virtue of the statute, operate as a general exercise of all powers of appointment, yet it does not***

operate as an exercise of a power of revoking a previous instrument" (citing the still earlier case of Pomfret v Perring [1854] 5 D.M.& G 775)."

67. See also, for a general discussion on the meaning of "property" under the Wills Law, and to the same effect on this point, Williams on Wills 8th Ed (2002), Chapter 29.

68. For the purposes of the transfer of a company's property upon amalgamation (merger), or reconstruction under section 87 of the Companies Law (2007 Revision), the definition of "property" is expressed to "include property, rights and powers of every description" (the same definition appears for those purposes in section 427 of the English Companies Act 1985 and its predecessors).

69. No definition of "property" is otherwise generally given for the purposes of the Companies Law, leaving that general meaning to be derived, by way of construction, from the definition in the Interpretation Law (see above). As Mr. McKie asked forensically, if that latter definition in the Interpretation Law which includes "things in action" were meant to include "powers", why then the need for the more specialized definition expressed in section 87 of the Companies Law?

70. This is a persuasive point, as the Legislature, absent the specialized definition given in section 87, would be taken to intend that the definition given in the Interpretations Law shall apply: see section 3(1) of the Interpretation Law (1995 Revision).

71. The lesson from the foregoing exercise, undertaken as a comparison of the statutory provisions against the background of the history of the common law, is

simple and compelling: in light of the well established common law rule that distinguishes powers from property, where the law intends to equate them, it has been necessary to create express statutory exceptions to the common law rule.

72. No such express exceptional reference to "powers" appears in the definition of "property" in the Trusts Law (2007 Revision), which is a comprehensive, though not exclusive, code for the governance of Cayman Islands trusts. There, in section 2, "property" includes "real and personal property, and any estate, share and interest in any property, real or personal, and any debt, thing in action and other right or interest, whether in possession or not."

THE MECHANICS OF EXECUTION

73. As we have seen, the appointment of a receiver by way of equitable jurisdiction has no proprietary effect, operating instead by way of injunction to restrain the judgment debtor from receiving any part of the property which it covers, if that property is not already in his possession. Thus, the order acts *in personam* against the judgment debtor: (see ***Masri*** above at para 51 page 137 and the excerpt from ***Snell's Equity*** (above)).

74. In order to bring about the vesting of the trust property in the receivers whose appointment is sought, what the plaintiff proposes therefore, is that Mr. Demirel be directed by the Court to exercise the power of revocation while being restrained from obtaining the assets which would come back to him by way of the resulting trust.

75. If he refused, as one might anticipate he would, then the Court, through a designated officer (here the Clerk of Court), would exercise the power on his behalf, pursuant to Grand Court Rules Order 45 Rule 8.

76. What is in effect proposed therefore, is that the power be ordered by the Court to be *delegated* by Mr. Demirel so that it can be exercised to give effect to the receivership. It is not proposed that the receivership be actually appointed over the power of revocation itself (although that was earlier suggested at para 19 of TMSF's outline submissions).

77. Such a proposed delegation gives rise to further concerns about the Court's jurisdiction, as the case law advises that a personal power such as this may not be delegated – whether by mandate of the Court or otherwise – without the consent of the holder of the power.

78. In ***Re Triffitt's Settlement*** ***[1958] Ch. 852*** the central question was whether the donee of the discretionary power of appointment (called in the case, a "hybrid power" – in one sense general, and in another a special power) could delegate the exercise of that power to the trustees of a settlement upon which the donee had in turn settled certain shares derived, along with her hybrid power to appointment, from an earlier marriage settlement. At page 861 Upjohn J (as he then was) said:

> ***"I have to consider whether there is a power in the Plaintiff to delegate the exercise of discretionary powers to others. In my judgment, that is essentially a question of construction of the marriage settlement. The donee of the power can delegate the exercise of discretionary powers to others in two cases: First, where there is a completely general power in its widest sense, that is tantamount to ownership, and, therefore, the donee of the power can exercise it in whatever way he pleases. That is not this case for reasons which I have already mentioned….***

Secondly, the donee may delegate discretionary powers where, as a matter of construction, some power can be spelt out enabling the donee of the power to delegate his discretion....

In all other cases the principle *"delegatus non potest delegare"* ***applies."***

79. There is no express power given to Mr. Demirel in either deed of settlement which enables him to delegate the powers of revocation. The powers, not being, in my view on the foregoing analysis, "tantamount to ownership", do not imply the right (per Upjohn J.) to delegate the power of revocation.

80. I am driven to conclude then that the power of revocation falls into neither of the categories identified by Upjohn J. in ***Re Triffitt's Settlement*** (above).

81. In the absence of statutory provision allowing the Court to assume a personal power of revocation and to exercise it for the donee by vesting it in someone else, it follows that TMSF's proposed mechanics for bringing about the revocation of the Trusts are impermissible. No such power appears in the Trusts Law (2007 Revision) although, by sections 50-57, the Court is able to make vesting orders in respect of trust property in a number of defined circumstances, including the appointment of someone (apart from the trustee in whom particular property has been vested in trust) to give effect to a transfer of property pursuant to such a vesting order.

82. To be clear, I would regard the outcome to be the same here, whether the proposed exercise is viewed as an assumption by the Court of the power or as a mandate of Mr. Demirel to delegate the power, so that it may be exercised in his stead.

83. The foregoing analysis brings me full circle to where I began – to the acknowledged unprecedentedness of the jurisdiction which it is proposed I should exercise.

84. In their final written submissions, the proposition is put quite frankly on behalf of TMSF in these terms by Mr. Moverly-Smith QC and Mr. Christopher Russell: *"We would respectfully remind the Court of the principles which now apply in relation to such an appointment (of a receivership) summarised in the judgment of Collins LJ in* ***Masri*** *(above).... There are no absolute boundaries to the jurisdiction, which is in a state of development and extension. Its aim is to enable a judgment creditor to obtain execution over a right or interest of the judgment debtor which cannot be conveniently reached by any other means of execution. The absolute entitlement of a judgment debtor, exercisable at any time, for any reason or for no reason, to have transferred to him the entirety of a fund, provides a paradigm example of such a right."*

85. This is, of course, an appealing argument, particularly when one is inviting the exercise of an equitable jurisdiction in aid of a worthy judgment creditor. But even a Court of Equity must be astute to recognise the appropriate bounds of its own jurisdiction. This is advice also given by Collins LJ in ***Masri*** (above, at para 178-180).

86. Construing a power of revocation of a trust so as to treat it as property of the holder tantamount to ownership of the trust assets for the purposes of enabling the exercise of the jurisdiction, would not involve simply the kind of incremental refinement and improvement of the jurisdiction contemplated by ***Masri*** (above, at para 181-184). Such a proposition would involve nothing less than the setting

aside of the settled common law principles which have distinguished powers from the property they affect, for hundreds of years. As we see from Sugden (loc. cit. pp 186-187) this has been so, (except for the purpose of the exercise of the Sovereign power of forfeiture or bankruptcy legislation), at least since Elizabethan times. Consistently up through to early Victorian times, we see that Lord Eldon did not regard his Court as having the power, in the perceived absence of enabling legislation, to compel a bankrupt to execute a general power of appointment over trust property in favour of his creditors: ***Thorpe v Goodall, [1811] 17 VES 388, 460; 1 Rose, 40*** – cited at Sugden (loc. Cit. p 187). That conclusion was hardly surprising: the ability of the beneficial owner of a legal estate to separate the equitable from the legal interest so that the legal owner became a mere trustee for the equitable owner was by then well established as one of the fundamentals of English law: ***Abbott v Burton (1708) 11 Mod. 181 at 182; Chablis 385*** and discussed in Megarry and Wade (loc. cit, p 148).

87. The fundamental distinction between power and property is still fully recognised by the modern text book writers: see Thomas on Powers, 1st Edition 1998 (Sweet & Maxwell) p 2.

88. An extension of the jurisdiction in the manner proposed here must therefore be recognised for the far-reaching implications of policy that it carries. Such an extension would strike at the very heart of the trust concept. A ready example apart from this case will suffice to illustrate: a settlor creates a settlement for the maintenance of an incapacitated child by which capital or income can be appointed for his benefit, but with a power of revocation reserved to the settlor with the firm but unexpressed intention, that it be exercised only if the child

predeceases the settlor. Unfortunately, however, during the lifetime of the child, the settlor becomes the subject of a judgment debt which cannot be satisfied without recourse to the trust assets, although the settlement of the trust had in no way diminished the settlor's assets which should be available to creditors.

89. If TMSF is correct in its present arguments, the Court's jurisdiction would extend to enable the defeasance, not only of trusts such as those settled by Mr. Demirel here, but also such as that exemplified. While the circumstances differ, the principles would be the same.

90. I consider that any such far-reaching interpretation of the jurisdiction should be effected only by way of legislation. There is here no ready analogy with a case involving a typical chose in action such as in ***Masri*** itself (above, rights under an oil concession) or ***Bourne v Colodense Ltd.*** (above) (right to claim under an indemnity). Here, the trust concept itself is implicated and intervenes and, as already noted, it is not contended before me that these Trusts should be regarded as anything but valid and duly constituted trusts.

91. If indeed it is to be shown that they contain the proceeds of fraud, there is other well-established recourse available at law. This consideration by itself is another factor advising against the equitable relief prayed for here: Snell's Equity and ***Masri*** (above).

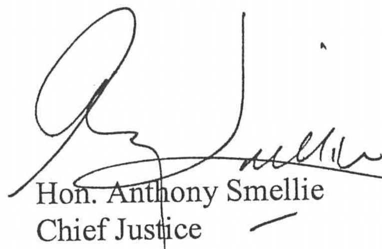
92. I am compelled to the conclusion that the jurisdiction does not permit the appointment of receivers in these circumstances.

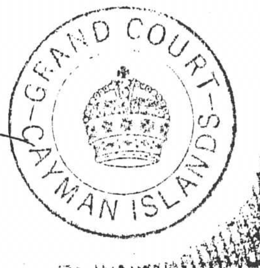
93. For what it may be worth, I will note, however, in conclusion as follows. The relief sought here against Mr. Demirel is *in personam* by way of enforcing the Turkish judgment against him. I would therefore be prepared to grant relief by

way of equitable execution by the appointment of a receivership over any income or capital that may in future be appointed out to him or for his benefit or his disposition, from the Trusts. (See ***Masri*** (above) at para 184 in support of the proposition that equitable execution can be granted over future receipts).

94. Similarly, were Mr. Demirel at some time in the future to exercise his personal power of revocation, the assets which would revert to him by way of resulting trusts would become amenable to receivership and I am prepared to so declare.

95. The application, as presently framed, is refused.





Hon. Anthony Smellie
Chief Justice

June 26 2009