10.4.2000

GRAND COURT CAYMAN ISLANDS

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE No. 459 of 1996

Felicia
Relevant
Judgment
Binder.
Thanks
Stan
27/5.

IN THE MATTER of The Corduroy Trust, originally constituted by a Trust Agreement Dated 14th September 1989 made between Tony Djeddah and the Bank of N.T. Butterfield & Son (Cayman) Limited.

AND IN THE MATTER of the Trusts Law (1996) Revision

BETWEEN: ISABELLE AL-IBRAHEEM [nee Djeddah] (by herself and representing her heirs and the heirs of Marilyn Peters and Rachelle Blume and representing the persons who would be entitled to the estate of the Second Defendant if he died intestate, unmarried and resident in and a citizen of the Republic of Mexico) — PLAINTIFF

AND:

(1) BANK OF BUTTERFIELD INTERNATIONA (CAYMAN) LIMITED

(2) TONY DJEDDAH (by his Guardian ad litem, Howard M. Reiner)

(3) STEVEN BARRIE (representing the heirs of Wolfgang Erbstoesser)

— DEFENDANTS

LEGAL DEPARTMENT
CAYMAN ISLANDS GOVERNMENT
APR 18 2000
FILE -
COUNSEL-

Appearances:
Mr. Lawrence Cohen Q.C. and Mr.William Helfrecht of Boxalls & Co for the plaintiff.
Mr. Kenneth Farrow of Quin & Hampson for the Trustee.
Miss Sara Collins of Walkers for the Guardian ad litem.

RULING

These proceedings were instituted by the plaintiff in Autumn 1996. She is one of four daughters of the 2nd defendant who is the settlor of the Corduroy Trust.

From the inception of these proceedings the plaintiff alleged that her father had become mentally incapacitated some years before and that the trustee should no longer be making distributions of income or capital directly to him as he could no longer manage his affairs. She sought an administration order, inviting the Court to inquire into the validity of the Second Amendment to the Trust Deed and distributions made under it. The Second Amendment was made by the settlor also at a time after she claimed he had lost capacity.

From the outset the trustee, even while acknowledging that as a beneficiary of the trust the plaintiff had the right to bring these proceedings, resisted her allegations, challenging the form of her pleadings and her lack of direct evidence of the incapacity of the settlor. The troubling issue presented now arises from evidence which suggests that the trustee and its legal advisors were on notice that the settlor had indeed become incapacitated for some time prior to the institution of these proceedings.

Before me now is a summons by the trustee and a summons by the guardian ad litem of the settlor.

The summonses seek directions from the Court in what can only be described as the sad aftermath of the determination by the Court of the invalidity of the second amendment and of the now manifestly apparent and incontestible incapacity of the settlor.

These are issues which have consumed the very life blood of the Trust fund.

The Second Amendment purported to change beneficial entitlements under the Trust by removing the settlor's four daughters as contingent beneficiaries upon his death and replacing them with a lady who underwent a ceremony of marriage with the settlor, Mrs. Luz Djeddah. A further provision of the Second Amendment purported to allow the four daughters to elect the payment of the sum of one-half million dollars each from the Trust Fund. This election, presented in the nature of an ultimatum by the second amendment, was made by three of the daughters, and payment actually obtained by two of them. The plaintiff, financially better placed to resist the ultimatum, refused. She insisted from the outset that the second amendment was invalid because it was procured while the settlor was incapacitated and by the undue influence of Luz Djeddah.

When, after more than two years into these proceedings, the trustee was ordered to give inspection of its files to the plaintiff and to the guardian ad litem by then appointed for Mr. Djeddah; it was discovered by counsel for the guardian that a duly notarised copy of the Second Amendment could not be found and, in enquiries being made of the trustee, it

transpired that there was none. It became apparent that without such notarisation, the Second Amendment had never taken effect. In order to try to perfect the Second Amendment, the trustee on the advice of its lawyers released it to a Mr. Chatsky, the Texan lawyer of the settlor who had originally delivered it to them. This was done for the purpose of attaining its notarisation. This was a regrettable step taken by the trustee in light of what transpired, not least because in so doing they, in effect, sought to prefer the interests of Luz Djeddah over those of the four daughters who were the ones who properly remained beneficially entitled under the trust.

Mr. Chatsky obtained the notarisation of the Second Amendment more than three years after the event, in March 1999, and ultimately to no avail.

The question of the effect of the notarisation of the Second Amendment was tried by Murphy J. in October 1999. All agreed that the notarisation obtained in March 1999 had no retrospective effect, that the original execution of the Second Amendment in July 1996 was invalid and therefore could not be cured retrospectively by the attempt in March 1999. Murphy J. determined the only remaining issue – whether the defective lack of notarisation was cured in March 1999 as of that date – in the negative.

There has been no appeal against his decision.

The costs to the Trust of the determination of the notarisation issue alone ran to hundreds of thousands of dollars. These are costs which would plainly have been avoided but for

the ill-advised attempt in March 1999 to effect notarisation to validate the Second Amendment.

Moreover, the three years of litigation costs consumed up until then in respect of the incapacity issue and some questionable distributions made under the Second Amendment, could have been avoided had the effect of the lack of notarisation been sooner recognised. The overall costs have been enormous and taken with distributions of capital from the trust fund, devastating.

There are several issues arising on the summonses before me now in respect of some of which the directions to be given will be agreed.

There are, however, some which are unavoidably contentious and in respect of which I must decide.

Costs

In the order of presentation, I treat with this issue under two heads:

(i) the plaintiff's costs

(ii) other parties' costs

It has been properly conceded that the plaintiff should be entitled to her costs on the indemnity basis from the Trust fund as her institution of these proceedings by way of originating summons, was intended for the benefit of the Trust and its beneficiaries as a whole, was not hostile proceedings against the Trust or the trustee and the proceedings have been conducted throughout and by order of the Court, in the nature of administration proceedings.

I am satisfied that the costs should be regarded as falling within the second limit of the principles enunciated by Kekewich J. in In re Buckton [1907] 406 and adopted in the subsequent cases:

> "There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the applications is made, not by trustees (who are respondents) but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course had been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole."

I have already described the nature of these proceedings instituted by the plaintiff as requiring them to be regarded as administration proceedings. Although they were not instituted "because for some reason or other a different course had been deemed more convenient" as between the plaintiff and the trustee, the trustee never objected to the form of the proceedings, participated in them throughout as being in the nature of administration proceedings and, when in December 1997 the plaintiff sought to transform them into contentious proceedings by way of points of claim against the trustee for

breach of trust; successfully objected to that course of action arguing that the proceedings were, indeed, administration proceedings and could not be so transformed. (See written ruling delivered on 12 December 1997 in this Cause).

The plaintiff's costs as a liability of the trust fund, stand to be recovered as a priority over beneficial entitlements.

Subject to taxation, they have been stated to be over $800,000 - well in excess of the present remaining value of the trust fund which now stands at only $691,000. This value precariously close, even without the liability for costs factored in, to being insufficient to meet the ongoing living expenses of the settlor, the primary beneficiary.

In fact, treating the claim for costs of the plaintiff and the other parties including the guardian ad litem as proven and to be paid now, would result in the trust fund having to be regarded as insolvent.

The plaintiff, in the interest of securing her father's the settlor's welfare, has offered an undertaking to set aside sufficient to meet his needs for two years i.e.: $456,000 - if the entirety of the trust fund is paid over to her to meet her costs, which would still leave her with a substantial deficit.

The guardian ad litem for the obvious reason that no other course would assure his ward of such a fixed sum, supports that proposal.

The trustee, on the other hand, is unable to do so for the equally obvious reason that as the liabilities exceed the fund that would be a preference of the plaintiff's costs over other

liabilities including its own costs and expenses;. Thus the present situation would require that all parties costs go to taxation and be paid rateably.

Attractive though I found the plaintiff's proposal to be, I must be guided by the clear principle behind the trustee's concerns.

The Order I make now is an interim order that $235,000 be paid out to the plaintiff immediately, against the liability for her costs which the Trust fund has acquired. The balance of her claim for costs is to be taxed on the indemnity basis, as it will not be agreed. The balance of $450,000 remaining in the fund is to be kept intact until further Order of the Court, save that the trustee shall continue to pay the monthly distributions of $19,000 to the guardian ad litem required for the settlor's medical and living expenses.

As to the costs of the trustee and the guardian ad litem the other principal liabilities of the Trust, I reserve my order until the outcome of the further enquiries to be directed as follows.

Enquiries into the Trustee's costs

I regard the previous Orders made in these proceedings for costs of the trustee on the indemnity basis as subject to review by the Court in the exercise of its domestic administrative jurisdiction in these proceedings.

There is now clearly before me an issue whether these costs were "reasonably and properly" incurred. These were the words which conditioned the order for Costs on the indemnity basis which was primarily made in these proceedings on 10 October 1996.

There is ample authority that a trustee may not recover costs based on the Courts pre-emptive order unless they are reasonably and properly incurred and that the Court remains seized of the power to review the question of how costs are incurred. The early dictum of Jessel M.R. in Turner v. Hancock (1882) 20 Ch D 303 at 305 that trustees have the right to secure out of the trust fund "all their proper costs incident to the execution of the trusts' has been applied and explained in later cases.

In Holding and Management Ltd. v. Property Holding and Investment Trust plc and others [1995] - the English Court of Appeal applied the dictum and went further to express the view that the same conditions of reasonableness and propriety are to be implied into the provision of a trust deed which expressly gives the trustee the indemnity for its costs.

At least in one case (Birks v. Micklethwait (1864) 34 LJ Ch 362) cautionary words have been expressed that to deprive a trustee of his costs is "a violent exercise of the courts discretion." Although uttered in an era when trustees often acted gratuitously for the sake only of their cestuis que trust – a service to be encouraged in the public interest – here I take the same approach as necessary in recognition also of the modern relationship between a professional trustee who cannot be expected to undertake the onerous responsibilities of office without the assurance of having the costs of litigation properly incurred being indemnified from the trust fund.

I intend to direct, upon reasonable notice to the trustee an enquiry into the allegations of costs improperly and unreasonably incurred. The notice will contain particulars in that regard.

This process will include an enquiry into whether the Trustee might properly rely upon the indemnity given in Article 7 of the Deed of Settlement as a basis, apart from the earlier Orders of this Court, for recovering its costs from the Trust Fund.

Enquiry into the costs of Maples and Calder

I also direct, of my own motion, an enquiry into whether there has been a failure on the part of Maples and Calder (the former legal advisors and representatives of the trustee); to fulfill their duty to this Court in the conduct of these proceedings in such manner as to result in the improper delay of the disposal of the issue of the incapacity of the settlor, of the issue of the invalid notarisation of the Second Amendment and in unnecessary expense and costs thrown away.

In this regard the directions I give are based upon the jurisdiction of the courts authoritatively pronounced in Myers v Elman [1940] A.C. 282. The most often cited dicta from this case comes from the speech of Lord Wright (at pp. 318 – 319):

> "…. Alongside the jurisdiction to strike off the Roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had been guilty of professional misconduct (as it is generally called) not,

however, of so serious a character as to justify striking him off the Roll or suspending him. This was a summary jurisdiction exercised by the Court which had tried the case in the course of which the misconduct was committed....

It was a summary jurisdiction, in which the intervention of the judge was involved at the conclusion of the case either by motion in the Chancery court or by a motion or application for a rule in the Courts of Common Law. Though the proceedings were penal, no stereotyped forms were followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the solicitor has full and sufficient notice of what is the complaint made against him and full and sufficient opportunity by answering it .... The summary jurisdiction this involves a discretion both as to procedure and as to substantive relief, though there was and is an appeal.

The cases of the exercise of this jurisdiction to be found in the reports are numerous and show how the Courts were guided by their opinion as to the character of the conduct complained of. The underlying principle is that the Court has a right and a duty to supervise this conduct of its solicitors, and visit with penalties any conduct of a solicitor which if of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by Abinger C.B. in Stephens v. Hill [(1842) 10 M & W 28]. The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere

mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy may suffice.

It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfill his duty to the Court and to realize his duty to aid in promoting in his own sphere the course of justice. This summary procedure may often be involved to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in this action."

I think that at this stage I should only further indicate that in keeping with those principles I decided that the summary procedure should be adopted given the precarious position of the Trust fund and in order to avoid the costly exercise which would be involved in requiring the plaintiff, the trustee or the guardian ad litem, to institute different recovery proceedings such as the evidence would, prima facie, suggest would be appropriate.

The grounds of the alleged failure to fulfill the proper duties of an attorney in these respects will also be particularised in a notice to be given for the enquiry to be taken.

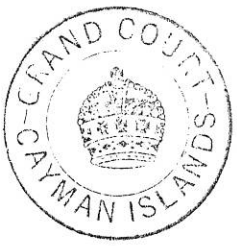
Equitable Relief

I am satisfied that the person most likely to wish to bring a claim for equitable relief, is Mrs. Luz Djeddah, the putative wife of the settlor. She has actual notice of the decision of this Court on the invalidity of the Second Amendment for want of notarisation and of the present stage of the proceedings. The outcome is that she was never entitled as a beneficiary under the Trust. Large sums of capital and income paid to her for the benefit of the settlor have nonetheless been applied to her benefit and to the benefit of her son, Wolfgang Erbstoesser. She has made no offer to restore these sums to the Trust and has been sued in Texas by the Guardian for recovery. Contrary to any intention to restore to the Trust she has indicated by letter an intention to make an application to this Court for equitable relief.

That application is only to be entertained if the settlor had capacity to marry her at the time of the putative ceremony of marriage.

From all the evidence now available, that seems likely to be a real issue and a major obstacle she would have to overcome before equitable relief could be considered or granted.

In all the circumstances, I make no directions as regards any application she may wish to bring for equitable relief, leaving it to her to decide what steps she wishes to take in that regard.



Anthony Smellie
CHIEF JUSTICE

DATED THE 10TH DAY OF APRIL 2000.