Original CJ file

8.11.95

Doc#517

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 296/94

IN THE MATTER OF a MEMORANDUM of Agreement dated 20th July 1976 (known as the Continental Foundation)

AND IN THE MATTER of a Memorandum of Agreement dated 7th October 1982 (known as the Aall foundation)

AND IN THE MATTER of the Trust law (Revised)

BETWEEN:

(1) BRIDGE TRUST CO. LTD
(2) ROBERT N. SLATTER — Plaintiffs

AND:

(1) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS — First Defendant

(2) EVEN WAHR-HANSEN — Second Defendant

(3) COMPASS TRUST CO. LTD — Third Defendant

(4) TRANSWORLD TRUSTCOMPANY — Fourth Defendant

(5) AALL TRUST & BAKING CORPORATION LTD AND OTHERS — Fifth to Seventy-third Defendants

BEFORE HARRE CJ.

For the plaintiffs: Mr. Terence Etherton Q.C. and Mr. Angus Foster
For the first defendant: Mr. Michael Hart Q.C. and Mr. William Helfrecht
For the second defendant: Mr. John Martin Q.C., Mr. Graham Ritchie and Mr. Alden McLaughlin
For the third defendant: Mr. Alan Boyle Q.C. Mr. Nicholas Harrison and Mr. Nigel Clifford
For the twenty fourth to seventy-third defendants: Mr. Steven Barrie

RULING

These are my reasons for dismissing the summons dated 9th November 1994 by which the second defendant sought that all proceedings in this action be stayed under the inherent jurisdiction of the court on the ground that there is pending in the Chancery Division in England an action brought by him against, among others, the plaintiffs and the third defendant concerning the same subject matter and raising the same issues and that these issues may be more suitably resolved in the English action. In dismissing the summons I also ordered that there be tried as preliminary issues questions as to the true construction of memoranda of agreement dated respectively 20th July 1976 and 7th October 1982 which set up entities known as the Continental Foundation and the Aall Foundation. Those questions are whether on the true construction of the memoranda the trusts declared therein were valid or void.

I shall now, as briefly as I can, refer to the evidence of the second defendant, Even Wahr-Hansen to the extent which is necessary for an initial perception of the issues.

Wahr-Hansen is a administrator of the estate of one Anders Jahre, ("Jahre") who died in 1982. His claim is that assets of the estate have been misappropriated, and in his affidavits he sets out his evidence of the history of the matter. In 1939 a Panamanian company called Pankos Operating Company S.A. (Pankos) was formed. Wahr-Hansen

alleges that Jahre was always the true owner of its shares and assets. By 1976 Pankos had changed its name to Continental Trust Company Inc. ("CTC") and in that year 80% of the shares of the company were purportedly settled on the trusts of the Continental Foundation, said to be a charitable foundation. It is alleged that those transactions were void and that Jahre remained the true owner of the shares and assets. In 1979 the remaining 20% of the shares were bought in by CTC. The consideration for that transaction was paid not to Jahre but to or at the direction of one Thorlief Monsen, an associate of Jahre. Within months of Jahre's death the majority of the assets of the Continental Foundation were transferred to a new foundation called the Aall Foundation. The validity of that transfer is also in dispute and it is alleged that the assets purportedly held on the charitable trusts of the Aall Foundation were used for the benefit of Thorleif Monsen and his family, companies under their control and a private Monsen family trust. On that basis Wahr-Hansen, on behalf of the estate mounts claims for breach of trust and tracing claims for a very large sum of money.

The proposition on which the application for a stay is based is that the underlying facts disclose a closer and more substantial connection with England than with any other jurisdiction including the Cayman Islands. In particular, a finding that Continental Foundation was void ab initio and that shares or assets were never validly transferred to it would remove any meaningful Cayman connection. It is claimed that a strong English connection exists particularly through a long association with the merchant bank Lazards in London

who performed a strong advisory and administrative function throughout, the role of various defendants alleged to be involved in breaches of trust, claims to assets in England and because the following issues need to be determined in the English proceedings before the dispute can be fully resolved -

(a) Was Jahre before 1976 the true owner of the CTC shares? If not, the action by his estate will obviously fail.

(b) If the answer to the first question is affirmative, did subsequent events extinguish Jahre's title. That would involve not only determination of whether the objects of the trusts are on the face of it charitable but whether even if this is so they fall foul of the "proforma" provisions of Norwegian Law which relate to fictitious transactions.

Only if the estate succeeds in all these respects will it be necessary to consider whether there was a misappropriation of assets by their transfer from the Continental Foundation to the Aall Foundation.

There is also the question whether or not the two thousand shares in CTC which were not transferred to the Continental Foundation in 1976 were held by Thorlief Monsen as nominee for Jahre.

All these matters and others are in issue in the English proceedings which were begun some four months before the Cayman proceedings.

Moreover, it is claimed that if there is an alternative forum to England it is the Bahamas because the Law of the Bahamas still applies to the Continental Foundation and the Aall Foundation and in any event the claim of the Cayman trustees that they need quick answers in order to be able to fulfil their duties is spurious in that they have known of the claim on behalf of the estate since 1993.

There are also certain judicial and procedural advantages claimed by Wahr-Hansen as flowing from the conduct of proceedings in England.

In summary, what Wahr-Hansen is saying is that in any event the trustees will need to know for whom they hold the assets in trust. The original ownership of the assets will still need to be investigated and what is being dressed up as a construction question will take the parties straight to the issues in the English proceedings.

There are many defendants in the English proceedings who are not parties in Cayman. However, those who would not otherwise be bound by the Cayman proceedings have written in substantially similar terms indicating that they agree not to dispute a determination in the Cayman proceedings as to whether the trusts of the Foundation are valid or void, and the trusts on which the assets are held, provided that they are permitted to join in the Cayman proceedings and make representations as to how the issues are to be determined.

All the arguments about the appropriate forum are resisted by the

plaintiffs who are the trustees of the Aall Foundation, the Attorney General, representing the interests of charity, and Compass Trust Co. Ltd the executor of the estate of Thorlief Monsen.

I will seek to set out what I regard as the most important matters on which they rely.

1. The trustees of the Aall Foundation, Bridge Trust Co. Ltd and Mr. Slatter, are both resident in the Cayman Islands and were so resident before the commencement of the English proceedings and it is through them that the administration of the Aall Foundation is carried out. The situs of the Aall Foundation is in Cayman and its assets are in the hands of Cayman companies.

2. If the provision of the Aall Foundation which governs its situs and governing law is valid, that law is the law of the Cayman Islands.

3. Those factors pointing to Cayman as the most natural forum for resolving doubts about the validity of the Aall Foundation and its trust are underlined by the role of the Attorney General as guardian of the interests of charity.

4. The arguments of Wahr-Hansen by which he asserts that the appointment and retirement of previous trustees may have been invalid; that all his claims had arisen by the time the majority of the trustees of the Aall Foundation were resident in Cayman; that there is doubt under Bahamian and Cayman law as to what is the proper law to apply to determine the validity of the Aall Foundation; that Bridge Trust Co. Ltd. is not truly independent in that the right to appoint new trustees (a majority of whom may remove trustees) rests with advisers who are members of the Monsen family; that Bridge Trust Co. Ltd is not properly to be regarded as resident in Cayman because two of its three directors are resident elsewhere; that the trustees have begun the Cayman proceedings to frustrate and delay Wahr-Hansen's claim, particularly in relation to the breaches of trust alleged in England; and that the connection between the Aall Foundation and Cayman may be transient, do not refute the proposition that Cayman is undoubtedly the most appropriate forum for resolving doubts as to the validity of the trusts and the extent of the assets properly held by the trust unless there are strong countervailing factors.

I now turn to consideration of these issues.

THE TESTS TO BE APPLIED

The principles expressed by Lord Goff in Spiliada Martime Corporation v. Casulex (1987) 1 AC 460 have been often repeated. The broad question to be asked is whether the issues in these proceedings can more suitably be tried here or in the English proceedings for the interest of all the parties and for the end of justice. Spiliada was a case which was concerned with service of proceedings out of the jurisdiction under Order 11 of the English Rules of the Supreme Court, and the second defendant relies, in relation to burden of proof, on the following passage from the speech of Lord Goff at page 481 in which he refers to such service out of the jurisdiction -

> "Statutory authority has specified the particular circumstances in which that power may be exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted "unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction;" see R.S.C., Ord. 11, r. 4 (2).
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> Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the Amin Rasheed case (1984) A.C. 50, 65, that the jurisdiction exercised under Order 11 may be "exorbitant". This has long been the law. In Societe Generale de Paris v. Dreyfus Brothers (1885) 29 Ch. D. 239, 242-242, Pearson J. said:
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> > "it becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the

jurisdiction."

> That statement was subsequently approved on many occasions, notably by Farwell L.J. in The Hagen (1908(P. 189m 201, and by Lord Simonds in your Lordships' House in Tyne Improvement Commissioners v. Armement Anversois S/A (The Brabo) 1949) A.C. 326, 350. The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right."

The present matter is not about service out of the jurisdiction. The plaintiffs have obtained leave to serve Wahr-Hansen and he has entered a conditional appearance and applied for a stay. The plaintiffs are a Cayman resident company and individual. They seek guidance as trustees in relation to assets which they have hitherto regarded themselves as holding through Cayman companies on the trusts of the Aall Foundation. Two of the three defendants are within the jurisdiction I do not find in that situation justification for the argument at this stage that the normal questions in forum matters where a stay is bring sought - that is to say whether or not there is prima facie another clearly more appropriate forum and secondly whether nevertheless a stay should not be granted - are not those which should be asked. That is a different state of affairs from that which obtained in the Insurco cases 1992-3 CILR where leave had to be obtained to serve all defendants out of the jurisdiction and all sought orders that the leave to serve out be discharged. Two defendants also sought orders that the writ and service of notice of

it be set aside and one applied for a stay of proceedings. Against that background I am satisfied that Schofield J was doing no more than restating the well known Spiliada principle to which he expressly referred,, and not expressing a proposition that whenever leave had been given to serve a defendant (and in particular one of several defendants) out of the jurisdiction and a conditional appearance has been entered the burden of proof in a subsequent application for a stay was reversed. The matter went to appeal, but I find nothing in the decision of that Court to alter that opinion. This ruling, however, did not turn on burden of proof at all.

Clearly the present proceedings could not have been begun in England. A key question is whether the existence of the English proceedings which were begun earlier than those in Cayman and the leave given by the English Court to serve defendants out of the jurisdiction tip the scale in favour of England as the more appropriate forum for resolving all the issues. They English jurisdiction is being disputed by those defendants. From de Dampierre v. de Dampierre (1988) 1 AC 72 at 108 I take and respectfully adopt the following passage from the speech of Lord Goff which followed a reference by him to the Spiliada principle to which I have referred -

> "The same principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum; see The Abidin Daver (1984) A.C. 398, 411, per Lord Diplock. However the existence of such proceedings may, depending on the circumstances, be relevant to the inquiry. Sometimes they may be of no relevance at all, for example, if one party has commenced the proceedings for the purpose of demonstrating the existence of a competing jurisdiction, or

> the proceedings have not passed beyond the stage of the initiating process. but if, for example genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties."

The English proceedings are still at an early stage. At the time of the hearing the procedural complications of the action were already manifest. The earlier existence of the English proceedings is not in my view in itself of great significance. The statement of claim in those proceedings does, however, considerably assist this court in understanding the issues and seeking to determine the appropriate forum.

Prima facie, the issues which are common to both the English and Cayman proceedings should be tried in the Cayman Islands. The question is whether the remaining issues are so connected with England, so interwoven with the Cayman issues and so determinative of the matter as a whole as to make England the appropriate forum for it.

I accept the position of the Attorney General that he is a necessary party in Cayman to all actions relating to charities. He represents the Crown as protector of all persons interested in charity funds as well as the objects of the charity. This is an important role in a

case such as this. If issues relating to assets which are on the face of it assets of Cayman charitable trusts are to be determined in England the Cayman Attorney General is a necessary party to those proceedings, a state of affairs which seems to me to underline the unsuitability of those proceedings for the determination of such questions. The trusts of the Continental and Aall Foundation will be valid only if they are valid charitable trusts. It should be for the Cayman court to decide questions of Cayman charity law in the light of local policy considerations.

Another question which arises is in respect of the proper law of the trust in the light of clause 39 of the Continental Foundation and Clause 40 of the Aall Foundation which read as follows -

> "This Trust shall have its situs and be subject to the laws of such country as the Trustees shall from time to time elect in writing with power to the Trustees to transfer such situs or country of all or part of the Trust as they in the exercise of an absolute discretion consider it appropriate so to do but in the absence of such determination at any time the Trust shall have its situs subject to the laws of the country where a plurality of the trustees are normally resident. (Continental Foundation, clause 39).
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> "The original situs of the Trust shall be THE COMMONWEALTH OF THE BAHAMAS but thereafter it shall have its situs and be subject to the laws of such jurisdiction as the Trustees shall from time to time elect by resolution and the Trustees may by resolution transfer the situs or the laws of the jurisdiction to which the Trust or all or part of the Trust is subject as the Trustees in the exercise of an absolute discretion consider appropriate. In the absence of such a resolution, the Trust shall have its situs and shall be subject to the laws of the jurisdiction where a plurality of the Trustees are normally resident." (Aall

Foundation clause 40)

The question of the governing law will involve consideration of the Cayman Trust (Foreign Element) Law 1987 and the Bahamian Trust (Choice of Governing Law) Act 1989. All that need to be said at this stage is that there is a good arguable case that Cayman law governs the question of the validity of the two Foundations, and that is a position which gives effect to their express wording. That is a question best suited for resolution by the Cayman Court.

There has been lengthy affidavit evidence on this application from Mr. Michael Austin, a director of the first plaintiff, Mr. Wahr-Hansen, Mr. Jeremy Sandelson, a partner in the English firm of solicitors which represent Compass in the Cayman and English proceedings and other defendants in the English proceedings also, and on behalf of the Attorney General of the Cayman Islands. From the evidence and the arguments the plaintiffs invite me to adopt a very simple approach. It is that the application to the Cayman Court is made by Cayman resident trustees of a Cayman trust which is or may well be found to be a charitable trust. The trust assets are for the most part held by Cayman companies owned by the trustees. The proceedings are to resolve doubts as to the validity of the trusts and the extent of the assets properly held on those trusts. The Cayman Attorney General is a proper party to the proceedings in view of the issue as to whether the trusts are charitable, on which issues of Cayman public policy will arise.

It is obvious that the plaintiffs could not have brought their present proceedings in England. Prima facie, in my judgment, Cayman is the most appropriate forum for them. But the real question was whether the complex factual issues in the English proceedings provided such strong and countervailing factors as to outweigh that.

I am invited to consider whether the determination of the validity of the trusts, as a matter of construction of the trust instruments of the Continental and Aall Foundation in the light of the proper law which applies to them, will, if decided one way dispose of Wahr-Hansen's claim to the assets of the Aall Foundation.

That is on the basis of the well established practice in relation to preliminary issues which was expressed as follows by Lord

Denning in Carl Zeiss Stiftung v. Herbert Smith (1969) 1 Ch. 93 at 98

> "The rule was stated by Romer L.J. in Everett v. Ribbands:
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> > Where you have a point of law which, if decided in one way, going to be decisive of litigation then advantage ought to be taken of the fascilities afforded by the Rules of the Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings."
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> "I have always understood such to be practice. I quite agree that in many cases the facts and law are so mixed up that it is very undesirable to have a preliminary issue. I always like to know the facts before deciding the law."

The case for hearing the first and second prayers in the plaintiffs'

summons before moving on to the third is I think different. It is simply that the third prayer cannot be addressed until a conclusion on the first two has been reached. To hear and determine them first is the only sensible course. The issues to be determined upon a decision one way or the other on them are quite different. Should the trusts of the Continental Foundation be found as a matter of construction to be void, the question of who was the true provider of the assets which purported to have been settled will remain undetermined; and even if valid, the possibility remains of an attack on the transfer of assets from CTC under Norwegian law.

There is great advantage to the trustees of the Aall Foundation and to the Attorney General of the Cayman Islands in having the proceedings heard here. The policy issues will be heard in the forum to which they relate and that must be in the general interest of justice; the trustees will not be embroiled in the lengthy English allegation of breaches to trust or the tracing claim in relation to the CTC shares not vested in the trustees of the Continental Foundation. They are likely to get a speedier answer in Cayman.

What could be the corresponding disadvantage to Wahr-Hansen?

It would be remarkable indeed if I were to send Cayman trustees to England because they would not there not have the benefit of the Trust (Foreign Element) Law. That would imply that the law was itself unjust.

The expertise in all relevant areas in the Cayman Islands is now very considerable and has been tested in recent cases, notably the BCCI matter. To put it at its lowest, professionals here have shown themselves ready and able to draw on resources from elsewhere when necessary.

The matter of costs recoverable by a successful litigant in Cayman is indeed a judicial disadvantage. It is a matter of grave concern which is being actively addressed. All that can be said at this stage is that is a disadvantage which may fall upon either party.

There is one other matter which I should deal with.
One basis of the argument that Cayman is the appropriate forum is that Wahr-Hansen prefers England because he is aware that much of the evidence on which he wishes to rely in both proceedings may have been obtained and/or supplied to him in breach of the Confidential Relationships (Preservation) Law of Cayman. I should say that is strenuously denied and there is no need for me to make a decision now. Nevertheless there is enough in evidence for me to take the view that it would be an abdication for me not to regard as a strong factor the necessity for this court to monitor closely and take control of that aspect of the matter.

I am conscious that I have referred only briefly to a number of matters which were gone into at great length both in the affidavit evidence and in counsel's submissions, in particular the meticulous analysis of the factual background by Mr. Martin. It would be

disingenuous if I did not acknowledge that in putting together these reasons I was not already aware that the English proceedings had been abandoned by Mr. Wahr-Hansen and that he had decided not to appeal against my decision not to grant a stay of the Cayman proceedings. I remain under a duty nevertheless to place on record the points which carried most weight with me and having done so to proceed as quickly as possible to a decision on the substantive hearing of the summons itself.

Dated 2nd November 1995

G.E. Harre

Chief Justice