CJ

12.7.95

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 All Foundation)

AND IN THE MATTER of the Trust Law (Revised)

BETWEEN:

(1) BRIDGES 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 & BANKING CORPORATION LTD AND OTHERS — Fifth to Seventy-third Defendants

BEFORE HARRE CJ

For the plaintiffs: Mr. Angus Foster
For the first defendant: Mr. William Helfrecht
For the second defendant: Ramon Alberga Q.C., with him Mr. Alden McLaughlin
For the third defendant: Mr. Nigel Clifford
For the twenty fourth to seventy-third defendants: Mr. Steven Barrie

REASONS FOR ORDER DATED 30.6.95 DISMISSING THE PLAINTIFF'S SUMMONS FOR FURTHER DIRECTIONS DATED 28.6.95.

On the 11th May I made an order which included among other things the following -

That the parties do have leave to adduce expert evidence on the Law of the Bahamas, if so advised, to be limited to the evidence of one expert each.

That the parties do exchange any expert evidence on the Law of the Bahamas in the form of affidavits not later than 28 days prior to the date of trial.

The parties adopted very different approaches in their presentation of expert evidence. The second defendant presented an affidavit by Mr. John Mowbray Q.C., to which was exhibited his legal opinion. He deponed that he was called to the Bar of the Commonwealth of the Bahamas as a permanent member in 1971 and ever since has had a more or less continuous advisory practise concerning the Bahamas and has appeared as counsel in the Supreme Court and Court of Appeal there from time to time. He is a leading counsel of the English Bar, has been in practise there, mainly in the Chancery Division, since 1953, and has special familiarity with the law of trusts.

Mr. Mowbray begins his opinion by saying that he has been asked on behalf of Mr. Wahr-Hansen the second defendant to give a written

expert opinion on some questions of Bahamian Law. The problem with which I now have deal has arisen because it is common ground that in many respects the Bahamian Law relating to Trusts mirrors English Law and Mr. Mowbray has conducted and extensive review of the English authorities. I shall refer to that in more detail later.

The plaintiffs and their supporters took the view that expert evidence on Bahamian law was only appropriate where that law differed from English Law and they produced an affidavit by Mr. Michael Barnett which adopted that approach. He says in his affidavit that he has practiced law since 1978 and has been member of the Bahamas Bar since then. He is now a partner in a firm practising in Nassau and, among a number of other civic appointments has served as Chairman of the Bahamas Bar Council. He claims to be well versed in the Trust Law of the Bahamas and describes the experience with which he supports that claim. He is also admitted to the Bar of England and Wales. He states that he has been asked for his opinion as to the extent of Bahamian Law on a number of issues. Where he expresses the view that the law of the Bahamas does not differ from English Law he says that he is advised or understands that English leading counsel will be making further submissions.

So we have on the one hand affidavit evidence from Mr. Mowbray which includes extensive reference to English authorities and on the other hand Mr. Barnett's evidence which contemplates that they will be dealt with by submissions and not by evidence. It should be remembered that any such submissions will not be made by "English leading counsel".

The fact that they are in another manifestation distinguished members of the Chancery Bar does not alter the fact that they conduct their cases here as Cayman attorneys-at-law.

In an attempt to address this problem the plaintiffs issued their summons dated 28th June which I heard on 30th June, having abridged time. It sought the following relief -

> "That where any party claims or accepts that any relevant principle of Bahamian law is the same as English law, the relevant English law be presented to this Court by way of submissions and not by way of sworn expert evidence.
>
> That where any party purports to adduce evidence to this Court of English law by way of sworn expert evidence or written statement or opinion the other parties shall not challenge such evidence or purported evidence by way of cross-examination but shall do so by way of submission to this Court".

In the light of that I need to consider the nature of the affidavit evidence. Mr. Mowbray's opinion exhibited to his first affidavit is divided into eight sections, the numbering of which I shall follow. In the first section he describes what he has been asked to do. I have already referred to that. Section 2 sets out assumed facts. Section 3 is a consideration of the Rules of Bahamian Law for the choice of law and what law the Bahamian Courts would apply in deciding whether the Continental Foundation was originally a valid trust. Section 4 deals with perpetuities on the basis that, statute apart,the rules against perpetuities is the same in the Bahamas as in England with consideration given to the Bahamian Perpetuities Act 1995. In

section 5 Mr. Mowbray concludes that the broad principles for determining whether a trust is charitable are the same in the Bahamas as in England. That, he says, was decided in the Bahamas by the Court of Appeal in AG v. Royal Trust Co. (1983-6) 36 WIR 1. In reaching, in section 6, the conclusion that "public good and benefit" is not exclusively charitable Mr. Mowbray again refers to the Bahamian Court of Appeal's decision in AG v. Royal Trust Co. which he describes as completely consistent with the English authorities, and on that basis he goes into them in some detail. Section 7 is a lengthy dissertation based almost exclusively on English authority in support of Mr. Mowbray's view that the trusts and powers of the memorandum go beyond the bounds of charity and are therefore void. I have no doubt that all these authorities are cited in support of Mr. Mowbray's conclusion on Bahamian Law. Section 8 debates the power to change the governing law on the basis not only of English authority but of Bahamian statute. It concludes with Mr. Mowbray's opinion that according to Bahamian Law the December 1976 memorandum of agreement was not effective to change the governing or proper law of the foundation.

Mr. Mowbray's opinion is, unequivocally, an opinion on the law of the Bahamas throughout, no less than Mr. Barnett's , and given in his capacity as an expert in the law of that country.

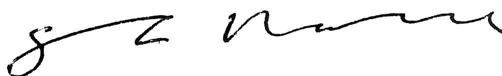
When giving evidence as to foreign law a witness may refer to authorities, laws and treatises upon it. That, in my view, is exactly what Mr. Mowbray has done. The fact that those very same sources may apply elsewhere, and indeed in the domestic forum, seems to me to be

neither here nor there. It has nothing to do with any presumption to the effect that foreign law is the same as the domestic law of a forum unless proved otherwise. These reasons are not concerned with that question at all, and least of all with the long established general practices of Cayman Courts when considering the law of England.

It was submitted that just because English law happens to be part of Bahamian law does not mean that it has to be proved to this court. I prefer the contrary proposition - that because Bahamian law happens to be the same as English law does not mean that it does not have to be proved to this court. To say in this connection that English, Bahamian and Cayman law are really all the same thing seems to me to be fallacious.

It was for these reasons that on 30th June I dismissed the plaintiffs' summons for direction dated 28th June 1995.

It will, I think, be useful if I refer to a point which arose after that decision. It was whether I had made any additional order. My contemporaneous not makes no reference at all to the general discussion which took place at the end of the hearing and I share the recollection of the plaintiffs that this was informal in nature.



19th June 1995

G.E. Harre

Chief Justice