

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



Cause No. 311/93

25-03-94

BETWEEN: BARCLAYS PRIVATE BANK & TRUST (CAYMAN) LIMITED - PLANTIFF
AND: ALEJANDRO ARENA TORRES LANDA - DEFENDANT

Mr. R. Alberga QC with Mr. R. Nelson for plaintiff
Mr. P. Lamontagne QC with Mrs. E. Nervik for defendant

Schofield J.

The Hampstead Trust was created by declaration of Trust made on the 12th February, 1991. Its Trustees were Barclays Trust International (Cayman) Ltd., the predecessors of the present Trustees, who are the plaintiffs in this action, Barclays Private Bank and Trust (Cayman) Ltd. The settlor was Alejandro Arena Garcia who is named in the Trust deed as the first beneficiary. There are two other beneficiaries named in the Trust deed. The Trust was declared to be revocable by the Trustees during the lifetime of the settlor and the Trust fund would vest in the settlor absolutely on such revocation. The Trust became irrevocable on his death. He died on 6th March, 1992, having sent a letter to the Trustees dated 14th January, 1992, requesting them to revoke the Trust.

By originating summons the Trustees ask the Court to determine whether (a) the Trust has been revoked and they hold the Trust fund for the estate of the settlor or (b) the Trustees continue to hold the Trust fund subject to the powers and

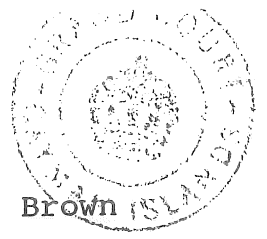
provisions declared and contained in the declaration of Trust. The defendant, Alejandro Arena Torres Landa, is the son and executor of the estate of the settlor. The Trustees have been appointed by order of this Court to represent any beneficiaries who may be interested but who are unrepresented.

Prior to the Trust being created, by letter of instructions and wishes signed on 15th January, 1991, the settlor declared that he would expect the Trustees to consider him as the principal beneficiary to the exclusion of the others and he would expect the Trustees to consult him in all matters relating to the Trust and deal with all distributions of income and/or capital in accordance with his wishes. This was expressed to be subject to the overriding discretion vested in the Trustees. It will be remembered that the Trust was declared revocable during the settlor's lifetime and irrevocable on his death. The letter of instructions and wishes stated that after his death the settlor wished the entire balance of the Trust fund to be distributed to the second-named beneficiary, or, should she predecease him or die before receiving her share, to the third-named beneficiary.

The settlor's letter dated the 14th January, 1992, was received by the Trustees, by courier, on 5th February, 1992. I need not recite it here; in clear and unequivocal terms the settlor asked the Trustees to revoke the Hampstead Trust. The letter was opened in the presence of Kevin Brown the Trust Manager of the Trustees. He took out the file and ensured that

the person signing the letter was the person who could ask the Trustees to exercise their power of revocation. He then approached Alan Symington the Deputy Managing Director of the Trustees on the basis that the signatory of the letter was the settlor, in whom the Trust fund would vest on revocation. Mr. Symington agreed to proceed with revocation, subject to verification of signature.

The file was then passed to Laverne Connolly who was responsible for the day-to-day administration of the Trust. She verified the signature on the letter of 14th January, 1992, and requested their accounts department to prepare a closing statement of the account. She then sent the draft statement together with a draft letter of approval and release to Barclays Bank in Miami, for onward transmission to the settlor and for him to sign the letter of approval and release. Ms. Connolly's letter forwarding these documents was dated 24th February, 1992. Barclays Bank in Miami forwarded the documents to the settlor by letter dated 3rd March, 1992. That letter was written in the Spanish language. After some disagreement on its exact translation, a translated copy agreed by both sides was tendered to Court. I do not think anything rests on the letter or on the earlier confusion as to its contents. The settlor died on 6th March, 1992 never, it seems, having received the documents sent by Ms. Connolly. Certainly he did not sign and return the letter of approval and release, and it is the evidence of three witnesses for the Trustees, that no further action was taken to



effect revocation of the Trust. The evidence of Messrs. Brown and Symington was that their company would not revoke a Trust unless and until it had received a signed release from a settlor acknowledging agreement of the accounts. Thereafter a minute of release would be signed by two senior members of staff one of whom would be a director. That, of course, was not done in this case. Mr. Brown testified that since he had been with the company documents to revoke a Trust had been completed probably five or six times. Mr. Symington said that this may have been the first time he was asked to revoke a Trust since being employed by the company.

It is the Trustees' case that the Trust was not revoked; that the Trustees never effected the final act of revocation. On the other hand the defendant argues that the Trustees were under an obligation to follow the settlor's intentions and that in any case the Trustees exercised their power of revocation even if they did not execute the instruments relevant thereto.

Clause 15 of the Trust deed makes provision for its revocation. It reads:

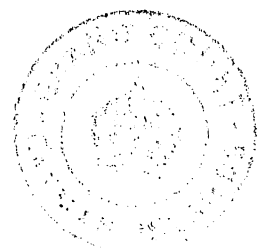
- " REVOCABILITY
15. This Trust hereby created shall be revocable by the Trustees during the lifetime of Alejandro Arena Garcia, whereupon the Trust fund shall vest absolutely in the said Alejandro Arena Garcia. On the death of the said Alejandro Arena Garcia the Trust hereby created shall become irrevocable."

There is no merit in the argument that the Trustees had no discretion in the matter; that they had to follow the settlor's intentions. The Trust deed clearly puts the power of revocation in the hands of the Trustees and a discretion is vested in them whether to exercise that power. To suggest that the Trustees were obliged to follow anyone's instructions without exercising their own discretion strikes at the heart of a Trustee's duties and responsibilities under this kind of Trust.

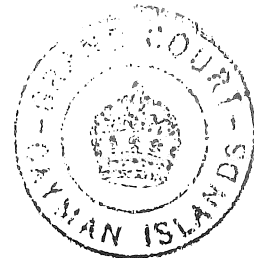
Did the Trustees in fact exercise their power of revocation? Paragraph 13 of the Schedule to the Trust deed deals with the exercise of the Trustees' powers. It reads:

"13. (a) Every decision resolution or exercise of a power or discretion required to be or capable of being made by the Trustees hereunder shall be validly made if so made by a majority in number of the Trustees for the time being and any deed or instrument executed in pursuance of any such decision resolution or exercise shall have binding legal effect (as if executed by all the Trustees hereof) if it shall be executed by a majority in number of the Trustees for the time being but not so as to render any of the Trustees liable for any act or thing done or omitted without his consent by reason of the provisions of this clause or for any act in which he joins for conformity only.

(b) Every Trustee who is a corporation or company may exercise or concur in exercising any discretion or power hereby conferred on the Trustees by a resolution of its Board of Directors or governing body or may delegate the right and power to exercise or concur in exercising any such discretion or power to one or more members of its Board of



Directors or governing body by one or more of its officers or employees duly authorised for that purpose."



I have set out both sub-paragraphs of paragraph 13, even though on its face sub-paragraph (a) does not apply to this case, because the defendant prays its provisions in aid of his argument that the exercise of the power of revocation of this Trust could be exercised informally. He points to the distinction made in sub-paragraph (a) between the act of decision to exercise a power and the execution of any deed or instrument in pursuance of such decision. The defendant argues, as I understand it, that once Messrs. Brown and Symington had determined to follow the settlor's request to revoke the Trust the act of revocation was complete, and it did not require a formal written resolution to put into effect that decision to revoke.

I am further referred to the letter of release sent to the settlor for his signature. It is addressed to the Trustees and reads:

" Dear Sirs,

RE HAMPSTEAD TRUST

I, Alejandro Areno Garcia hereby approve the attached Statement as at January 31st 1992 and acknowledge receipt of the sum of US\$305,719.00 in full and final settlement of the amount due to me on the winding up of the Trust.

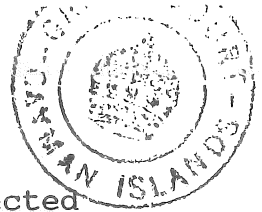
AND IN CONSIDERATION of the said payment I hereby release and indemnify Barclay Trust International (Cayman) Limited from and against all costs and claims arising hereafter in respect of the said Trust."



It is argued for the defendant that Trust accounts are settled, examined and acknowledged as correct on termination of the trusteeship and not before. The Trust comes to an end first and then release papers are sent and signed. In response to that, Messrs. Brown and Symington say that they would not have formally revoked the Trust without receiving first from the settlor a release and acknowledgment that the accounts were correct.

Odd it may be that the settlor was expected to acknowledge receipt of Trust funds which he is not at the time of acknowledgment receiving, and indeed he was expected to acknowledge receipt of an amount which at the end of the day he would not receive, for there would be interest and possibly charges accruing from the date the letter of release was sent to him and the date it was received back by the Trustees. However, that does not detract from the force of the evidence for the Trustees that Messrs. Brown and Symington never put into effect their intention to revoke the Trust and would not have done so without receipt of the release and acknowledgment duly signed. Nor does it detract from the force of the evidence that the Trust fund was not closed down or a cheque ever cut for the balance upon it to be remitted to the settlor. To my mind the evidence given by the Trustee's assistant accountant about the statement of account does not take the arguments on this point any further.

Counsel for the Trustees would have me hold that release of

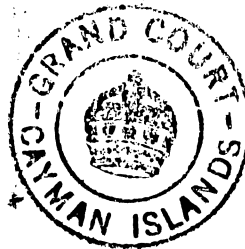


obligations under a Trust deed, prima facie, may only be effected by way of deed. Counsel for the defendant would have me hold that the release of such obligations may be effected informally and cited two United States authorities for that proposition, Gifford Estate, 18 pa. D&C 2 d. 769 (1959) and Poltz v. Tyree 705 P. 2d 1229. I need not go as far as either counsel urges. I need look no further than paragraph 13 (b) of the Schedule to the Trust deed and the evidence. Clearly, the Trustees had delegated the power of exercising the discretion to revoke to two employees, one of whom had to be a Director of the company. That does not offend paragraph 13(b). These employees had formed an intention to revoke the Trust, provided certain formalities were complied with. Without those formalities being effected they would not carry out their intention. There is nothing improper in that. It was prudent business practice for the Trustees to require a release from liability and an acknowledgment that the accounts were correct before they released the funds due on revocation of the Trust. That the release and acknowledgment was unhappily worded does not detract from the propriety or prudence of the practice. It was prudent practice for the Trustees to require a formal minute of the revocation to be drawn up and signed before the revocation was regarded as being effected. In fact, it would be imprudent for the Trustees to treat anything less than a formal minute as an effective revocation. Otherwise, how would anyone be able to determine the exact point at which the Trust was terminated. If the defendant's view prevails, when did this Trust terminate? On receipt by Mr.

Brown of the settlor's letter of 14th January, 1992. On Mr. Brown's determination to carry out the settlor's request, or on his discussion with Mr. Symington in which it was resolved to carry out the request, subject to verification of the settlor's signature? Or at some later time? The defendant's arguments are fraught with danger, and if followed would lead to uncertainty and give room for fraud.

The Trustees were entitled to demand certain formalities to be fulfilled before the Trust was revoked. They commenced those formalities but did not complete them. On the evidence before me I find as a fact that the Trustees did not revoke the Hampstead Trust. I find that the Trustees continue to hold the Trust fund subject to the powers and provisions declared and contained in the Trust.

I shall hear arguments on costs.



Judge

Dated this 25th day of March, 1994