

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM No. BVIHCV2003/0026

BETWEEN:

IN THE MATTER OF THE TRUSTEES' RELIEF ACT CAP. 304 SECTION 6

AND

IN THE MATTER OF A SETTLEMENT DATED THE 26th DAY OF APRIL 1984

AND

IN THE MATTER OF THE ESTATE OF WILLIAM DUDLEY WOODS (Junior)
deceased

AND

IN THE MATTER OF WALTER THOMAS WOODS & PAMELA MARY FIELDING

AND

IN THE MATTER OF AN APPLICATION BY IMT TRUST COMPANY LIMITED

Appearances:

Mr. Paul Webster, QC, Ms. Hilary Reid with him, for the Applicant IMT Trust Company Ltd.
Mr. Phillip Kite for Walter Thomas Woods and Pamela Mary Fielding

2003: June 12
August 12

JUDGMENT

- [1] **RAWLINS, J:** This case came on the hearing of an application by IMT Trust Company Limited ("the Trustee"), which is registered in Jersey, Channel Islands, British Isles. The Trustee seeks the aid of the court to interpret Clause 2 of a Settlement that was made by William Dudley Woods ("the grantor"). The Settlement is dated 26th April 1984. The Trustee also seeks consequential directions.
- [2] The application is made under **section 6 of the Trustees' Relief Act, Cap. 304 of the Revised Laws of the British Virgin Islands, 1991** ("the Act"). This section permits a trustee to apply to the court for its opinion, advice or direction on any question concerning the management or administration of trust property. In this case, out of an abundance of caution, the Trustee is asking the court to interpret the Clause and to direct it as to the manner in which it should carry out its duties as trustee under the Settlement. Specifically,

the Trustee seeks directions regarding the manner in which property at 41 Irene Road, London, which the grantor owned, should be treated.

- [3] In particular, the Trustee wishes to know whether the Irene Road Property became “the Substituted Property” within the meaning of the Settlement, and, if it did, whether Walter Thomas Woods (“Mr. Woods”) and Pamela Mary Fielding (“Ms. Fielding”), the brother and sister of the grantor, became entitled to it as the beneficiaries under the Settlement.
- [4] The difficulties that have been created for the Trustee in carrying out its trust arise because of its uncertainty as to the status of the Irene Road Property. This uncertainty arises because of the provisions of the Settlement, the terms of Clause 4 of the Will, and what appears to have been the contemplation of the grantor, contained in an unexecuted Will that the Irene Road Property would have become the Substituted Property. The Trustee wishes to ascertain its duties and purview as trustee in this matter.

The Duties and Purview of Trustees

- [5] It is trite law that a trustee is obliged to obey, stringently, the directions set out in a Settlement. A trustee that deviates from the letter of its trust must later justify its actions to the court. It must satisfy the court that its actions were necessary, beneficial and honest. A trustee may otherwise be liable for any loss that a beneficiary sustains as a result of any action that is outside the parameters of the trust instrument. A trustee may also be liable for actions performed negligently. It is therefore always desirable that a trustee should seek directions or the sanction of the court, where the powers conferred in a Settlement are not clear.
- [6] Mr. Paul Webster, QC, reminded us of the duties of a trustee in the position of IMT in a case such as this. He referred to **Underhill and Hayton on the Law of Trusts and Trustees (16th Edition)**, at page 493. He also referred to **Halsbury’s Laws of England (4th Edition)**, Volume 48, paragraphs 826 and 918. The learning is that generally, a trustee is obliged to act impartially between beneficiaries, looking at the interests of all and not to the interests of any particular beneficiary or class of beneficiaries. This is unless the

instrument that creates the trust expressly confers a discretion upon the trustee to adopt a course of action that will benefit one beneficiary at the expense of another. A trustee who is in doubt is entitled to take the court's opinion, and is entitled to the reasonable protection and direction of the court in the exercise of the trust. The court may also direct a trustee to dispose of or to transact the trust property, if it is expedient to do so, where neither the trust instrument nor the law clearly permits the trustee to take these steps. Against this background, the facts will provide a helpful precursor to the decision in this case.

The Facts

- [7] The grantor died on 15th October 1996. He had executed a Will on 17th April 1984, a few days before he established the Settlement. On 27th June 1997, the Supreme Court of Queensland, Australia, granted probate of the Will to Mr. Woods and Ms. Fielding. They were the executors and trustees named in the Will.
- [8] The 1984 Settlement was established under, and is governed by, the law of this Territory. In it, the grantor appointed Neptune Trust Corporation, which was registered in this Territory, as the trustee of the Settlement. This Corporation later became IMT Trust Company Limited, the Applicant in this case.
- [9] Clause 1(b) of the Settlement provides for a Trust Fund. According to the terms of the Settlement, this is constituted of the shares that the grantor had prior transferred to Zona Limited, a Jersey Company. The Fund is also constituted of any investment or further sums transferred to the Trustee as additions to the capital of the Trust Fund, and any money or investment representing the shares added to the Fund.
- [10] Clause 2(1) of the Settlement confers upon the grantor a general power of appointment over all of the assets of the trust, such appointment to be effected by instrument in writing taking effect during his (the grantor's) lifetime. It does not appear that there was any attempt to exercise the power. However, Clause 2(3)(i) of the Settlement provides that in default of appointment, the Trustee shall from and after the death of the grantor hold the Trust Fund.

- [11] At the time of the Settlement, the grantor owned property at 14 Coniger, Fulham, London (“the Coniger Property”). He resided at that property with his friend, Ronald Cairns-Jones. He provided in the Settlement that the Trustee should hold this property and, further, that it shall constitute or form part of the Trust Fund or part of the assets of any company all of whose shares constitutes or forms part of that Fund.
- [12] In 1996, the Coniger Property was sold on the direction of the grantor and the Irene Road Property was purchased in its stead. The grantor also resided at this property with Jones, who continues to live there.
- [13] The grantor also had another Will drafted during 1996. However, it was not finalized or executed before his death. In Clause 3(a) of this unexecuted Will, the grantor appears to have contemplated that the Irene Road Property would have become the Substituted Property under the Settlement, in the place of the Coniger Property. Thus, the pivotal question in this case is whether the Irene Road Property became the Substituted Property.

The Status of the Irene Road Property

- [14] Whether the Irene Road Property became the Substituted Property under the Settlement is to be determined from Clause 2(3)(ii) of the Settlement. It provides as follows:
- “If the Property shall have been sold or otherwise disposed of by the Trustees or by any such company and any other property (“the Substituted Property”) shall be held as aforesaid and the Settlor shall by notice in writing given and not revoked during his lifetime have appointed that the Substituted Property take the place of the Property for the purposes of this sub-clause”.
- [15] Mr. Webster, QC, submitted that the Irene Road Property would only have become the Substituted Property under this Clause, if it can be shown that the grantor had, by notice in writing given and not revoked during his lifetime, appointed that the Irene Road Property should take the place of the Coniger Property when this was sold. He noted, however, that the Trustee’s concern is whether Clause 3 of the unexecuted Will points to an intention by the grantor that might amount to notice.

- [16] It is noteworthy that Mr. Webster doubts that the unexecuted Will is capable of being construed as such notice since its provisions take effect only on death. He submitted that in any event, the Will contains no direct or even implied reference to the Irene Road Property being substituted for the Coniger Property.
- [17] Learned Counsel for Mr. Woods and Ms. Fielding, Mr. Phillip Kite agreed. He however submitted, in addition, that no notice was given in the form that is required by Clause 14(2) of the Schedule to the Settlement. Mr. Kite also made a further interesting submission. He said that the unexecuted Will does not constitute good evidence of the intention of the grantor.
- [18] I call to mind, of course, that even instructions given for a Will, whether duly executed or in draft, may be admitted to proof if it is shown, on evidence, that a testator intended to dispose of his estate in accordance with those instructions up to the time of his death. (See **Whyte v Pollock (1882) 7 App Cas 400** and **Tristram and Coote's Probate Practice (28th Edition)**, at page 75, para. 3.221.). This principle does not hold, however, in a case such as this, where a valid Will is in existence.
- [19] I agree with Mr. Kite that the manuscript amendments to this unexecuted Will suggest that the unexecuted Will was not in final form. Additionally, although Clause 3 of the unexecuted Will purports to make appointment under Clause 2(3)(ii) of the Settlement, it makes no clear appointment that constitutes the Irene Road Property as Substituted Property. This, coupled with the difficulties occasioned by the failure of the grantor to make a clear appointment of beneficiaries of the Trust Fund, either under the Settlement or under his Will create the dilemma that brought this application. The resolution of this dilemma is necessary. First, however, I must make clear my agreement with the submissions of both Counsel that the Irene Road Property did not become the Substituted Property under the Settlement to take the place of the Coniger Property.

Resolving the Dilemma

[20] Mr. Kite submitted that because the Irene Road Property is not the Substituted Property, it falls to be held on the same trust under the Settlement as the general Trust Fund. He thereby agreed with the submission of Mr. Webster that the Irene Road Property should therefore be ignored as a specific item under the Settlement and be treated merely as one asset of Zona Limited. It will be recalled, of course, that the Trustee holds the shares in Zona Limited on the trusts of the Settlement. Both Counsel noted, however, that there is no specific provision under the Settlement regarding the shares in Zona Limited. I agree that these shares are to be treated in accordance with the general Trust Fund.

[21] The dilemma for the Trustee resides, primarily, in Clause 2(3) of the Settlement. This would be best appreciated by its verbatim reproduction. We keep in mind, of course, that in Clause 2(1), the grantor reserved the right to appoint beneficiaries, from time to time, for whom the Trustee held the Trust Fund. Clause 2(3) then states: -

“(3) Subject to and in default of every and any such appointment the Trustees shall from and after the death of the Settlor hold the Trust Fund:

- (i) if the property known as 14 Coniger Road Fulham in the London Borough of Hammersmith and Fulham (“the Property.”) shall be held by the Trustees and shall constitute or form part of the Trust Fund or shall be held by and constitute or form part of the assets of any company all of whose shares constitute or form part of the Trust Fund or
- (ii) if the Property shall have been sold or otherwise disposed of by the Trustees or by any such company and any other property (“the Substituted Property”) shall be held as aforesaid and the Settlor shall by notice in writing given and not revoked during his lifetime have appointed that the Substituted Property take the place of the Property for the purpose of this subclause

ON TRUST first to offer or cause to be offered to Ronald Cairns-Jones of 8 Cornwall House Allsop Place London N.W.1 (if he shall have survived the Settlor) the grant of a lease for life on terms as may be proposed by the Trustees but which shall include a rent at a peppercorn and covenants on the part of the Lessee of a full insuring and repairing nature and payment of all outgoing of the Property or (as the case may be) of the Substituted Property and if such offer be accepted to grant or cause to be granted such lease accordingly and subject thereto on trust for such persons and if more than one in such shares and with and subject to such trusts powers and provisions as the Settlor may by will appoint **and subject to or in default of such appointment in trust for such persons in such shares and for such interests as would be entitled to the estate of the Settlor if the Settlor had died intestate and had remained domiciled in the State of Queensland.** (Emphasis added).

[22] Both Counsel observed, quite correctly, that the difficulty in interpreting Clause 2 of the Settlement, and Clause 2(3) in particular, is the function of drafting that is unhelpful, or by errors in cross-referencing that the drafters made. They suggested various alternative constructions of Clause 2(3). The gravamen of their submissions is that this Clause, when read with Clause 4 of the Will, leads to the conclusion that Mr. Woods and Ms. Fielding are the beneficiaries who were validly appointed. While the suggestions are quite ingenious and convincing, it is my view that they require an unwarranted degree of overstretching and overreaching of the provisions of the Clause in order to determine the intention of the grantor. Because of this, and with respect, I shall recast the considerations in the light of the submissions, as I perceive them, in the following paragraphs.

[23] The grantor owned the Coniger Property. The shares were held by Zona Limited and ultimately by the Trustee. He sold the property. He purchased the Irene Road Property. It is not clear whether the proceeds from the sale of the Coniger Property remained a part of the Trust Fund or whether they were used, wholly or in part, towards the purchase of the Irene Road Property. In any case, this latter property did not become the Substituted Property under the Settlement. It is, however, held by the Trustee by way of shares in Zona Limited.

[24] For the purpose of determining the disposition of the Irene Road Property, therefore, Clause 2(3)(i) does not arise for consideration. Clause 2(3)(ii) does not arise for consideration either, because this property is not the Substituted Property. Its shares form a part of the Trust Fund. There has been a failure of appointment of any beneficiary under the Settlement. The attempt to appoint beneficiaries under the Will also failed. The only provision that is applicable, therefore, is that which is at the very end of Clause 2(3) of the Settlement. I have highlighted this at the end of Paragraph 21 of this Judgment. It states:

“ ... subject to or in default of such appointment in trust for such persons in such shares and for such interests as would be entitled to the estate of the Settlor if the Settlor had died intestate and had remained domiciled in the State of Queensland.”

The Distribution of the Trust Fund

- [25] The result of my finding in Paragraph 24, foregoing, is that the Trust Fund, including the Irene Road Property or the proceeds from it, shall be settled and distributed as if the grantor died intestate and had remained domiciled in the State of Queensland, Australia. I so order.
- [26] Christopher Perkins, Senior Trust Officer at IMT Fiduciary Services Limited, stated, at paragraph 9, that the persons who would be entitled if the grantor died intestate and domiciled in Queensland are Walter Thomas Woods and Mary Pamela Fielding. This stands as the uncontroverted legal position in these proceedings and I accept it accordingly.
- [27] In the premises, I hereby direct the Trustee to transfer the Irene Road Property to Walter Thomas Woods and Mary Pamela Fielding, the beneficiaries, with vacant possession, if they both agree. Failing agreement, the Trustee shall sell the property and divide the proceeds equally between the said beneficiaries. The Trustee shall do such acts as are necessary to give effect to this order. Costs reserved for further consideration on application and submissions.

Hugh A. Rawlins
High Court Judge