

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2006

CLAIM NO. AXAHCV/2005/0021

BETWEEN:

JOHN KOONMEN
GARETH PHILLIPS

Claimants

AND

SINEL TRUST ANGUILLA LIMITED

Defendant

APPEARANCES:

Mr. Ravi Bahadursingh for the Defendant/ Applicant
Mr. Michael Driscoll Q.C. for the Claimants/ Respondents

Date: 24th April, 2006
2nd May, 2006

RULING

[1] **GEORGE-CREQUE, J.:** The Defendant /Applicant applied for the removal of Mr. David Sargeant as Receiver of funds comprised in two trusts known as the Gemstone A and the Gemstone B Trusts ("the Gemstone Trusts"). He was appointed Receiver in this action by Order of the Court made on 15th September, 2006, on the Application of the Claimants/Respondents who are the sole and majority beneficiaries respectively, of the Gemstone Trusts. The Defendant /Applicant ("STAL") seeks to replace him with Mr. Gary Brough, a partner of the accounting firm of KPMG, who it says is more qualified and independent and thus more suited to the task of Receiver of these funds which is said to

be in the region of US\$60 million. There is no challenge to the Order appointing a Receiver.

[2] It was accepted that Mr. Brough does not reside in Anguilla. Further, as at the date of the hearing of this Application there was nothing before the court signifying Mr. Brough's consent to act in such a capacity, were the Court so minded to appoint him, save for a schedule of the firm's usual charge out rates for performing such services. His consent came rather belatedly (two days after the hearing) after the point had been taken in the proceedings by counsel for the Claimants/ Respondents.

[3] STAL, in seeking Mr. Sargeant's removal, contend that:

(a) Mr. Sargeant is not independent as he is employed by First Anguilla Trust Company Limited, a company owned by two of the partners of the firm of Webster Dyrod Mitchell ("WDM"), who are solicitors for the Claimants; and

(b) That he is not impartial in that he has shown partiality towards the Claimants/Respondents and antagonism towards the directors of STAL.

[4] STAL's interest in seeking Mr. Sargeant's removal is said to be that when the litigation between Mr. Koonmen and one Mr. John Bender was settled, which settlement brought about the establishment of the Gemstone Trusts, comprised in the settlement agreement were provisions for a number of very complex cross-indemnities designed to ensure that in the event of attack by one Joel Silverman who was associated with Mr. Koonmen and Mr. Bender in the operation of various investment funds called the "Amber Funds,"¹ that both the Bender and Koonmen trust funds would equally meet any claims brought and that STAL itself is entitled to various indemnities under the said settlement agreement.

[5] Indeed, the ongoing proceedings² in Jersey brought by United Capital Corporation ("UCC") is as assignee of Mr. Silverman in respect of fees which are said to be due in respect of the operation of the Amber Funds in which it is asserted, in essence and at the risk of over

¹ See: Exhibit PCS1-2 Amended Order of Justice dated 5th August, 2005, Royal Court of Jersey

² Royal Court of Jersey – Claim No. PL2005/235

simplification, that the proceeds from the successful trading of the Amber Funds found their way into the Gemstone Trusts. The Claimant, Mr. Koonmen, herein is the second Defendant in those proceedings with Mr. Bender being the First Defendant. Also Defendants to those proceedings are the entities Bluebird Limited and Dovetail Limited both of which are entities of the Gemstone Trusts. The Trust funds are subject to a freezing order imposed by that court in the said proceedings. STAL is no longer a Defendant to those proceedings and thus the issue of its indemnities would no longer, in my view, hold significant sway in relation to the dispute.

[6] Additionally, STAL contends that it is owed fees by the Gemstone Trusts in respect of its trusteeship as such fees were stopped abruptly in April, 2005, and as such would be entitled to a share of the funds comprised in the said Trusts. In fact, the substantive proceedings in this action concern the issue of whether or not STAL was validly removed as Trustee of the Gemstone Trusts. Apart from the beneficiaries who are actually entitled to the funds, STAL names itself and other persons such as UCC and other Revenue Authorities which may have potential or contingent claims against the Gemstone Trusts funds.

The Receiver's Independence

[7] The main purpose of appointing a Receiver is to collect and safeguard assets until a determination is made as to their proper entitlement or disposition. When the court appoints a Receiver, the general rule is that some entirely indifferent person ought to be appointed.³ Persons who have been held not to be appropriate include the solicitor (or former solicitor) of a party⁴, a trustee of the estate in respect of which the appointment is sought,⁵ and anyone who has displayed partisanship for one of the persons interested.⁶

[8] A court appointed Receiver may be discharged, inter alia, for default in submitting his accounts, or paying his balances, misconduct or where the order appointing him was

³ Snell's Equity 31st Ed. 431 - 17-11

⁴ Garland-v- Garland (1793) 2 Ves Jun 138

⁵ Sutton-v- Jones (1809) 15 Ves Jun 584

⁶ Blakeway – Blakeway (1833) 2 LJ Ch 75, Lupton –v- Stephenson (1848) 11 ! Eq R 484

improperly obtained, or for incompetence. The mere fact however, that some other person is shown to be more competent or better suited for the post is not a sufficient ground for discharge⁷

[9] It has not been established that Mr. Sargeant is the solicitor of any of the parties. He is employed by a separate and distinct legal entity which is not one and the same as the solicitors of the firm of WDM or an employee of Mr. Wiggin, a consultant to the firm, as has been alleged. The court was apprised of this position at the time of making the appointment. Save for making bald assertions, no evidence has been produced by STAL which shows that Mr. Sargeant is in any way under the control of Mr. Koonmen or his solicitors or legal consultants or any of the parties to the proceedings. Neither is he the trustee of the Gemstone Trusts which is the subject of the dispute.

[10] It is not being suggested that Mr. Sargeant is incompetent, even though it has been pointed out that a partner in KPMG would be better suited given their worldwide resources and experience given the complex nature of the matters which STAL now says this job requires, notwithstanding the fact that it was obviously indicated to KPMG that the work required to be performed by the Receiver was non complex. It is not immediately apparent the reason for the change of view, particularly having regard to the fact that the Trust funds, as I have already indicated, are to all intents and purposes frozen. As the matter currently stands, very little can be done with the funds.

The Display of Partisanship.

[11] The court's attention was drawn to correspondence between Mr. Sargeant as Receiver on the one hand, and STAL and/or its solicitors on the other, which the Applicant says shows partisanship or an antagonistic stance towards STAL and or its directors. Firstly, there is no evidence that Mr. Sargeant displayed any partiality to any side in the dispute prior to his appointment. Having perused the correspondence, suffice it to say that although the earlier correspondence may be considered spirited, the later correspondence showed willingness by STAL to cooperate and the Receiver's sense of satisfaction that matters

⁷ Halsbury's Laws 4th Ed. Para. 349, 467,468.

were being moved along. The correspondence when taken together as a whole, does not, in my view, cross the borderline where it can be said to show partiality to any side in the dispute or that he is antagonistic towards STAL and its directors. What becomes clear is the serious sense of duty with which the Receiver undertook his tasks while giving fair warning in respect of any attempts to impede or thwart his efforts in performing his functions as Receiver. It must be noted that the persons with the information and who were required to execute necessary resolutions enabling the Receiver to gain access to the assets of the Trusts are STAL and/or its directors. From the correspondence it is also fair to say that some time was taken before the Receiver may be said to be receiving the full cooperation of STAL, even though it may be that STAL was seeking to ensure that the Receiver was not attempting to exercise any powers beyond the scope of the powers contained in the Order of appointment.

Receiver's Accounts

- [12] At the hearing, counsel for the Applicant sought to suggest that the Receiver had been at fault in his duty in not providing interim accounts as he is under a duty to do. I do not consider that such an argument could be persuasive given the delays encountered by the Receiver in obtaining relevant information and documentation to which I have already alluded. Additionally, it is quite recently (in April) that any response was obtained from the Swiss banks (UBS) in respect of accounts which may possibly hold Trusts' funds. So far, they are not in a position to confirm which of those accounts held at their bank relate to the Gemstone Trusts. This information must, in my view, be within the knowledge of STAL, who was at the material time the undisputed trustee. It became necessary for the Receiver to domesticate the Order of Appointment of Receiver in Jersey. This eventually occurred in early December, 2005. It appears that a similar approach is required in Switzerland. A list of bank accounts and balances as at 28.03.06 produced by the Receiver in his affidavit of 24th April, 2006, (and previously exhibited to his affidavit sworn for the purpose of the Jersey proceedings) shows in relation to the UBS Geneva accounts that requisite information for the completion of this list was still outstanding. It appears that the bank itself was not as cooperative as may have been desired. When UBS was finally moved to provide a substantive response to the Receiver by letter dated 13th April, 2006,

limited information was given. The Receiver must still seek to identify which, if any, of those accounts relate to the Gemstone Trusts.

[13] I am satisfied that the Receiver has already done, notwithstanding the difficulties encountered, a considerable amount of work and in my view is adequately suited to the task. His replacement by a partner of KPMG who does not reside in the jurisdiction will involve significantly higher costs which must ultimately be met out of the Trusts funds thus impacting the established beneficiaries of the Trusts. Further, a person resident outside of the jurisdiction is not suitable for appointment as Receiver because it is said that the ordinary remedies against a receiver such as committal are not available against him⁸. I must also bear in mind the interests of the beneficiaries and take into account their views.⁹ They do not wish Mr. Sargeant removed.

[14] For the reasons which I have given, I am not satisfied that any sufficient grounds have been advanced justifying the removal of Mr. Sargeant as Receiver. Accordingly, STAL's Application is dismissed.

Costs

[15] I had reserved the question of costs in respect of the scheduled hearing date of 13th January, 2006 to the adjourned hearing of the Application. Having heard submissions by Mr. Wallbank on behalf of the Claimants/ Respondents and Mr. Bahadursingh on behalf of the Defendant /Applicant, I am of the view that the appropriate costs order to be made in the circumstances is that the Defendant/ Applicant bears the costs of the Application (including the costs occasioned by the adjournment on 13th January) said costs to be assessed unless agreed within fourteen days. I make the observation however, that the Receiver was, in my view, a bit tardy in not furnishing to the Defendant/ Applicant the information regarding the accounts which he had obtained at least as early as 28th March 2006, and UBS' letter of 13th April, 2006, by not so doing until the last business day prior to the hearing. This information would have provided relevant information to STAL in

⁸ Halsbury's Laws 4th Ed. Para. 350

⁹ See: Re Dickinson's Trusts [1902] WN 104

how far matters had been undertaken by the Receiver in carrying out his tasks and may have impacted the manner in which STAL proceeded with its application. Whilst I do not regard this delay as an adequate ground for denying the Claimants/ Respondents their costs, it is a factor which ought to be borne in mind in the determination of quantum.

[16] Finally, I am grateful to counsel on both sides for the assistance provided to the court.

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Janice M. George-Creque
High Court Judge