

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 1 OF 2005

BETWEEN:

ANDREW POPELY

Claimant

v

AYTON LIMITED
CORPORATE DIRECTORS LIMITED
ST. VINCENT TRUST SERVICES LIMITED
LEX SERVICES LIMITED

Defendants

Appearances: Mr. S.K. John and Mr. A. John for the Claimant
Mr. P.R. Campbell Q.C. and Mr. M. Peters for the Defendant

2008: March 18 & 19
April 15
October 13

RULING

[1] **THOM, J (IN CHAMBERS):** On March 15, 2007 His Lordship Justice Bruce-Lyle ordered inter alia that the following preliminary issues be determined by the Court before trial of the substantive action:

- “1. Whether the Notice of Appointment dated 1st December 2006 given by the 4th Defendant to the 3rd Defendant in purported exercise of the powers of the settlor under clause 7.2 of the Blue Ridge Trust is improper, void and of no effect.
2. Whether or not John Popely’s letter of 6th December 2006 was effective to remove the 3rd Defendant as Trustee of Blue Ridge Trust and to appoint Cosmos Trust Ltd. in its place.”

BACKGROUND:

- [2] The Claimant is one of the beneficiaries of the Blue Ridge Trust which the Fourth Defendant purported to remove by the Notice of Appointment dated 1st December 2006. Blue Ridge Trust is an international Trust registered pursuant to the International Trust Act 1996 Laws of Saint Vincent and the Grenadines.
- [3] The First Defendant Ayton Limited is an International Business Company registered pursuant to the International Business Companies Act 1996 Laws of Saint Vincent and the Grenadines and is wholly owned by the Blue Ridge Trust.
- [4] The Second Defendant Corporate Directors Limited is the sole director of the First Defendant Ayton Limited.
- [5] The Third Defendant St. Vincent Trust Services is the Trustee of the Blue Ridge Trust.
- [6] The Fourth Defendant Lex Services Limited is named as settlor in the Trust Deed of Blue Ridge Trust.
- [7] Blue Ridge Trust was set up on the instructions of John Henry Popely the father of the Claimant. The beneficiaries of the Blue Ridge Trust are the Claimant and other members of the Popely family. The Notice of Appointment dated 1st December 2006 purported to remove these beneficiaries.
- [8] It is not disputed that the Defendants are directly under the management and control of the Jeeves Group who are professional trustees.
- [9] A dispute arose between the Popely family and the Defendants in relation to costs incurred by the Defendants. A charge was placed on the sole asset of Blue Ridge Trust "White Owl Barn" the family home of the Popelys.

- [10] This claim was then instituted and the reliefs sought included an order setting aside the decision to register the charge against “White Owl Barn” and an order appointing the Claimant and John Oxley as directors of Ayton Ltd.
- [11] Other issues in dispute in relation to Blue Ridge Trust were to be the subject of arbitration pursuant to the Blue Ridge Trust Deed.
- [12] On June 8, 2006 by mutual consent of the parties the Court ordered that arbitration be disposed with and that all issues in dispute between the parties be determined in the Claim. These issues included what costs and charges were incurred by St. Vincent Trust Services and whether the Defendants acted in breach of their fiduciary duties to the Claimant.
- [13] On 1st December 2006 Lex Services the named settlor in the Trust Deed of Blue Ridge Trust in exercise of the power under Clause 7.2 of the Trust Deed gave notice to St. Vincent Trust Services purporting to remove the named beneficiaries of Blue Ridge Trust and appointing in their place the International Red Cross and the World Wildlife Fund as beneficiaries.
- [14] On 6th December 2006 John Henry Popely pursuant to the power under Clause 12 (b) of the Trust Deed instructed Lex Services to remove St. Vincent Trust Services as Trustee of Blue Ridge Trust and appoint Cosmos Trust Limited in its place.
- [15] On January 20, 2007 the Defendants filed a Notice of Application in which they sought inter alia a declaration that Lex Services has the Settlor’s rights under the Blue Ridge Trust Deed including the power to appoint and remove beneficiaries and trustees.
- [16] On 18th March 2007 the Claimant filed an application in which he sought a declaration that the Notice of Removal and Appointment dated 1st December 2006 is void and of no effect and sought an interim injunction restraining St. Vincent Trust Services from dealing in any way with any asset of Blue Ridge Trust.

[17] On March 15, 2007 Justice Bruce-Lyle ordered that the preliminary issues outlined in paragraph [1] be determined.

SUBMISSIONS:

[18] Learned Counsel for the Claimant submitted that the Notice of Appointment dated 1st December 2006 is improper, void and of no effect. The letter of 6th December 2006 was effective to remove the St. Vincent Trust Services as trustee of Blue Ridge Trust.

[19] In support of his contention Learned Counsel submitted that:

(a) On a true construction of the Trust Deed the true settlor of Blue Ridge Trust is John Henry Popely and Lex Services is the nominee settlor and agent of John Henry Popely. Lex Services is therefore not entitled to exercise any rights of settlor save on and in accordance with the instructions of John Henry Popely, except where the instructions are contrary to paragraphs (1) and (4) of the Letter of Irrevocable Instructions dated 27th November 1997. Paragraphs (1) and (4) read as follows:

“1. John Henry Popely born 23rd March 1944, hereby instructs Lex Services Ltd. Trust House 112 Bonadie Street, Kingstown, St. Vincent and the Grenadines, to form a trust for the benefit of the persons set out in the schedule hereto (Annex I) and the assets set out in the second schedule hereto (Annex II).

4. I stipulate that I am not to be a beneficiary and cannot be appointed as a protector.”

Construction of the Blue Ridge Trust Trust Deed must be on principles of common law and equity. Learned Counsel referred the Court to the English Law Application Act Chapter 8 Laws of Saint Vincent and the Grenadines.

Learned Counsel urged the Court to take into account the Irrevocable instructions when determining who has the settlor’s rights. While parol evidence is not admissible a collateral written contract is admissible – **Jacobs and Batavia v**

General Plantation Trust Ltd; and **Heilbut Symons & Co v Buckleton**. In construing the Trust Deed the Court must apply the ordinary rules of construction – **Roger Lester Breadnor & Others v Jonathan Granville-Grossman** [2003] EWHC Chapter 224. Learned Counsel also referred the Court to various clauses in the Trust Deed where the terminology used referred to the settlor as a natural person.

The true effect of the Irrevocable Instructions and the Trust Deed is that so long as the beneficiaries are alive Lex Services is not entitled to exercise the power of settlor save for the bona fide benefit of one or more of the beneficiaries.

- (b) Learned Counsel further submitted that as nominee settlor Lex Services was the agent of John Henry Popely and was therefore obliged to exercise the power of settlor only upon the specific instructions of John Henry Popely. As agent the law imposed upon Lex Services in the exercise of the power special duties of a fiduciary nature towards his principal. Learned Counsel referred the Court to **Snell's Equity** 29th Edition at page 92 where the Learned Author stated as follows:

“Agency – An agent and a trustee resemble each other in that each is subject to fiduciary obligations towards his principal or beneficiaries as the case may be ...”

- (c) Alternatively if Lex Services has an independent power to remove the beneficiaries the exercise by it of the power in all the circumstances is not bona fide and is unconscionable and capricious. The Defendants misused their power as fiduciary to recover their costs. In so doing they are acting in their own interest.

[20] Learned Queen's Counsel for the Defendants submitted that John Henry Popely is the real settlor of the Blue Ridge Trust and Lex Services is the nominee settlor. John Henry Popely is not a party to the Trust Deed which was signed by Lex Services and St. Vincent Trust Services. A person that is not a party to an agreement including a Trust Agreement or Trust Deed cannot assert rights there under. A real settlor that does not have an agreement with the nominee settlor cannot assert terms and conditions that were not and

have not subsequently been expressly agreed nor can such terms be implied. Lex Services is named in the Trust Deed as settlor, therefore Lex Services has the settlor's rights as set out in the Trust Deed and in the International Trust Act 1996.

[21] In construing the Trust the Court is required to consider the instrument creating the Trust in the context of the statutory frame work being the International Trust Act and the relevant surrounding circumstances. Learned Counsel referred the Court to Sections 7 and 9 of the International Trust Act. The background circumstances to be looked at are that John Henry Popely being a director of Hever Worldwide Properties did not wish to have to disclose that he had an interest in Blue Ridge Trust who was a shareholder of Casterbridge Properties Ltd who had shares in Hever Worldwide Properties, so he named Lex Services as the settlor of Blue Ridge Trust. He divested himself of the powers of settlor when he had Lex Services execute the document as nominee settlor. Lex Services is therefore entitled to exercise its absolute discretion as settlor and the Court may not interfere with that discretion.

[22] The Claimant is a discretionary beneficiary. A discretionary beneficiary has no proprietary rights – **R v Barnet Magistrates' Court Exp Cantor** [1999] 1 WLR p. 334. A discretionary beneficiary has no right to challenge his removal. He is merely a volunteer and equity will not assist a volunteer. Also the Court will only exercise its inherent jurisdiction on the application of a party with a sufficient interest. Since the Claimant has been removed as a discretionary beneficiary, he does not have the right to insist on being a beneficiary of a discretionary trust he therefore has not locus standi to continue the claim, **Deloitte & Touche A.G. v Johnson.**

[23] In relation to the issue of bona fide exercise of the power Learned Queen's Counsel submitted that the actions of the Defendants could be described as robust, but did not amount to mala fide. The claims made were honest claims for sums due.

LAW:

[24] In determining the preliminary issues the following questions arises:

- (1) Who is empowered to exercise the power of settlor under the Trust Deed, John Henry Popely as the real settlor or Lex Services as the nominee settlor?
- (2) If Lex Services is empowered to exercise the powers of settlor is it empowered to do so independently of John Henry Popely?
- (3) If Lex Services is empowered to exercise the power is it a fiduciary power? If yes, was it exercised bona fide?

[25] The Court has an inherent jurisdiction to supervise the administration of trusts. This is based on the duty and obligation of a fiduciary and it does not matter whether the power is exercised by a trustee or an agent. In **Bowstead an Agency** at page 5 the Learned Author stated:

“As long as you are a donee of a power, it creates whether it comes from the contractual obligation or whether it comes purely from equitable principles and trust; you are subject to fiduciary duties and obligations to act bona fide and in good conscience.”

[26] The Blue Ridge Trust is registered under the International Trust Act of Saint Vincent and the Grenadines and is governed by the Laws of Saint Vincent and the Grenadines.

[27] It is not disputed that the Defendants are all under the common management and control of the Jeeves Group who are professional trustees. It is also not disputed that John Henry Popely is the real settlor of the Blue Ridge Trust and Lex Services is the nominee settlor.

[28] The applicable law is the International Trust Act and by the Application of English Law Act Chapter 8 the Common Law and Rules of Equity from time to time in force in England. Section 4 of the Application of English Law Act reads as follows:

“(1) Subject to the provisions of sub-section (2), without prejudice to the provisions of any Act of the Parliament of Saint Vincent and the Grenadines and in particular the provisions of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, the common law and the rules of equity from time to time in force in England shall be in force in Saint Vincent and the Grenadines in so far as they may be applicable to the circumstances thereof and subject to such modifications

thereto as the circumstances may require, save to the extent to which such common law or any such rule of equity may be excluded by any Act of the Parliament of Saint Vincent and the Grenadines.

- (2) Where on or after the 27th October 1969 any provision of the common law or any rule of equity has been; or is abrogated or superseded by an Act of the Parliament of the United Kingdom such provision or rule, as the case may be, shall continue to apply in Saint Vincent and the Grenadines as it applied before such abrogation or supersession unless and until an Act of the Parliament of Saint Vincent and the Grenadines provides otherwise.”

[29] Lex Services purported to exercise the powers of settlor under Clause 7.2 of the Trust Deed which provides as follows:

“The Settlor, and the Protector after the Settlor’s death, shall be authorized to designate the Beneficiaries under this Trust and shall determine the time and modus of distribution of Trust Funds to them. Unless agreed by the Settlor in writing the Protector shall not be a Beneficiary.

The Settlor and/or Protector shall inform the Trustee of the designation of such Beneficiaries by Notice of Appointment in writing. Such Notice of Appointment shall be binding upon the Trustee. The Settlor may at any time alter or divest the beneficial interest of appointed Beneficiaries or change the designation of Beneficiaries at his discretion. The Protector may not change or revoke or amend the designation of Beneficiaries effected by the settlor, but may only amend appointments effected by the Protector.

If no Beneficiaries shall have been appointed and no notice of appointment can be presented at perpetuity date, the International Red Cross and the World Wild Life Fund shall become beneficiaries or the Trustee shall appoint Beneficiaries within the intendment of the Settlor’s assumed wishes.”

[30] While John Henry Popely by his letter of December 6, 2006 purported to instruct Lex Services to exercise the powers of Settlor under Clause 12 (b) of the Trust Deed, Clause 12 (b) reads as follows:

- “(b) Any Trustee may at any time upon six day’s notice during the lifetime of the Settlor be removed from office as Trustee hereunder by delivery of a written instrument signed by the Settlor. A telex “Request your resignation as Trustee of the Trust” shall be sufficient notice to remove the Trustee(s). Any Trustee may be removed by the Settlor on shorter notice if the Trustee should be in breach of the Trust Deed of any amendment or By-Law thereof.

After the Settlor's death or in case of his inability to act the power granted to the Settlor hereto shall be vested in the Protector."

[31] The International Trust Act recognizes that an International Trust could be created by the Settlor or his nominee. An international trust is defined in the Act as follows:

" "International Trust" or trust" means a trust in respect of which
(ii) the trust is evidenced by a writing signed by the Settlor or his nominee and by a Registered Trustee"

While Section 7 reads as follows:

"7. An international trust that does not contain a power of revocation shall be presumed to be irrevocable by the Settlor or his legal personal representative notwithstanding that the Trust is created inter vivos or voluntarily by the Settlor or his nominee."

[32] The Defendants agree that not a single asset of the Blue Ridge Trust was transferred from Lex Services. Lex Services has settled no property of its own on the Blue Ridge Trust. Learned Counsel for the Defendants stated in the submission that:

"The said dispositions were effected on behalf of John Henry Popely by Lex."

While Lex Services is named as settlor in the Trust Deed, as stated earlier the Defendants agree that John Henry Popely is the real settlor and Lex Services is the nominee settlor. This is as a result of the Irrevocable Instructions of John Henry Popely dated 27th November 1997.

[33] I agree with the submission Learned Counsel for the Claimant that Lex Services being the nominee settlor of John Henry Popely the real settlor, Lex Services was obliged to exercise the power of settlor in accordance with the instructions of John Henry Popely. As John Henry Popely's nominee Lex Services was the agent of John Henry Popely.

[34] In **Halsbury's Laws of England** 4th Edition paragraph 701 the Learned Authors stated:

"Nature of the relation of Agency.
...The relation of agency arises whenever one person called "the agent" has authority to act on behalf of another, called "the principal", and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent..."

And at paragraph 702:

“...The word “agent” is also frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as that other’s alter ego and not merely as an intermediary between the principal and the third party.”

[35] In the Irrevocable Instructions John Henry Popely outlined the duty which he required Lex Services to perform being the creation of a Trust for the benefit of named members of the Popely family with specific instructions in relation to the Trust. The form of the Trust was attached to the Irrevocable Instructions. Lex Services signed the Irrevocable Instructions accepting the responsibility to perform the duty.

[36] In the event that I am wrong in finding that Lex Services as nominee settlor is required to exercise the power of settlor on the instruction of John Henry Popely the real settlor and that on a true construction of the Trust Deed Lex Services as nominee settlor is the donee of a special power of appointment which Lex could exercise independent of John Henry Popely then I find it is a fiduciary power. In *Snell’s Equity* 29th Edition at page 201 the Learned Author stated:

“Express Power: The Trust may confer an express power of appointing new trustees. The donee of such a power can appoint himself, but should do so only in special circumstances, for the power is fiduciary.”

[37] It was submitted on behalf of the Defendants that the nominee settlor Lex Services is entitled to exercise its absolute discretion and the Court may not interfere with that discretion. No legal authority was cited in support of that contention and in my research I found none.

[38] I find that Lex Services is required to exercise the power bona fide for the end designed. The Learned Author of *Snell’s Equity* 29th Edition at page 562 explained how the donee of a special power of appointment should exercise that power in the following manner:

“Power must be exercised bona fide. The donee of a special power of appointment must exercise the power bona fide and for the end designed and not for any purpose which is foreign to the power. If the power is exercised not bona fide, but for a purpose beyond the scope of the instrument creating the power or not justified by it, the appointment is said to be a fraud on the power and equity holds it bad.”

[39] In the decision of the Privy Council in Vaucher v Powell [1915] A.C. p. 372 at p. 378 Lord Parker outlined the principle as follows:

“The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor’s purpose and intention is to secure a benefit for himself or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the quantum of the benefit bona fide intended to be conferred on the appointee and the quantum of the benefit intended to be derived by the appointor or to be conferred on a stranger.”

[40] The question that arises is was the power exercised by Lex Services for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power, was the purpose and intention of Lex Services in exercising the power to secure a benefit for Lex Services or some other person not an object to the power?

[41] Clause 3 of the Trust outlined the purpose of the Trust as follows:

“Purpose of the Trust

The purpose of the Trust shall be:

- Charity of any kind.
- The supporting of selected natural or juridical persons or institutions.”

[42] The purpose for which the power was exercised can be seen from the various affirmations of Ms. Phelan on behalf of the Defendants. By way of background, in her second affirmation made on 13th September 2005 Ms. Phelan states as follows at paragraph 32:

“BRT was set up as a family trust, on behalf of JHP, JHP was not the named settlor on the Trust Deed and does not consequently have the settlor’s rights. The trust is however, still in existence as a consequence of his request that it be formed and managed by SVTS as trustee for the benefit of certain beneficiaries, under the Trust Deed and St. Vincent and the Grenadines law. Often a trust will own a company and the company will be the entity to own all the assets, rather than the trust directly. This is done for a variety of reasons, including assets

protection. In the circumstances, the trust will often not have its own bank account, or funds. However, as a Saint Vincent and the Grenadines registered trust, there are Government fees to pay. There are also trustee fees to pay. These fees have to be paid by someone or something. Ordinarily, the fees are either paid by the underlying company, if it has funds, or by the real settlor, for whom the trust has been formed and is being managed.”

[43] In her third affirmation sworn on the 8th December 2006, one week after the issue of the Notice of Appointment by Lex Services, Ms. Phelan states:

“93. The Popely’s last remaining hope to hold onto their home, White Owl Barn, to avoid paying costs orders against them in England and to obtain monies to replace the funds they have wasted in all their unsuccessful litigation, is to continue with these proceedings against the Defendants. The fact is they cannot.

94. The removal of the Claimant, his brother and their children was the only way in which the systematic depletion of the assets of the BRT structure could be stopped and an end brought to these sorry proceedings. As has been symptomatic throughout all of this Popely litigation, they have been their own worst enemies.

[44] Further the Defendants state the basis for their application to strike out the Claim is that the Claimant and the other parties on whose behalf the Claimant brought the claim are no longer beneficiaries of the Blue Ridge Trust and consequently have no locus standi to continue with the claim. In the Notice of Application to strike out the claim the Defendants stated:

“9. Despite having no right to be beneficiaries to BRT and/or to benefit from the Trust, only being beneficiaries of a discretionary trust at that time, the Claimant, John Anthony Popely and their children brought a claim through the Claimant which not only threatens BRT, but also its underlying company, Ayton, as well as Ayton’s only asset, White Owl Barn.

10. Allowing the Claimant, John Anthony Popely and their children to remain beneficiaries of BRT would jeopardize the very existence of the BRT structure.

11. In their attempt to obtain at all costs an entitlement to White Owl Barn, the Claimant and his family actually diminished the value of this asset to the BRT structure and consequently acted against their own interests, whilst they were beneficiaries.

12. Upon realization of White Owl Barn, most of the funds will be used to satisfy the debts of the BRT structure, which primarily consist of court costs and fees incurred litigating against the Popely family.
13. In order to stop the value of the BRT structure assets diminishing any further, Lex Services Limited removed the Claimant, John Anthony Popely and all their children as beneficiaries with effect from 1st December 2006.
19. The removed beneficiaries cannot challenge their removal. Firstly they are no longer beneficiaries of BRT and therefore have no standing ...

[45] In view of the above I find that the exercise of the power under Section 7.2 of the Trust Deed by Lex Services was for the purpose of benefiting the controllers and management of Lex Services. It is not disputed that the fees are being disputed. The matter is before this Court. By mutual consent the parties agreed not to proceed with arbitration but to have all of the matters including the dispute in relation to fees be determined by the Court. The exercise of the power by Lex Services to remove the beneficiaries is for the purpose of having the claim struck out since they would have no locus standi. This would then enable the Defendants to dispose of the sole asset of the Trust, White Owl Barn and use the proceeds to pay fees they allege are due to them, the very fees that are in dispute in this claim.

[46] I find the exercise of the power by Lex Services was not for the benefit of the end designed, it was for the purpose of benefiting a person not an object of the power being the Defendants. In **Re Brooks Settlement** [1968] 3 AER the Court referred to the principle as stated by the Court in **Aleyn v Belchier** being:

“No point is better established than that a person having a power must execute it bona fide for the end designed, otherwise it is corrupt and void.”

[47] While I would agree that the first paragraph of Clause 7.2 of the Trust Deed is wide enough for the settlor to make an appointment of the International Red Cross and the World Wild Life Fund, the clear meaning of paragraph 3 of Clause 7.2 is that the International Red Cross and the World Wild Life Fund were to become beneficiaries if no beneficiaries were appointed and no notice of appointment could be presented at perpetuity date.

- [48] In conclusion I find that Lex Services as nominee settlor was obliged to exercise the power of settlor under Clause 7.2 in accordance with the instruction of the real settlor John Henry Popely. If I am wrong and Lex Services is indeed the donee of an independent discretionary power then Lex Services was required to exercise that power bona fide for the end designed. This Lex Services failed to do.
- [49] In relation to the first preliminary issue I find that the Notice by Lex Services dated 1st December 2006 is improper, void and of no effect.
- [50] In relation to the second preliminary issue I find that Lex Services as nominee settlor is obliged to act in accordance with the instructions of John Henry Popely as outlined in the letter of December 6, 2006.
- [51] Both parties will make submissions on the issue of costs on October 24, 2008.

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Gertel Thom
HIGH COURT JUDGE