

BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIH(COM)2010/157

IN THE MATTER OF A SETTLEMENT DATED 1 MAY 1996
AND IN THE MATTER OF SECTION 6 OF THE TRUSTEES' RELIEF ORDINANCE (CAP 304)
AND PART 67 OF THE CIVIL PROCEDURES RULES 2000

BETWEEN:

KCTS HOLDING LTD.

Claimant

Appearances: Mr Jack Husbands for the Trustee
No other party had been joined or served and none appeared

JUDGMENT

[2010: 16 December

2011: 21 January]

(Trust deed – construction – parties)

- [1] **Bannister J [ag]:** This is a claim by the Trustee of a settlement made on 1 May 1996 by Beneficence Corporation of the one part ('the Settlor') and the Trustee of the other ('the Settlement') for the determination of a question of construction that has arisen under it. Until the occurrence of an 'emergency' (upon which the Settlement may migrate with an appropriate change of governing law) the Settlement is governed by the law of the British Virgin Islands. There is no evidence that any such emergency has occurred, so that the rights of the beneficiaries and the construction of the trust deed are to be determined in accordance with the law of this jurisdiction.
- [2] These proceedings are brought by fixed date claim form under CPR Part. The evidence in support of the claim is sworn by Darwin Tu ('Mr Tu') who is a director of the Trustee.

[3] The Settlement was made for the benefit of Robert Ing ('Robert'), Nita Ing ('Nita') and Tina Ing Yahng ('Tina'), who are the children of Glyn TH Ing, and of the natural born issue of Nita and Tina (but not of Robert). There is provision for addition to be made to the class of beneficiaries but it does not appear that any such addition has been made. The living beneficiaries are Robert, Nita and Tina together with issue of Nita and Tina.

[4] Clauses 2.2 and 2.3 of the Deed of Settlement are in the following terms:

2.2 Thirty percent (30%) of the Trust Income shall be annually distributed to ROBERT ING during his lifetime for his health, support and maintenance in his accustomed standard of living. Distribution of Trust Income pursuant to this Clause 2.2 shall cease upon the death of ROBERT ING.

2.3 The balance of the Trust Income after distribution pursuant to Clauses [Sic] 2.2 shall be annually distributed between NITA ING and TINA ING YAHNG, who shall receive fifty-seven and one hundred forty three one thousandth percent (57.143%) and forty-two and eight hundred fifty seven one thousandth percent (42.857%) of such remaining balance, respectively. If either or both NITA ING and TINA ING YAHNG are not then living, such remaining balance shall be distributed in accordance with Clause 2.4.'

[5] The trust assets are such that no income has to date been received by the Trustee for distribution, but it is anticipated that that position may change. If that happens, the Trustee needs to know how that income is to be distributed. It is the view of the Trustee that the combined effect of clauses 2.2 and 2.3 of the Deed of Settlement is that during Robert's lifetime and while each of Nita and Tina remain living (the present state of affairs), the Trustee must distribute 30% of income to Robert and the remaining 70% to Nita and Tina in the proportions 57.143% and 42.857% respectively. For completeness, I should say that this obligation is subject to certain overriding powers granted to the Settlor under clause 3 of the Deed of Settlement.

[6] The Trustee is concerned, however, that the words

' . . . for his health, support and maintenance in his accustomed standard of living'

where they occur in clause 2.2 of the Trust Deed may operate to restrict the amount of income distributable under that clause to an amount sufficient to achieve those objects, up to a limit of 30%. The Trustee therefore seeks the determination of the Court upon this question of construction.

Procedural considerations

- [7] As will have been noticed from the title to these proceedings, the Trustee has joined none of the beneficiaries as Defendants. Mr Tu says that Robert has been informed of the Trustee's intention to bring this claim and has been provided with a copy of the claim in draft. He is said to be financially secure and has never had any need of financial assistance from the Settlement, whether for his health, support, or maintenance or otherwise. He has not indicated any wish to participate in these proceedings. Mr Tu says that the Trustee has not added any other beneficiary, on the grounds that it does not consider that the relief sought can adversely affect their interests.
- [8] The claim is said to be brought under section 6 of what is described as the Trustee Relief Ordinance (CAP 304), (more accurately referred to as the Trustees Relief Act of 1877) ('section 6', 'the Act') and CPR Part 67. Section 6 allows trustees (and personal representatives) by petition in open court or by summons by written statement in chambers to apply to a Judge for the opinion, advice or direction of the Judge upon any question respecting the management or administration of trust property. It provides that the application is to be served upon, or the hearing to be attended by all interested parties or such of them as the Judge may think expedient. If the trustee acts upon the opinion, advice or direction of the Judge given upon such an application then, in the absence of fraud, willful concealment or misrepresentation the trustee is treated as having discharged his duties. Section 7 of the Act makes clear that the Judge may decide any such question on paper.
- [9] In my judgment, the question which I am asked to determine in these proceedings is a question respecting the administration of the property of the Settlement.
- [10] CPR Part 67.1 distinguishes between what it calls 'administration claims', which it classifies as being claims for the administration of the estate of a deceased person¹ and claims for the execution of a trust under the direction of the court², on the one hand, and claims to determine any

¹ CPR 67.1(1)(a)(i)

² CPR 67.1(1)(a)(ii)

question (or grant any relief) relating to the administration of the estate of a deceased person or the execution of a trust (which are not classified as administration claims)³, on the other. So far as CPR Part 67 is concerned, the question which I am asked to decide falls within the latter category. CPR 67.4(1) provides that a trustee (among others) may bring a claim for the determination of any question without bringing an administration claim. 'Any question' includes⁴ any question as to the rights or interests of a person claiming to be beneficially entitled under a trust. In my judgment, the latter words are broad enough to include a question raised by a trustee for the determination of the rights and interests of persons named as beneficiaries in an instrument.⁵

[11] CPR 67.2(3) provides that the general rule is that the claimant trustee raising a question for determination under CPR 67.4 need not join as a defendant any person having a beneficial interest under the trust, although the claimant may make such a person a defendant and the court may direct that such a person is made a defendant. In this respect CPR 67.2(3) and (4) are similar in their effect to Rule 64.4(1)(c) of the English Civil Procedure Rules, although our CPR differ in providing that the general rule is that beneficiaries need not be served.

[12] As I have already said, the Trustee took the view that there was no need to serve Robert, because he has indicated no wish to participate in these proceedings and took the view that there was no need to serve Nita or Tina because their interests could not be prejudiced. I disagree with the Trustee over that. While on no construction of clauses 2.2 and 2.3 could the interests of Nita and Tina be reduced to less than 70%, a decision to distribute less than 30% to Robert in any given year would increase the 'balance' available under clause 2.3 in that year for distribution to Nita and Tina. It seems to me, therefore, that Nita and Tina are interested in the outcome of this claim.

[13] Given the present drafting of our CPR, it is not possible for these proceedings to be served on any of the existing beneficiaries, since each of them is outside the jurisdiction.⁶ After having heard submissions in the matter on 16 December 2010, however, I directed that notice of the proceedings be given to Nita and Tina and that it was to be made clear to them that they were to be free either to attend an adjourned hearing and make oral submissions or, if they preferred, to

³ CPR 67.1(1)(b)

⁴ CPR 67.4(2)(d)(ii)

⁵ It is true that the wording differs from that in CPR 64.2(3), which is drafted by reference to 'interests' rather than 'claims', but I think that in context the expression 'claiming to be beneficially entitled' is wide enough to encompass a person who has a claim to be treated as beneficially entitled.

⁶ **Pasig & Ors v RWC & Ors** BVIHC (COM) 24 of 2010, 30 July 2010

send in written submissions. Each has indicated in writing that she does not wish to attend an adjourned hearing or to make any submissions in writing. While these statements of intention, coupled with the very broad terms of CPR 67.2(3), give some comfort, the fact remains that because neither they nor Robert have been (or can be) served none of these persons will, as a matter of law, be bound by this decision and still less will be the successors in interest of each of Nita and Tina, if and when their interests take effect in possession.

[14] It seems to me that despite the width of CPR 67.2(3), where the Court is called upon to make a decision about the nature or extent of a beneficiary's interest under a settlement, principle requires that they be joined. Section 6 itself requires service on interested persons. While CPR 67.2(3) lays down a general rule, it does not, in my judgment, dispense with the need to serve beneficiaries if they are to be bound by a decision of the Court determining the nature or extent of their entitlements.

[15] If, however, the Court declines to answer the Trustees' question on the basis that interested parties have not been and cannot be served, then the Trustees will be left without the benefit of the Court's assistance. Given that no question of fact arises on the present application and given the stance adopted by the presently interested beneficiaries, it seems to me that it would be wrong of the Court not to offer the Trustee its opinion on the extent of Robert's interest under clause 2.2 of the Settlement. In circumstances where no interested beneficiary is a party to the proceedings, however, that is all that it can be – an opinion. It cannot as a matter of law protect the Trustee because it will not bind any of Robert, Nita or Tina and it cannot, *a fortiori*, bind parties other than Robert, Nita or Tina. As explained in **Pasig**⁷, the Court cannot devise or adopt procedures of its own in order to bind persons not otherwise amenable to its jurisdiction, merely on the grounds that it would be convenient to do so. To bind persons by its decisions the Court needs jurisdiction and jurisdiction is predicated on service: see Dicey, Morris & Collins, *The Conflict of Laws*, 14th Ed at 11-003.

[16] On that basis and strictly on that basis, I proceed to give my opinion, for what it is worth, on the true construction of clause 2.2 of the Settlement.

⁷ *supra*

Clause 2.2 of the Settlement

[17] I have no doubt that the Trustee's construction of clause 2.2 is the correct one. Had the words 'for his health, support and maintenance in his accustomed standard of living' been intended to restrict the amount available for distribution, then the words 'up to' or 'a maximum of' or 'not more than' would have been expected to have been found at the opening of the sub-clause. The use of the words 'The balance', rather than the words '70%', at the opening of clause 2.3 does not seem to me to be surprising or to suggest that the draftsman had in mind a fluctuating figure. It simply makes, in my judgment, for more felicitous expression.

[18] What clinches the point, in my view, are the terms of clauses 2.4 and 3(b) of the Settlement. Clause 2.4 reads as follows:

'2.4 Upon the death of either or both NITA ING or TINA ING YAHNG, the decedent's respective share of the Trust Income shall be distributed as follows:

- (a) Upon the death of NITA ING, her share of the Trust Income shall be distributed to her then living issue, by right of representation. If NITA ING and TINA ING YAHNG are alive, NITA ING's share of the Trust Income shall be distributed equally to ROBERT ING and TINA ING YAHNG. If ROBERT ING is not then living, NITA ING'S full share of the Trust Income shall be distributed to TINA ING YAHNG, if she is then living, or, if she is not, then to her then living issue, by right of representation. Upon the death of NITA ING, if TINA ING YAHNG is not then living and leaves no living issue, NITA ING's full share of the Trust Income shall be distributed to ROBERT ING, if then living.
- (b) Upon the death of TINA ING YAHNG, her share of the Trust Income shall be distributed to her then living issue, by right of representation. If TINA ING YAHNG at her death leaves no living issue and both ROBERT ING and NITA ING are alive, TINA ING YAHNG's share of the Trust Income shall be distributed equally to ROBERT ING and TINA ING. If ROBERT ING is not then living, TINA ING YAHNG's full share of the Trust Income shall be distributed to NITA ING, if she is then living, or, if she is not, then to her then living issue, by right of representation. If NITA ING leaves no living issue upon the death of TINA ING YAHNG, TINA ING YAHNG's full share of the Trust Income shall be distributed to ROBERT ING, if then living.'

Clause 3(b) reads as follows:

‘3. IRREVOCABILITY; SETTLOR’S RETAINED POWERS

The trust hereby created shall be irrevocable. However, notwithstanding any provision of this Deed to the contrary, the Settlor shall retain the following powers which shall be exercisable without the approval of the Trustees:

....

(b) The power to require the Trustees to make distributions of the assets of the Trust Fund, or any part thereof, to any one or more of NITA ING, TINA ING YAHNG, and any issue of either of them; provided that such principal distributions shall be made for any purpose that the Settlor sees fit including for the pleasure, desire or happiness of any Beneficiary; and further provided that such principal distributions shall be made from the Trust Fund as a whole and shall not be chargeable against the proportionate share thereof held for the payment of income to the person to whom the principal distribution is made.’

[19] These provisions make it plain that the Settlor regarded the three adult beneficiaries as having defined interests in the Trust Income from the outset. If he had intended Robert to have a fluctuating interest (albeit one capped at 30%) whose extent depended upon the amount of income which the Trustee decided in any given year to give him for his health, support and maintenance in his accustomed standard of living, the ascertainment of ‘her share of the Trust Income’ upon the death of either of Nita and Tina for the purposes of operating clause 2.4 would have been impossible if the death occurred during Robert’s lifetime. The fact that the Settlor regarded the ‘share of the Trust Income’ of either of Nita and Tina as identifiable without more upon her death while Robert remained a beneficiary shows that Robert’s share of the Trust Income must, also have been regarded by the Settlor as fixed. The only candidate for the size of Robert’s share of the Trust Income, on that basis, is 30%.

[20] The reference in clause 3(b) to the ‘proportionate share’ of the Trust Fund held for the payment of income to Nita or, as the case might be, Tina, is if anything even more persuasive. This expression would be meaningless if their respective shares of income were not regarded by the Settlor as fixed. Once their shares are treated as fixed, then Robert’s share must also be fixed.

[21] It has to be accepted that the latter point involves an assumption that the entirety of the Trust Fund is at all times income producing and uniformly so across the board. The expression 'Trust Income' is not defined in the Settlement. If certain assets comprising the Trust Fund produce income from time to time while others do not, it might be a nice point what assets are from time to time held for the payment of income to Nita or, as the case may be, Tina. Clause 3(b), however, is not dispositive. It merely directs that distributions of assets under that clause operate as deductions from the Trust Fund overall. What it does show, however, is that the Settlor regarded each of Nita and Tina as having a defined, rather than a fluctuating entitlement. It must follow that during Robert's lifetime he, too, was regarded as having a defined entitlement to income – which can only have been to 30%.

Conclusion

[22] In my opinion, therefore, the gift to Robert in clause 2.2 must be taken to be a gift (subject to the Settlor's overriding powers under clause 3) of 30% of the Trust Income. The words 'for his health, support and maintenance, etc' where they occur in clause 2.2 must be regarded as indicative of the rationale for the making of the gift, rather than as words of limitation. There is not dissimilar language in clause 3(b), which contains an apparently otiose reference to the 'pleasure, desire or happiness' of the appointee.

[23] Although Trust Income is not defined, it seems to me that it must, at any rate for the purposes of clauses 2.2 and 2.3, mean the income from time to time generated by such of the assets of the fund as are income producing over the year in question. Robert is entitled to 30% of that income annually.

Commercial Court Judge

21 January 2011