

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

CLAIM NO: BVIHC (COM) 88 OF 2011

BETWEEN:

HSBC INTERNATIONAL TRUSTEE LIMITED

Claimant

and

**[1] JETFIELD (PTC) INC.
[2] LEE SO FONG SUSAN
[3] LEE KING CHEUNG JOHN
[4] LEE KING TING FRANK
[5] LEE KING SING HENRY
[6] LEE TSE VEN THOMAS
[7] LEE TSE VEN YIN BETTY
[8] KUNG LINDA LEE (ALSO KNOWN AS LEE HEUNG
FONG LINDA)
[9] LEE JEFFREY HENDERSON
[10] NG KIT YEE KATHERINE**

Defendants

Appearances: Mrs Shân Warnock-Smith QC and Mr Jeremy Child for the Claimant
Mr Paul Webster QC and Ms Nadine Whyte for the Second and Third Defendants
Mr Garvin Simonette and Ms Hélène Lewis for the Fourth Defendant
Mr Brian Green QC and Mr Oliver Clifton for the Fifth to Tenth Defendants
The first Defendant and the eighth to tenth Defendants were not represented and did not appear

JUDGMENT

2012: 11, 21 December

(Private trust company as trustee of unit trust – trust property comprising shares in eight family companies – units held by trustees of two family discretionary trusts – beneficiaries agreed that private trust company should be removed as trustee of unit

trust – whether new trustee of unit trust should be existing trustee of the discretionary trusts or some other person – second and third defendants proposing other person – fourth defendant proposing different other person – principles to be applied in selecting new trustee)

- [1] **Bannister J [Ag]:** This is rather an unhappy case. A long retired and highly successful Hong Kong entrepreneur, active originally in the music industry but with other interests worldwide, decided in 1992 to settle the group of companies which he had built up together with the help of his wife upon discretionary trusts for his family. The chosen machinery for turning a valuable group of companies into trust property was for the group companies to be transferred to the first Defendant ('Jetfield') in exchange for the issue by Jetfield to the Settlor (the sixth Defendant) and his wife (the seventh Defendant) of some 75 million units, which were settled by them on family discretionary trusts (the Betom Trust) by transferring them to the trustee of such trusts, originally another professional trust corporation, but since 1997 the Claimant, HSBC International Trustee Ltd ('HSBC'). Jetfield held the transferred shares on the trusts of a trust called the Jetfield Unit Trust. For reasons which elude me, one unit was issued by Jetfield to the third Defendant ('John'). The second to fifth Defendants are the children of the Settlor and his wife and are beneficiaries or potential beneficiaries of the discretionary trusts. The remaining Defendants, who have taken no part in the proceedings, are among Jetfield's current directors.
- [2] There is a slight complication in the present case. For reasons having to do with US tax considerations, in 1998 some 11 million units were appointed out of the Betom Trust, and resettled into a separate family discretionary trust¹ called the Field Gold Trust. The trustee of both family discretionary trusts is, however, HSBC and for present purposes the distinction can be ignored.
- [3] The nature of the present application, as originally conceived, was whether, because of disharmony between those of the Defendants who are among its directors, leading to paralysis at board level, Jetfield should be removed as trustee of the Jetfield Unit Trust and some other person appointed in its place.
- [4] Although by the time the matter came on for hearing all were agreed that Jetfield must be removed from its position as unit trustee, there is disagreement as to whom or what should be appointed to replace it. The general principles by which the Court must be guided in appointing a new trustee of such a trust, however, do not seem to be in dispute. Any new unit trustee will have to be competent to and likely to act in the best interests of its beneficiaries. In this case its beneficiaries are two other trustees (although embodied in the same person - HSBC). It is HSBC which, as against the 'real' beneficiaries, has all the discretionary powers and which is intimately concerned with their best interests as discretionary beneficiaries. Jetfield is merely the holder of assets (its eight immediate subsidiaries, which in their turn own their particular sub-groups of companies). It seems to me that the duties which it owes to HSBC (and to

¹ through the medium of its own separate underlying unit trust

the sub trust unit trustee) are not different in essence from the duties which the board of any group holding company would owe to the company in question.

- [5] It follows that a unit trustee holding assets of this sort is not required to run the businesses of the operating subsidiaries. It is required to appoint as directors of the companies whose boards they directly control persons who are competent to act as directors of companies of the type and size which the unit trustee owns. Presumably, although no-one told me this, unit trustees in this sort of position are further required to ensure that they are sufficiently supplied with accurate and adequate information about the affairs of the group in order to enable them, if necessary, to make such strategic arrangements in the group structure, or in the boards of subsidiaries, as will permit identified risks or existing problems to be avoided or remedied. This must mean that they are bound to put in place, maintain and make regular use of reliable and secure reporting systems.
- [6] HSBC, and the fifth to tenth Defendants (who include the Settlor and his wife) wish HSBC to be appointed to replace Jetfield as unit trustee. It was urged upon me that identity of both the unit and the discretionary trustee would have the benefits of familiarity and economy, together with knowledge and experience of the family and its concerns. With all deference to the distinguished Counsel whose proposal this is, and with due deference to the wishes of the Settlor and of his wife, this seems to me not to be a good idea from the perspective of the ultimate discretionary beneficiaries whose property is at stake here and which seems to me to be the perspective that really matters for present purposes.
- [7] The great (possibly the only) merit of the present structure, apart from its supposed fiscal benefits, is that it separates control of the group which forms the substance of the trust property from the discretionary trustees. The discretionary trustees are thus freed from the burden of managing (in the non-operational sense) the trust property and, more importantly, are in a position to complain if that management is exercised to the detriment of the ultimate discretionary beneficiaries. If the identities of the discretionary trustees and the unit trustee are merged, those benefits vanish. Although it appears, from his support for HSBC's proposal, that the Settlor is not now of that view, I think that I am bound to assume that the arrangements were originally structured with these benefits, among others, in mind. Appointing HSBC as unit trustee would effectively collapse this structure.
- [8] A further objection to the appointment of HSBC as unit trustee is that it has declared the intention, if it is appointed, of exploring the possibility of making distributions of the trust property *in specie* and thus of putting an end to the trusts. If within a relatively short period it becomes apparent that no such scheme is viable, then it is the intention of HSBC to appoint another trustee in its place and to retire. Although one must admire HSBC's frankness, this does seem to be an extraordinary stance for a candidate for appointment as owner of a large trading group to adopt. It seems to me that it would require extraordinary circumstances before the Court should exercise a power of appointment for the purposes of exploring the winding up of a trust and, if that search should prove fruitless, of impliedly approving the resignation forthwith of the new appointee. I can see great practical merit in winding up these trusts, but in my judgment

that is something that should be done through the combined will of the beneficiaries. The appointment of a new unit trustee should be made on the basis that the appointee is a fit and proper person to carry out the duties which the office involves and not for any other reason.

- [9] For these reasons I do not propose to appoint HSBC to fill the vacancy that will arise upon the removal of Jetfield.
- [10] John and third Defendant, Ms Lee So Fong Susan ('Susan'), suggest a variety of options each involving an entity vaguely referred to in the evidence as 'Deloitte.' Susan exhibits to her affidavit a prospectus whose author is described simply as 'the Deloitte Restructuring Services Group.' The 'Proposed Senior Professionals' mentioned in the document are two individuals described as 'Partners.' Of what firm they are partners is not disclosed, although it is clear that both have been working in Hong Kong for many years. They suggest 'Possible Options for Consideration.' The first is that Jetfield remain as trustee with board control being given to persons from Deloitte. This proposal has been overtaken by events. The second suggested option is to appoint new trustees 'from Deloitte' to act as co-trustees with Jetfield. That option must go the same way as the first. The third option is to appoint 'Deloitte' partners to act as managers of the underlying companies. I have no power to make any such appointments and in any event the purpose of the application before me is to appoint a new trustee, not managers of group member companies.
- [11] Not only are the 'Deloitte' proposals out of line with what is required, but when I raised the question of consent, I was told by Mr Paul Webster QC, who appeared, together with Ms Nadine Whyte, for John and Susan, that no consent had yet been obtained, but that one was in the process of being produced. Towards the end of the hearing I was handed a copy of a letter from a company called Deloitte & Touche Financial Advisory Services Limited, saying that in addition to the possible options contained in the prospectus, Deloitte & Touche Financial Advisory Services was prepared to act as sole unit trustee. What, if any, connection this company has with Deloitte Restructuring Services Group Mr Webster QC was not able to explain.
- [12] This was the first time that there had been any suggestion from 'Deloitte' that it was prepared to act as sole trustee of the unit trust. The upshot is that I have no material upon which I can confidently identify, let alone consider the suitability of a candidate for replacement unit trustee from this quarter. I do not, therefore, intend to appoint a new trustee at the instance of John and Susan, not because I am unwilling to consider proposals from them but because I do not have sufficiently precise materials from them to enable me to make a considered choice.
- [13] The fourth defendant ('Frank') proposes Rawlinson and Hunter Limited, through its BVI arm, R&H Trust Co. (BVI) Ltd. ('R&H') as replacement unit trustee. Although there is no written consent to act from R&H, Frank in his affidavit records that his Solicitors, Messrs Simonette Lewis, have established its willingness to act. There can be no question of R&H's professional suitability to take such an appointment and indeed none of the other parties had any objection to such an appointment on that ground. The principal objection is that R&H has no presence in Hong Kong. This is a serious drawback, but I

do not think that it is as serious as it appears at first sight. R&H will not be dealing with members of the Lee family as beneficiaries. If it is appointed as unit trustee, it will be dealing with HSBC. It is not necessary for it to be in Hong Kong for it to be able to do that. It will, of course, have to deal with the boards of its immediate subsidiaries, but they are all BVI companies and it will no doubt need the assistance of other professionals in order for it to carry out its duties, but in these days of modern travel and instant electronic communication it is easy to exaggerate the need for face to face encounters.

- [14] An advantage of an appointment on the suggestion of Frank is that, so far as I can see from the evidence of his father, the Settlor, he has largely stood aloof from the disputes which, according to the Settlor, have soured relations between the John and Susan on the one hand and the fifth Defendant ('Henry') on the other. Indeed, while he refers sorrowfully to these disputes, the Settlor's affidavit mentions Frank only in passing. I take it from that that, if not neutral, Frank is not actively embroiled in conflict with any of his siblings. While that is not the reason for my selecting R&H out of the three candidates proposed, it seems to me that their appointment will have the additional advantage of preventing either of John and Susan on the one hand and Henry on the other from feeling that they would have in some way 'lost' if the other's preferred candidate had been appointed.
- [15] I shall therefore remove Jetfield (PTC) Inc as trustee of the Jetfield Unit Trust and appoint R&H Trust Co. (BVI) Ltd as new trustee in its place.



Commercial Court Judge
21 December 2012