THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 112 OF 2013

IN THE MATTER OF THE NEW HUERTO TRUST

AND IN THE MATTER OF THE TRUSTEES' RELIEF ACT and Part 67 of the CIVIL PROCEDURES RULES

ROYAL FIDUCIARY GROUP LIMITED

Claimant

Appearances: Mr Alistair Abbott for the Trustee
No other party appeared or was represented

JUDGMENT

[2013: 16 October, 8 November]

(Trusts – discretionary trust – no express power in trustee to vary identity of beneficiaries or terms of settlement – whether power of appointment available to exclude beneficiary and vary terms of settlement – **Blausten v IRC**[1] not followed)

[1] **Bannister J [Ag]:** This is an application by the Trustee of a discretionary settlement ('the Trustee,' 'the Trust') seeking a declaration that it has power under the original deed of settlement to exclude the Settlor permanently and irrevocably [2] from any benefit under the Trust; and for an order that the Claimant Trustee be at liberty to execute a draft deed of appointment, exhibited to an affidavit sworn for the purposes of this application by the Trustee's Executive Director ('the draft'), intended to bring that about. Mr Abbott, who appeared on this application, which was unilateral, for the Trustee, described the

[1] [1972] 1 WLR 256

[2] I am not sure the second adverb adds anything to the first

exercise as one of obtaining the sanction of the Court for the proposed exercise of the power in question. In addition to purporting to exclude the Settlor from benefit under the Trust, the draft also contains provisions which, if effective, would release the Trustee's supposed power of revocation and give it an unlimited power in the future to vary the terms of the Trust.

[2] The Trust is governed by BVI law It was set up in 2002 and is a simple discretionary trust. There are two classes of discretionary beneficiary: the Settlor (who alone comprises Class A); and the Settlor's children and remoter issue (Class B). There is no power to add to the classes of beneficiary and no express power to remove any beneficiary from either class. There is no express power to vary or revoke any provision of the settlement. Clause 2 of the Trust is in the following terms:

> THE Trustees STAND POSSESSED OF THE Trust Fund and the income thereof upon DISCRETIONARY TRUSTS for the benefit of the Beneficiaries or any one or more of them exclusive of the others in such shares and proportions and subject to such terms and limitations and with and subject to such provisions for maintenance, education or advancement or for accumulation of income during minority or for forfeiture in the event of bankruptcy or otherwise and such other conditions as the Trustees may from time appoint by Deed revocable or irrevocable executed before the Vesting Day.

[3] The Settlor married for the second time in 2006. For reasons already given, the Settlor's second wife ('the Wife') is not now and cannot become a beneficiary of the Trust. There are three children of the Settlor's second marriage, aged between three and eight. They are the only existing members of Class B, although by a so-called deed of Appointment made in September 2010, expressed to be revocable with the consent of the Protector, they were purportedly declared ineligible to receive benefits from the Trust for a period of seven years thereafter.

[4] In about 2009 the Settlor and his family moved to reside in France. For reasons principally, or, perhaps more accurately, solely to do with French tax law,[3] the Trustee executed a Deed of Appointment on 31 August 2010. Having recited, among other provisions of the Trust, clause 2, its operative part was in the following terms:

> In exercise of the powers aforesaid, the Trustees HEREBY DECLARE and APPOINT that with effect from the date hereof *the* Class A Beneficiary shall cease to be eligible to receive benefits

[3] this was also behind the purported exclusion of the children from benefit in September 2010

> from the Trust for the period of seven (7) years from the date hereof, but subject always to Clause 2 hereof

[5] In 2011 the relationship between the Settlor and the Wife broke down. Some time later she commenced divorce proceedings in the Family Division of the High Court of Justice in England, in which, on 1 May 2013, a Judge of that Court made a world wide freezing order against the Settlor ('the English proceedings,' 'the Order'). The threshold above which the Settlor is free to dispose of his assets was set at GDP35 million. It is thought that this figure is the result of a belief held by the Wife, and/or by those by whom she is being advised, that the Settlor's assets include the assets of the Trust and, together with his other property, are worth some GDP70 million. This appears to be confirmed by the inclusion in the Order of a list of specific assets expressed to be covered by the injunction which includes substantial real property belonging to the Trust, together with valuable motor vehicles described in terms in the order as belonging to the Trust.[4] Further support for the view that this is the belief of the Wife and her advisers, as well as being that of the English Court, may perhaps be found in the definition of 'Assets' in the Order:

> 'Assets means any kind of property including but not limited to:
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> 13.1 any interest under any trust under which the First Respondent is a beneficiary (in each case whether actual or contingent or otherwise howsoever) or under which the trustees otherwise have the power to advance to him any assets of the said trust;
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> 13.2 any interest under any trust in relation to which the First Respondent is or has been a settlor, trustee or protector or in respect of which the trustees habitually follow the First Respondent's wishes;

[6] There is therefore no doubt that the English Court considers that at least some property which it knows[5] belongs to the Trust[6] is caught by the injunction. It is uncertain whether the English Court considers that arrangements which affected a mere right to be considered as an object of bounty by the Trustees would amount, for the purposes of the order, to interference with an asset of the Settlor, or whether an arrangement which affected any right of any person (other than the Settlor) under a trust created by the Settlor would be so viewed, but the wording of paragraphs 13.1 and 13.2 of the order is sufficiently opaque to make it impossible to be sure that it does not.

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[4] or to another trust with which this judgment is not concerned

[5] the motor vehicles; it is not possible to say whether it knows that some of the other specifically listed property is in fact property of the Trust

[6] or, if not to the Trust itself, then to some other trust rather than to the Settlor

[7] Finally, while no relief has been granted against either of them in the English proceedings, both Trustee and Protector are named as Respondents to them and, while it has not been served with the divorce proceedings themselves, the Trustee has been served with the Order.

[8] It is against this background that I have to consider the relief sought by the Trustee on this application, which is designed to ensure that the assets of the Trust are not available to the Court in the English proceedings.

The Trustee's concerns

[9] The present wishes of the Settlor are that the Trust assets be applied for the benefit of his children and grandchildren. At the same time, the Trustee is concerned that there is a real risk that the English Court may make an order which will have the effect that it is put under pressure to appoint Trust assets in favour of the Settlor, thus reducing the fund available for the children and grandchildren. It appears to the Trustee that the most efficient way of reducing this risk is to make clear that the Settlor does not now have and will not at any time in the future acquire any interest under the Trust. The potential detriment to the Settlor were the Trustee to take such a course is minimal, since his intention at present is that he will continue to reside in France and will thus benefit (or at any rate not suffer) fiscally from being excluded. The Trustee is therefore minded, if it can, to exclude the Settlor irrevocably from all benefit under the Trust.

The Trustee's powers

[10] As I have already mentioned, the Trustee has no express power to exclude the Settlor from benefit by deleting his name from the Classes of discretionary beneficiary. It could, of course, achieve the same result by making an irrevocable appointment of the whole fund in favour of any one or more of the Class B beneficiaries, but it seems that it has no present wish to do that. Instead, the Trustee proposes, in reliance on clause 2 of the Trust deed, to execute the draft, which incorporates the following, among other, provisions:

> The Appointor, in exercise of the power in clause 2 of the Trust and every other power it enabling, hereby declares that the Appointor shall continue to hold the Trust Fund and the income thereof upon, with and subject to all of the trusts, powers and provisions of the Trust and of the September 2010 Deed, but as if the trust, powers and provisions of the trust had been varied as follows:
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> (1) In the place of the wording of clause 1 a) of the Trust there was substituted the following:

"a) "the Beneficiaries" means the children and remoter issue of the Settlor born after 6 December 2002 and who presently comprise the Settlor's three sons: *[whose names are then set out]*;

And provided also that the trustees may not receive any benefit from this Trust other than in respect of the fees and remuneration payable under clause 10 hereof."

(2) in clause 4.1, in place of the words "the Class A Beneficiary or such other of" there were substituted the words "all or any one or more of the";

(3) in clause 4.2 and in clause 11, in place of the words: Class A Beneficiary" wherever they appear in those classes, there was substituted the word "Settlor";

(4) immediately after clause 4.2 of the trust there was added following new clause 4.3:

"4.3 Notwithstanding the trust, powers and provisions hereof, the Trustees, with the prior or simultaneous written consent of the Protector, may for the benefit of all or any one or more of the Beneficiaries, at any time or times until the Vesting Day, by Deed amend, vary, add to or delete all or any of the trust, powers and provisions of this Trust (other than clause 19) to any extent whatsoever (to the intent that the trusts, powers and provisions of this Trust (other than clause 19) may be replaced in their entirety by new trusts, powers and provisions and whether or not effecting a resettlement)."

[11] The effect of paragraph 1(1) of the draft is to delete the reference to the Settlor as a Class A Beneficiary of the Trust and to confine its beneficiaries to his children and remoter issue. Paragraphs 1(2) and 1(3) of the draft are purely consequential upon the amendment proposed to be effected by clause 1(1). Paragraph 1(4) of the draft confers upon the Trustee a new power to vary the terms of the Trust deed.

[12] In my judgment, the Trustee has no power under the Trust deed to vary the terms of the settlement as proposed in the draft. Clause 2 of the Trust deed gives the Trustee a power to appoint capital or income. Lewin on Trusts, 18th Ed at para 30-02, defines powers of appointment as powers to create beneficial interests in one or more objects of the power. The rest of the chapter proceeds upon the footing that special powers of

appointment, which is the type of power conferred by clause 2 of the Trust deed, are dispositive in nature. Snell's Equity[7] is to the same effect. The draft which I am asked to approve would not, as executed, appoint any property in favour of any person and would not, therefore, be an exercise of the power conferred by clause 2 of the settlement. In the absence of any express power to vary, it would, accordingly, be a nullity.

[13] Mr Abbott meets this rather obvious point by relying on a decision of the English Court of Appeal in **Blausten v Inland Revenue Commissioners.**[8] The settlement in that case, like that in this case, was a purely discretionary settlement. As in this case, there was no power to vary. The settlement embodied a special power of appointment permitting the trustees to appoint income and to advance or appoint capital to a class which, as defined, included the wife of the settlor ('the specified class'). For fiscal reasons, the trustees wished to exclude the settlor's wife from the specified class, while leaving her as an object of the power to advance or appoint capital after the settlor's death (that is, after she had become his widow). They purported to do this by executing a so-called deed of appointment irrevocably declaring that henceforth they would hold the capital of the trust fund upon trusts identical to those in the original settlement for the specified class, but re-defined so as to exclude the settlor's wife during his lifetime (as to both capital and income), but to write her back in, as it were, in respect of capital after the settlor's death. Because of an argument that the trustees retained a power to reinstate the wife as a member of the specified class under a separate provision of the settlement, the Crown contended that she had not been completely excluded from benefit for the purpose of the relevant taxing provisions and that the deed of appointment did not have the fiscal effect for which the trustees had hoped when they executed it. The Special Commissioners[9] upheld that contention.

[14] The taxpayer's appeal was heard by Goff J. The main part of his decision turned on the question whether it was indeed the case that the wife remained a potential object of the power to add non-members (including, as a result of the re-definition of the specified class, the wife) to the specified class. Goff J held that it was and upheld the Special Commissioners' decision accordingly.

[15] However, he also said,[10] in dealing with a new argument which had not been raised before the Special Commissioners:

> "In my judgment, the appointment was not effective at all. I do not think that an appointment of the capital upon the like trusts and with and subject to the like powers and provisions, as were

[7] 31st Ed at para 9-01
[8] [1972] Ch 256
[9] the tribunal then charged with hearing appeals from the decisions of tax inspectors
[10] at [1971] 1 WLR 1696, 1701

> declared and contained in the settlement, with the two modifications specified, was really an appointment of the capital for the benefit of any one or more of the specified class at all. It was really simply an attempt to delete members from the specified class, which there was no power to do, and then to read in the widow of the settlor as a possible object of the discretionary trust, leaving her still with nothing but a *spes*."

[16] On appeal to the English Court of Appeal,[11] Buckley LJ, who gave the lead judgment in a decision reversing Goff J and finding in favour of the taxpayer, said this about the passage which I have quoted above:[12]

> The appointment was in terms a resettlement on new trusts of the capital of the trust fund. The new trusts were trusts which were declared referentially by reference to the settlement but they differed in the particular respects stated in the appointment from the trusts of the settlement. The appointment was only to operate during the trust period and it is I think right that the only operative effect of the appointment was to take the settlor's wife out of the specified class for the purposes of the discretionary trust and of the power to advance capital and of the power of appointment and to restore her to class of persons in whose favour capital could be advanced or benefits could be conferred under an appointment as from the time when she might become the widow of the testator. The immediate effect was to exclude her from the objects of discretionary trusts of the income and that was clearly one of the major objectives of the exercise.
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> In my judgment, however, what was done by the deed of appointment was something which was clearly within the terms of the power of appointment. It was an appointment under which the capital was directed to be held upon trusts for the benefit of members of the specified class, and although the objective of the trustees in making the appointment may not have been the kind of objective which the settler had in mind when he conferred the power of appointment upon the trustees, the appointment nevertheless in my judgment falls within the power.

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[11] (supra)

[12] Goff J was also reversed on that part of his decision that held that the settlor's wife had not, because of the power to reinstate her as a member of the specified class, been entirely excluded from benefit

[17] With all due diffidence, I cannot accept that the reasoning in this passage from the judgment of Buckley LJ, with which the other two Lords Justice agreed, is correct. On the contrary, it seems to me to be obviously wrong. In my judgment, Goff J was right to hold as he did in the passage from his judgment which I have set out, for the reasons which he gave. I note that while **Blausten**[13] is referred to in Lewin[14] on a different point,[15] it is not mentioned in that work as authority for the proposition that a special power of appointment may be used to vary the provisions of a discretionary, or indeed any other trust. Underhill and Hayton, in their 'Law of Trusts and Trustees,'[16] refer to the case at two points,[17] but only on the question, raised in the Court of Appeal, that a power to appoint to any person in the world, or any person in the world barring a handful of exceptions, is too uncertain to be valid. Snell's Equity[18] also cites the case, but on the same point. None of the standard works, therefore, seems to rely upon the decision for the proposition for which it is relied upon in this case. Mr Abbott referred me to no authority, English or otherwise, in which that part of the decision upon which he relies has been followed.

[18] In further submissions, made following an invitation from the Court, Mr Abbott submits that the scope of clause 2 of the Trust document must be gathered from its terms. That is obviously right. Mr Abbott goes on to submit that clause 2 enables the Trustee to appoint upon new discretionary trusts. He argues, therefore, that the fact that the proposed deed would create no beneficial interests is irrelevant.

[19] I cannot agree with that. Clause 2 of the settlement provides for the Trustee to hold the fund on discretionary trusts. It does not confer a power to appoint on discretionary trusts. On the contrary, the power is to confer beneficial interests *'in such shares and proportions . . . as the Trustee may from time to time appoint . . .'* It is true that such appointments may be made subject to such terms, limitations and conditions as the Trustee may appoint, but the appointments permitted by the power are clearly appointments which create beneficial interests and none other.

[20] In his further submissions Mr Abbott relied upon **Muir v Muir**[19] for the proposition that the limitations created upon exercise of a special power of appointment must be read back into the original deed and that when that is done the settlement will, *ex hypothesi*, have been amended. That is correct, but it assumes that the appointment is a valid exercise of the power. The proposition cannot be stood on its head so as to validate an invalid

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[13] (supra)
[14] (ibid) at para 4-32
[15] whether a class can be so wide as to make a settlement void for uncertainty
[16] 17th Ed
[17] the index refers to a third, but the reference is wrong
[18] 31st Ed at para 20-24
[19] [1943] AC 468 at 481

exercise of a power, by arguing that had it been validly exercised the settlement would have been varied.

[21] Mr Abbott referred me to **Muir v IRC**,[20] another decision of the English Court of Appeal, where that Court held[21] that a purported exercise of a special power of appointment was effective to enable the donee of the power to resettle the whole fund on trusts identical to those contained in the original settlement, but with the omission of a power, contained in the original deed, to capitalise income. This decision was expressed to have been reached 'on the language of [the] clause [conferring the power] and in the absence of authority'[22]and in any case was made against the background of a settlement which had itself created beneficial interests, so that any resettlement would be to the same effect, as Harman LJ noted.[23] In my judgment, the case does not assist Mr Abbott.

[22] Quite apart from all that, it seems to me that the principle for which Mr Abbott contends, if right, proves too much. If it be right that a trustee with no express power to do so can re-write a settlement by declaring (by way of a notional re-settlement) that a named beneficiary is excluded, whether irrevocably or not, it can as well rewrite it again by 're-settling' so as to bring him back in, and so on *ad infinitum*. The Trustee cannot bind itself not to exercise the power of appointment in the future. So that even if everything which I have said above is wrong and everything which Mr Abbott has said is right, the execution of a deed in the terms of the draft could not satisfy the Court in the English proceedings that the Settlor had been irretrievably excluded from all possible benefit under the Trust.

[23] Mr Abbott says that **Blausten**[24] has stood for over forty years. That does not seem to me to be a good reason for following a decision which conflicts with the treatment in the standard works of the nature of special powers of appointment; which, for all anyone has told me, has never been followed judicially; and which the leading works on trust law pointedly ignore. I am told that English practitioners regularly rely upon it, but I am not told that it has ever been relied upon in this jurisdiction and no decision of mine will have any effect in England, so that a refusal to follow **Blausten**[25] here will not impact upon what I am told is the English practice.

[24] For these reasons, and notwithstanding the decisions of the English Court of Appeal in **Blausten**[26] and **Miur v IRC**,[27] I decline to approve the execution by the Trustee of any deed containing a provision in the form, or substantially in the form, of paragraphs 1(1),

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[20] [1966] 1 WLR 1269
[21] the judgment of Harman LJ was the only judgment that expressly dealt with the point
[22] ibid at 1283 C-E
[23] (ibid) at 1283 D-E
[24] (supra)
[25] (supra)
[26] (supra)
[27] (supra)

(2) and (3) of the draft. It follows that I am equally unprepared to sanction execution of a deed containing a provision in the form, or substantially in the form, of paragraph 1(4).

[25] That leaves paragraph 1(5) of the draft, which provides as follows:

> (5) immediately after clause 6 i) of the Trust was added the following new 6 j):
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> "Power, by instrument in writing revocable or irrevocable to release or extinguish (or restrict in any manner the future exercise of) any power vested in the Trustees, so as (subject to any contrary intention expressed in the instrument) to bind their successors. This power may be exercised at any time until the Vesting day for the benefit of all or any one or more of the Beneficiaries. Without prejudice to the forgoing, any release, extinguishment or restriction may be permanent or applicable only during a limited period."

[26] The attempt to add this proposed new power is, in my judgment, ineffective for substantially the same reasons as invalidate paragraphs 1(1) to 1(4) of the draft.

[27] I should add in passing that it is now suggested that because the proposed re-settlement makes no mention of the August 2010 deed, that deed would, on exercise of the power of appointment in the terms of the draft, cease to have effect. I agree that that would be the effect of the purported deed of appointment if the premise upon which it is founded were correct. In my judgment, and for the reasons given above, it is not. The August 2010 deed would remain in effect, despite the invalid exercise of the Clause 2 power.

Conclusion

[28] I therefore decline to sanction the exercise of a deed in the terms, or substantially in the terms, of the draft. If the Trustee considers that the reasoning in this judgment is fallacious, there is nothing to prevent it from executing a deed in the form of the draft and arguing for its effectiveness as against any party concerned to attack it. If it succeeds, no harm will have been done by this Court's refusal of sanction.

Commercial Court Judge
8 November 2013