

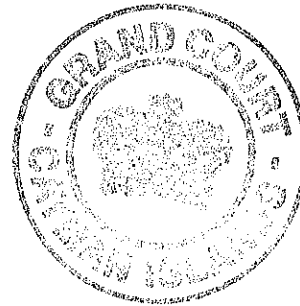
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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 206 OF 2016

**IN THE MATTER OF VARIOUS TRUSTS
AND IN THE MATTER OF THE TRUSTS LAW (2011 REVISION)
BETWEEN**

- (1) A
- (2) B
- (3) C
- (4) D
- (5) E



Plaintiffs

AND

- (1) D1
- (2) D2

Defendants

Appearances: Mr. J Asif QC instructed by Ms. P Mitchell of Kobre & Kim on behalf of the Plaintiffs

Mr. J Machell QC instructed by Ms. J Williams, Mr. D Vekaria and Mr. H Mander of Harneys on behalf of the Defendants

Mr. C de Serpa Pimentel of Appleby on behalf of FFP

IN CHAMBERS AND IN PRIVATE

Heard: 12 January 2017

Ruling delivered: 16 January 2017

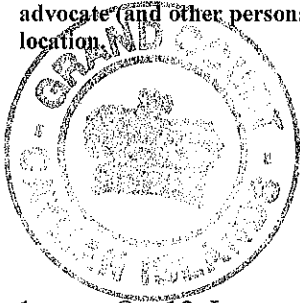
Written Reasons circulated: 17 February 2017

Written Reasons Delivered: 22 February 2017

HEADNOTE

Trusts – Section 10 of Trusts Law (2011 Revision) – whether expedient to appoint new trustees by way of substitution – Whether inexpedient, difficult or impracticable to do so without the Court’s assistance.

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REASONS FOR DECISION

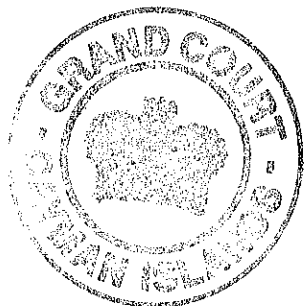
1. On 12 January 2017, I heard an application on behalf of the Plaintiffs made by way of Originating Summons filed December 9 2016, seeking an order pursuant to section 10 of the *Trusts Law (2011 Revision)* ("*the Law*"). The order sought the substitution of FFP (Cayman) Limited ("**FFP**") for the First Defendant ("**D1**") as Trustee of the Cayman Islands Trusts listed in the Schedule to the Originating Summons ("**the Trusts**"). The relief was sought on the grounds that it is expedient for the substitution to be made, and that it is inexpedient, difficult or impracticable to do so without the assistance of the Court.
2. The application was listed urgently because there are ongoing proceedings in the US District Court for the Central District of California ("**CDCA**") to which this application relates.

The Order

3. On 16 January 2017, upon certain undertakings, I granted the relief sought. FFP undertook by its Counsel, that it will not by itself or by any entity of which it has direct or indirect control take any action that directly or indirectly impairs the *in rem* jurisdiction of the CDCA in the relevant Court actions, save for the proper advancement of any claim in the forfeiture proceedings in the CDCA to an interest in the relevant assets. This includes any possible motion to dismiss for lack of *in rem* jurisdiction or lack of proper venue. In particular FFP undertook not to cause there to be any change of ownership of assets which are the Defendants to the actions before the CDCA. The Order which I made is as follows:

"IT IS ORDERED that:

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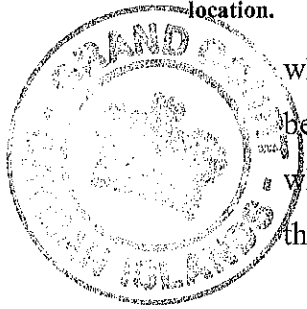


1. *..FFP be substituted as trustee in place of the First Defendant for each of the trusts referred to in the Schedule to the Plaintiffs' Originating Summons dated 9 December 2016 ("the Trusts"), pursuant to the Court's exercise of its power under section 10 of the Trusts Law (2011 Revision).*
2. *The assets of each of the Trusts that are vested directly in the First Defendant ("the Trust Assets") shall vest in FFP in its capacity as trustee of each Trust and the First Defendant shall, as soon as practicable, take all such steps as are within its power to transfer the Trust Assets to FFP in its capacity as trustee of each Trust.*
3. *There be no order as to costs"*
4. I understand that a parallel application was made to the New Zealand High Court and that that application has also been granted.
5. These are the reasons for reaching my decision.

Factual Background

6. The Plaintiffs are all members of one family. A and B are the parents of C, D and E. The Plaintiffs are the direct beneficiaries of the LT Trust and the ultimate beneficiaries of a number of other Trusts, including the M Trust. E is the Settlor of the Trusts. The evidence of the Plaintiffs is that all relevant additional beneficiaries have notice of this application.
7. All of the Trusts are governed by Cayman Islands Law and have clauses expressly to the effect that the Cayman Islands Courts have exclusive jurisdiction in any proceedings involving rights or obligations under the Trusts or their construction or effect.
8. D1 is a company incorporated in Country X and provides professional trustee services to the Trusts. D1 is the Trustee of each of the Trusts. Learned Queen's Counsel Mr. Asif,

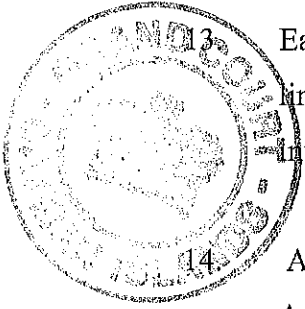
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who appeared for the Plaintiffs, indicated in his written submissions that D2 was joined because it is a beneficiary of certain intermediate trusts within the overall structures, where D1 is Trustee and will also be substituted by FFP. Furthermore, he explained that the Plaintiffs consider it appropriate to ensure that D2 is bound by the Court's order.

9. The various aspects of the trust structures of these Trusts relevant to these proceedings were set out in the affidavits of Daniel Amon Zaheer ("DAZ"). DAZ is an attorney-at-law representing the Plaintiffs in proceedings in the CDCA. There are complex trust and corporate structures, with the Trusts holding various assets in the United States and elsewhere. D and E, at the Court's request for evidence from the Plaintiffs themselves, have also sworn affidavits on behalf of the Plaintiffs, confirming the contents of the Affidavits of DAZ.
10. The US Government ("USG") has alleged that properties or rights ultimately forming the assets of some of the Trusts (via intermediate entities) ("**the Assets**") are traceable to a conspiracy to launder money misappropriated from a company wholly owned by the Government of Country Y. This conspiracy is said to involve E in particular. USG in or about July 2016 instituted forfeiture actions in CDCA against the Assets ("**the Forfeiture Actions**").
11. The Plaintiffs strenuously contest those allegations. The Plaintiffs rely in particular on an official statement issued by the Attorney-General of country Y in response to the USG's allegations, which refutes any allegations of misappropriation.
12. US Statute and Procedural Law allows for the entities which directly own the Assets and which are ultimately controlled by D1 as Trustee of the Trusts to make claims in the Forfeiture Actions within a certain period of time. That has not been done.

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Each of the Assets, as a result of the trust structures originally put in place, is held by a limited liability company, which in turn is held by one or more other corporate intermediaries, held in a trust of which D1 is the Trustee.

A,B,C, and D (collectively “P1-4”) have sought to advance claims in the Forfeiture Actions in an attempt to protect the Assets from forfeiture by default. They sought extensions of time for the Asset owning entities to make claims, and they also sought to make claims based on their indirect interest in the Assets by seeking leave to intervene in the Forfeiture Actions.

15. USG opposed these applications, in essence on the basis that P1-4 have no standing to make claims in the Forfeiture Actions.
16. The Assets involved are of substantial value; said to be worth hundreds of millions of dollars - see in particular page 5 of the “Reply and Notice of Non-Opposition to Intervenors’ Motion for Enlargement of Time to File a Claim” filed by Kobre and Kim on behalf of P1-4.
17. On 12 December 2016, the CDCA rejected P1-4’s motions for enlargements of time and to intervene.
18. The Plaintiffs say that since 16 December 2016, USG has made applications for certain of the Forfeiture Actions to proceed on grounds of alleged procedural default. P1-4 have filed opposition to USG’s request, but Mr. Asif indicates that the Plaintiffs are not confident that these will prevent defaults being entered administratively, which they say will result in consequent loss of, or impairment to the Assets.
19. In response to the Court’s enquiry as to the purpose of these proceedings, given the position taken by the CDCA and as to the urgency for this application to be heard, it was submitted that it remains urgent for this Court to grant the relief sought so that prompt

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steps can be taken to install FFP as replacement Trustee for D1. This is so that FFP can then direct or cause the Asset owning entities to seek permission from CDCA to make late claims in the Forfeiture Actions to enable the Forfeiture Actions to be fought on their merits rather than being determined (and the Assets being irretrievably lost), by default. The intention is that FFP would thereafter pursue such claims with a view to defeating USG's Forfeiture claims and protecting and preserving the Assets.

20. The Plaintiffs' case, as set out in their written skeleton argument, is that D1 is paralysed from performing its functions as trustee or from resigning as trustee of the Trusts due to the risk that it would be accused by USG of being involved in money laundering or otherwise exposed to civil or criminal liability for its actions. The Plaintiffs claim, in the Affidavit of DAZ1, that USG's stance in the CDCA proceedings encourages this concern.
21. Learned Counsel submitted that it is therefore expedient to substitute a new trustee in place of D1 in each of the Trusts. Further, that given the concerns summarised in DAZ1 at paragraph 49, it is inexpedient, difficult or impracticable for the necessary substitution to occur without the intervention of this Court.
22. There are certain Trusts referred to in the Schedule to the Originating Summons as "Additional Trusts". The assets of the Additional Trusts are said not to be the subject of the Forfeiture Proceedings. However, the Plaintiffs contend that, in light of the replacement of D1 by FFP as trustee of the other trusts, it follows that it is expedient to replace D1 as Trustee of all the Trusts for which the Plaintiffs are the ultimate beneficiaries. Further, that it is inexpedient, difficult or impracticable to do so without the Court's assistance.
23. A written skeleton argument was also filed on behalf of D1 and Mr. Machell QC made oral submissions to supplement those. At the Court's request, affidavit evidence was filed on behalf of D1 essentially confirming the information set out in the skeleton argument.

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24. XY and XZ, who are both directors of D1, gave evidence stating that D1 does not oppose the application, but for the reasons set out in paragraphs 4 and 5 of the respective affidavits, D1 considers itself not in a position to agree the appointment of new trustees out of Court or to consent to the Application.

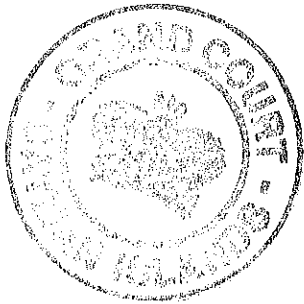
25. Paragraphs 4 and 5 state as follows:

“4. The application is made in the following circumstances:

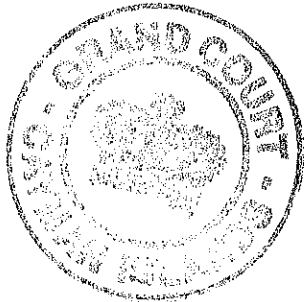
- a) *Some of the trusts that are the subject of the Application indirectly own assets (“**the Assets**”) that are subject of the forfeiture actions filed by the US Department of Justice (“**the Forfeiture Proceedings**”).*
- b) *The Forfeiture Proceedings raise serious allegations about the source of the funds used by the settlor of the trust to acquire the Assets.*
- c) *Having become aware of the Forfeiture Proceedings, D1 carefully considered how it should deal with the issues that arose, including whether it could properly accede to the request made by the Plaintiffs (through Kobre & Kim) that D1 take steps to compel the entities that hold direct interests in the Assets to file claims in the Forfeiture Proceedings.*
- d) *D1’s position is and has been that, given the information contained in the Government’s submissions as to the source of the funds used to acquire the assets and without more information, it was not in a position to take any steps by way of action in the US or a voluntary retirement as trustee.*

5. In the circumstances:

- a) *D1 is not willing (i) to take any action in the Forfeiture Proceedings or to cause any of the entities under its direct or indirect control to do so, (ii) to agree to an out of Court appointment of a new trustee or (iii) to consent to the Application.*



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The appointment of a new trustee would necessitate the transfer of the trust assets to the new trustee and that is a step that D1 is not willing to take voluntarily.

- b) *D1 takes the view that the appropriate stance to take is to neither consent nor oppose its replacement as trustee.....”*

FFP’s fitness to be appointed Trustee

26. FFP is licensed by the Cayman Islands Monetary Authority under the *Banks and Trust Companies Law (2013 Revision)*. Its principals are insolvency practitioners and forensically qualified specialists who currently act as officers of the Grand Court and have been appointed to a number of high value insolvent estates contentious disputes, generally with significant cross border elements. FFP has confirmed its willingness to be substituted as Trustee in place of the Defendants and was prepared to give the undertakings referred to in paragraph 3 above.

Notification to USG

27. At the commencement of this application, I was concerned to see whether USG had been notified of the date and time of the Hearing before me. A series of email correspondence passing between Kobre & Kim LLP and attorneys representing USG was handed up in Court, and subsequently exhibited to the Affidavit of Robin Rathmell, an attorney employed as a partner in the firm of Kobre & Kim LLP in the USA.

28. From the email correspondence, it was apparent that USG had received notice of the hearing, but the attorneys representing it did not feel that they had had a full opportunity to respond and asked that Kobre & Kim convey to this Court that they did not regard the Plaintiffs’ efforts as appropriate or consistent with US law.

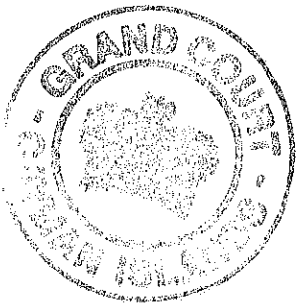
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29. Be that as it may, as Mr. Asif QC pointed out, USG could have sought formal leave to intervene in these proceedings, and they had had notice of the hearing for several weeks. They did not do so nor have they sought to have any legal representative appear before the Court. As I understand it, USG's attorneys requested a copy of the transcript of these proceedings, which the Attorneys for the Plaintiffs agreed to provide. (I have been informed by Mr. Asif QC, that this has since been done.)

30. In any event, the Trusts are governed by Cayman Law and that is what this Court has had to focus on, having taken all the steps considered appropriate to ensure that there would be no direct or indirect impairment of the US proceedings.

The Law

31. Sections 10, 12 and 64 of the *Law* are relevant. The relevant sub-sections provide as follows:



"Power of Court to appoint new trustees"

10. (1) *The Court may, whenever it is expedient to appoint a new trustee or trustees, and it is found inexpedient, difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.*

....

(3) *An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.*

.....

Powers of new Trustee appointed by the Court

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12. *Every trustee appointed by the Court shall, as well before as after the trust property becomes by law, assurance or otherwise, vested in him, have the same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any creating the trust.*

.....

Persons entitled to apply for orders

64. (1) *An order under this Law for the appointment of a new trustee or concerning any interest in land, stock or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.*

.....”

32. Reference was made by Mr. Asif to a number of authorities, including *Lewin on Trusts*, 19th Edition, Chapters 13, “*Death, Retirement and Removal of Trustees*”, and Chapter 15, “*Appointment of New Trustees by the Court*”. It was submitted, which I accept, that these authorities are instructive since section 10 of the **Law** is based upon section 41 of the Trustees Act 1925 (UK).
33. In my judgment, paragraphs 13-064, 13-069, 15-002, and 15-005 are particularly helpful in reasoning by analogy in the instant case, where it is said that the Trustee D1 finds itself paralysed. So far as relevant, those paragraphs state as follows:

“Principle guiding court in exercise of inherent jurisdiction



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13-064. *The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.*

....

Reasons for which a trustee may be removed

13-069. *The court has, at the instance of a beneficiary, removed a trustee in the following instances:*

....

(16) *where the trustee refused to act in the trust;*

.....

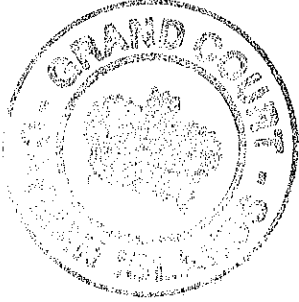
Discretionary nature of the power

15-002 *The power under section 41 is discretionary: whether or not the court will exercise the jurisdiction depends on the circumstances of the case.....*

Expediency of making appointment

15-005 *The proposed appointment must be shown to be "expedient". Cases of expediency may arise where the trustee appointed by a*

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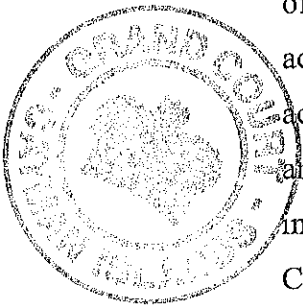


will is a minor, where a trustee is by reason of personal incapacity unable to act, particularly if he lacks capacity to exercise his functions as a trustee, or is unfit to act, particularly if he is insolvent, or where there is great difficulty in obtaining administration to the deceased trustee or last surviving trustee, or where there is no personal representative or a sole surviving trustee, where the trustee is in enemy occupied territory or where the trustee is a corporation which is in liquidation or has been dissolved..”

Discussion and Analysis

34. I am satisfied that the Cayman Islands is the appropriate forum for the hearing and the Grand Court is the appropriate Court for determining this application, given the terms of the Trust Deeds state that all of the Trusts are governed by Cayman Islands Law and have clauses expressly to the effect that the Cayman Islands Courts have exclusive jurisdiction in any proceedings involving rights or obligations under the Trusts.
35. The Plaintiffs are the primary beneficiaries of the Trusts and therefore have a beneficial interest in the assets and property which are subject to the trusts concerned in this application. Accordingly, they have standing to bring this application.
36. This Court is not concerned with the merits of the allegations made by USG in the CDCA, though they are obviously very serious allegations. Nor is the Court concerned with the merits of any contest which the Plaintiffs wish to mount before the CDCA, nor with the likelihood of success.
37. The Court is also not being asked to take a view on the appropriateness or merits of the position taken by D1. It is also the case that there is no question of misconduct or breach

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of trust or unfitness asserted in this application and nor is there any allegation that D1 is acting unreasonably. What the Court is being asked to consider is whether, in light of the actual state of affairs, with D1 in point of fact refusing to authorise the taking of any steps and refusal to resign, it is expedient to appoint new trustees, and whether it is inexpedient, difficult or impracticable for this to be done without the assistance of this Court?

38. In my judgment, there are substantial assets in the United States worth hundreds of millions of dollars which are likely to be forfeited to USG by a default or uncontested process unless parties properly authorised to do so, and who have standing and sufficient interest in relation to the assets, take such steps as are available to them under the relevant law to contest the making of such orders.
39. As I understand it, D1 feels that in the circumstances, "*its hands are tied*". In my view the Court's assistance is required to protect the welfare of the beneficiaries and to prevent or circumvent omissions that can endanger the trust property.
40. I am satisfied that it is expedient to replace the current trustees with Trustees who are fit to act as such and who are willing to take steps to protect the Trust assets and to protect the interests of the beneficiaries. In my view, FFP meets those criteria.
41. Additionally, I am satisfied that, given the posture of D1, there is no practicable manner in which new Trustees could be appointed without this Court's assistance and it is therefore inexpedient and impracticable to make the requisite appointment without the Court's assistance.
42. Whilst the assets of the Additional Trusts are not involved in the Forfeiture Proceedings, I find it expedient that D1 be replaced by FFP in respect of all of the Trusts of which the Plaintiffs are the ultimate beneficiaries.

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43. It was in these circumstances that I found it appropriate to exercise my discretion in favour of making the order referred to at paragraph 3 above.

44. FFP shall have liberty to apply to the Court for further directions, if required.




THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT