

In re XYZ Irrevocable Trust

High Court of the Cook Islands, Civil Division (Rarotonga)
[1999] CKHC 5 · O.A. 6/99 · August 11, 1999

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

O.A. 6/99

IN THE MATTER
of the Trustee Act 1956 (of New Zealand) as extended
by Section 639 of the Cook Islands Act 1915

AND

IN THE MATTER
of the XYZ IRREVOCABLE TRUST
dated 10 July 1995

AND

IN THE MATTER
of an application by ABC LIMITED a duly incorporated company
pursuant to the International Companies Act 1981/82, having its
registered office at Rarotonga, acting in the capacity as
Trustee of the XYZ Trust.
Applicant

Hearing: 29 July 1999

Counsel: B.J. Gibson for Applicant

A.M. Manarangi for F.T.C. Incorporated

Date of Judgment: 11 August 1999

JUDGMENT OF QUILLIAM C.J.

The Applicant has applied under s. 66 of the Trustee Act 1956 for directions in respect of the management and administration of the XYZ Irrevocable Trust established and settled under a Trust Deed dated 10 July 1995, and for declarations in respect of matters arising out of that Trust and of matters subsequent to its establishment. It is necessary first to set out the nature of the Trust and the sequence of events.

The XYZ Irrevocable Trust (the Trust) was constituted by a Trust Deed dated 10 July 1995 made between Mr M and his wife Mrs M as settlors and the Applicant, ABC Limited, which, together with the settlors, were the original trustees. The Trust was registered as an international trust under the International Trusts Act 1984. Initially the discretionary beneficiaries were the settlors' children. Child A and Child B but the settlors themselves were later added as discretionary beneficiaries.

The Trust-Deed provided that the settlors were also to be the Protectors of the Trust as defined in s. 2 of the Act. The settlors and their children are United States citizens.

By facsimile transmission dated 12 May 1998 the settlors informed the Applicant that the United States District Court in the District of Nevada had, in a lawsuit filed by the Commission (the Commission), issued a temporary restraining order ordering them (inter alia) to repatriate all their assets to the United States and to provide a full accounting of those assets to the Commission. The restraining order was based on an allegation that the settlors had engaged in certain acts in violation of United States laws dealing with telemarketing activities.

On 14 June 1998 the General Manager of the Applicant wrote to the settlors informing them that, by reason of an "event of duress" as defined in the Trust Deed, they had automatically ceased to be co-trustees of the Trust. The event of duress was that they had been the subject of an action in the territory in which they were resident the aim, purpose or effect of which was the "acquisition, expropriation or confiscation of any of the assets comprising the property of this Trust or any part thereof". The Applicant declined to comply with the terms of the restraining order on the basis that to do so would have been in breach of cls. 34 and 42 of the Trust Deed. Those clauses precluded any Excluded Person (as that expression is defined in the Trust Deed and to which reference is made later) from taking any benefit under the Trust. The result of this was that, on 18 June 1998, the District Court made an order for the imprisonment of the settlors for contempt of court.

On 7 July 1998 Mr M informed the Applicant of his imprisonment and said he had been requested by the Commission and the District Court to procure the consent of his children to the repatriation of the Trust Fund to the United States, and that if he was able to do this the Court would order his and his wife's release. The Applicant declined again to release any of the Trust Funds.

On 17 November 1998 Mr M informed the Applicant that the Commission and the District Court were examining other options in order to procure the repatriation of the Trust Fund. For this purpose the settlors' United States attorneys took advice from a Cook Islands solicitor, Mr. Manarangi, and as a result of that advice a new Cook Islands international company called Commission Incorporated (CI) was formed and registered under the International Companies Act. The directors of that company were Mr. Manarangi and his accountant, Mr X. The sole shareholder was the Commission.

The settlors then, on 18 December 1998 executed a document described as a Deed of Removal and Appointment of Trustee by which they purported to remove the Applicant as Trustee and to appoint CI as the new Trustee. Upon legal advice the Applicant rejected this Deed as invalid.

On 22 December 1998 a further Deed was executed by the settlors and CI. This was described as a Deed of Amendment, and its purpose was to amend the original Trust Deed by excluding the Commission from the definition of Excluded Persons in the Fourth Schedule to the Trust Deed, and by providing that the persons empowered to appoint successor trustees set out in the Fifth Schedule (namely the settlors) be deleted.

On the same day the settlors executed a Declaration of Resignation whereby they resigned as Protectors of the Trust pursuant to cl. 43(a) of the Trust Deed and purported to appoint CI as substitute Protector.

In the circumstances as set out above the Applicant has applied for declarations:

1. That the Deed of Removal and Appointment of Trustee of 18 December 1998 is not valid by reason of its being in breach of cl. 43(j) of the Trust Deed, and in particular as it purports to appoint CI as the new trustee for the benefit of an Excluded Person.

2. That the Deed of Amendment of 22 December 1998 is not valid as the person who purported to execute the Deed as trustee was not a validly appointed trustee, and that in any event the Trust Deed contained no power of amendment such as that purported to be exercised in the Deed.

3. That the appointment of CI in the Declaration of Resignation of 22 December 1998 is not valid as being the purported appointment of a substitute Protector for the benefit of an Excluded Person.

4. In the event that the Court holds that the appointment of CI as Protector is not valid the Applicant seeks directions as to whether or not some other person or entity should be appointed as Protector, and, if so, who such person or entity should be.

In order to arrive at a decision on these issues there are two basic matters which require consideration:

A. Whether, when Mr. and Mrs. M signed the Deed of Removal and Appointment of Trustee, the Deed of Amendment and the Declaration of Resignation, they did so under duress so as to render the documents void or voidable.

B. Whether the effect of the execution of those three documents was to confer a benefit upon an Excluded Person so as to make the documents invalid and unenforceable.

I deal with these in turn.

A. Duress.

It is common ground that the commencement by the Commission of an action in the U.S. District Court in the District of Nevada against Mr. and Mrs. M and several companies in which they were involved was an "event of duress" as defined in the Trust Deed and resulted in their automatically ceasing to be trustees. This left the Applicant as the sole trustee.

On 12 May 1998 Mr. and Mrs. M in attempted compliance with the order of the District Court, sent a facsimile transmission to the Applicant directing it to provide a full accounting of the assets held in the Trust and to repatriate the assets of the Trust to the District Court. The Applicant declined to comply with that direction and shortly after the Ms were held to be in contempt of court and were imprisoned on 19 June 1998.

On 7 July 1998 Mr. M rang Mr. T, the General Manager of the Applicant, and said he had been requested by the Commission and the District Court to procure the consent of the settlors' daughters to the repatriation of the Trust Fund. His understanding was that if he could secure that consent and repatriation he and his wife would be released. One of the daughters then wrote to the Applicant directing that one-half of the Trust assets be repatriated to the United States for her benefit, but the Applicant declined to comply with this direction.

An appeal was lodged against the Ms' imprisonment but was dismissed.

On 17 November 1998 Mr. M rang again saying he was still imprisoned and that the Commission and District Court were examining other options in order to obtain the funds.

On 3 December 1998 one of the daughters, Child B, rang Mr. T and said she believed her father was "being forced" by the Commission and the District Court to appoint a new trustee in order to have the funds repatriated.

On 15 December 1998 Mr. M rang again to say he was still in prison and had been requested by the Commission to sign a document appointing a new Cook Islands International Company as trustee in place of the Applicant and that he believed he and his wife would now be released. There followed then the execution of the three documents previously referred to.

Subsequently, and for the purpose of the present proceedings, Mr. and Mrs. M each made affidavits deposing that the documents had been reviewed by their attorney prior to execution and had been executed "on my own volition without duress".

This statement needs to be considered in the light of the remarks made by Mr. M in his telephone calls to Mr. T and which may well be capable of the interpretation that he was acting at the direction of the Commission and the District Court and solely to procure his and his wife's release from prison.

I have not had the opportunity of seeing and hearing those witnesses and am left to resolve the matter as best I can.

The only authority on the subject I have been able to find and which may apply to the present circumstances is a brief passage in Vol. 9 Halsbury's Laws of England, 4th, edition, para. 710:

"The question whether imprisonment or threatened imprisonment does or does not constitute duress depends upon whether the imprisonment is lawful or unlawful"

I do not doubt that the imprisonment for contempt of court was lawful according to the law of the State of Nevada and, as there is no oral evidence to cast doubt on the genuineness of the affidavits made by the Ms. I think I must accept that the withholding of release from prison until the documents had been executed is not such as to render those documents void or voidable.

B. Excluded Person

Clause 43(j) of the Trust Deed provides:

"43(j). No power of the Protector shall be exercisable by or for the benefit of an Excluded Person".

The Deed of Removal and Appointment of Trustee was executed by the Ms and settlors and Protectors in purported removal of the Applicant as trustee and the appointment of CI as the new trustee.

The Deed of Amendment was executed by them also as settlors and Protectors and purported to change the definition of Excluded Person in the Fourth Schedule to the Trust Deed.

The Declaration of Resignation was executed by the Andersons in order to resign as Protectors of the Trust and to appoint the Commission as Protector in their place. It is necessary to recognize that this Declaration, although brief, is in two separate parts. First it evidences the resignation by the Ms of their position within the Trust as Protectors. This they were entitled to do, and in the absence of any sufficient evidence that their resignations were made under duress. I consider those resignations to have been valid and effectual. The same comment does not necessarily apply to the remainder of the Declaration in which they purport to appoint the Commission as Protector in their place. That is a matter which depends for its validity on whether it was done in order to benefit as Excluded Person. The reference hereunder to the three documents therefore includes the Declaration only to the extent that it relates to the appointment of the Commission.

It was contended for the Applicant that each of those documents was invalid as being the purported exercise by the Ms in their capacity as Protectors of a power for the benefit of an Excluded Person.

The definition of Excluded Persons in the Fourth Schedule to the Trust Deed (so far as is relevant for present purposes) is:

"The following list of excluded persons shall be interpreted in its broadest sense, and shall include the following persons:

1. All court, administrative or judicial bodies, except for the court, administrative or judicial bodies organized or empowered under the laws of the Cook Islands.
2. Any and all creditors, claimants, judgment creditors, etc. of any Settlor, of any Trustee, or any Discretionary Beneficiary, or any other Beneficiary under the Settlement."

It must be acknowledged at once that CI, being an International Company registered in the Cook Islands under the International Companies Act, is not an Excluded Person. The question, however, is whether the purpose of the three documents was for the "benefit" of an Excluded Person, and this has particular reference to the Commission, which is the sole shareholder in CI, and to the District Court.

It is clear that the formation and registration of CI was intended to enable the Commission to enforce compliance by the Ms with the orders of the District Court to account to the Court for the assets of the Trust and to repatriate all those assets to the United States. In these circumstances it cannot in my view be disputed that execution of the three documents was in each case for the purpose of procuring that compliance and that, if this were achieved, it would be to the benefit of the Commission and the District Court. In other words, what was done was designed to bring the Trust assets within the jurisdiction of the District Court.

I should add that I am unable to construe the word "benefit" as confined to material benefit. I accept that if CI was validly appointed as trustee then it would have an obligation to administer the Trust in terms of the Trust Deed. What has happened, however, is that CI was appointed trustee in order to enable the Commission and the District Court to compel the transfer of the Trust assets to the United States and so bring them within the jurisdiction of the District.

It remains then to consider whether the Commission and the District, or either of them, was an Excluded Person.

The definition of Excluded Person as set out above includes first "all court, administrative and judicial bodies". It can scarcely be contested that the District Court is a Court and also a judicial body and as such is an Excluded Person. If, however, there should remain any doubt as to this, then attention must turn to whether the documents were executed for the benefit of the Commission. In view of the fact that the Commission is the sole shareholder of CI it is inconceivable that the procurement of the execution of the documents could not have been for the benefit of the Commission. In that event it is necessary to consider whether the Commission is an "administrative body".

That expression is not a term of art, and it is not surprising that counsel have not been able to refer me to any judicial interpretation of it, and nor have I been able to find one myself. Garner's Dictionary of Modern English Usage defines "administrative" as a "general, all purpose term meaning of or pertaining to administration", which does not seem to carry the matter much further. It was contended on behalf of CI

that "administrative" should be interpreted ejusdem generis with "court" and "judicial" bodies, and accordingly should be regarded as involving a body with at least quasi-judicial powers, and that this notion excluded the Commission from the definition. In the context in which the expression is used in the Trust Deed, however, I consider it is clearly to be contrasted with "court" and "judicial" bodies. Mr. C, in his affidavit made in his capacity as an employee of the Commission, describes it as "an independent agency" which "enforces a variety of federal antitrust and consumer protection laws". Having regard to the fact that the Fourth Schedule requires the definition of Excluded Person to be interpreted "in its broadest sense", it is hard to accept that the Commission is anything other than an administrative body in the generally accepted sense, and I am satisfied that it comes within the definition of Excluded Person.

In case I should be wrong in that conclusion, however, I consider that the Commission must certainly be regarded as a "claimant" so as to come within para. 2 of the definition in the Fourth Schedule. It was the Commission which was the plaintiff in the proceedings which were commenced against the Ms and the various companies in which they were said to have been involved, and I can see no distinction between its status as plaintiff and as a claimant.

Perhaps it should be added that the Commission itself, in its attempt to create a situation in which it could obtain repatriation of the Trust assets, appears to have recognized that it fell within the expression Excluded Person and for this reason procured the execution by the M's of the Deed of Amendment by which it purported to amend the Fourth Schedule by deleting the definition of Excluded Person.

For the reasons I have given I consider that the three documents are each invalid as having been made for the benefit of the Commission and the District Court (or either of them).

It remains to consider that final question asked in the Application, namely whether, if the Court holds that the appointment of the Commission as Protector is not valid, some other person or entity should be appointed as Protector, and, if so, who that should be.

In view of the decision I have reached that the Declaration of Resignation was a valid document in so far as it related to the resignation of the Ms but was invalid as to the purported appointment of CI, the office of Protector is at present vacant.

Subclause 43(h) of the Trust Deed provides that if at any time there shall be no Protector then all powers, duties and obligations of the Protector shall be vested in the Trustees until a new Protector is appointed. In view of the fact that in certain circumstances the Protector has a power of veto over some of the Trustee's powers, it would seem to be inappropriate to allow the present interim status of the Applicant as Protector to remain indefinitely. I accordingly consider that the appropriate course is for the Court to appoint a Protector. However, counsel have not made any reference to who this should be and I am in no position to decide whom it would be appropriate to appoint. This must, therefore, be a matter to be reserved for further submission.

Summary

Reverting to the form of the Application for Directions, there will be the following declarations:

1. The Deed of Removal and Appointment of Trustee is invalid as having been made in breach of cl. 43(j) of the Trust Deed for the benefit of an Excluded Person or Excluded Persons, namely the Commission and the District Court of Nevada, or either of them.

2. The Deed of Amendment is invalid as having been executed by the settlors in purported exercise of a power which, by virtue of an event of duress, they no longer had, and also that the Deed was for the benefit of an Excluded Person or Excluded Persons, namely the Commission and the District Court, or either of them.
3. The appointment of the Commission as substitute Protector in the Declaration of Resignation is invalid as being in breach of cl. 43(j) of the Trust Deed as the exercise of a power for the benefit of an Excluded Person, namely the Commission.
4. Leave is reserved to apply further for the appointment of a Protector or Protectors for the purposes of the Trust.
5. The Applicant is entitled to costs, and leave is reserved to it to apply for an order in that regard.