Tanya Marya Dick Stock v Pantrust International SA

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Grime, Thomas
Judgment Date:	06 September 2016
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Text

[2016] JRC 155

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner, and Jurats Grime and Thomas

In the Matter of the Manor House Trust and in the Matter of the Russian Trust

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984.

Between
Tanya Marya Dick Stock
Representor
and
Pantrust International SA
First Respondent

and

Richard George De Winton Wigley
Second Respondent

and

James Richard De Winton Wigley
Third Respondent

and

G.B. Trustees Limited
Fourth Respondent

Advocate JS. M. Baker **for the Representor**.

Authorities

Stock v Pantrust [2015] JRC 208 .

Stock v Pantrust [2015] JRC 223 .

Stock v Pantrust [2016] JRC 021 .

Stock v Pantrust [2016] JRC 053 .

Heinrichs v Pantrust & Others [2016] JRC 106A .

Trusts (Jersey) Law 1984.

Trust — declarations sought by the representor in relation to changes of proper law.

THE COMMISSIONER:

1 By her representations dated 28 th May and 3 rd June, 2015, (and amended in September 2015) the representor sought the removal of the first to third respondents as trustee of the Manor House Trust and the Russian Trust in favour of the fourth respondent, and, *inter alia*, declarations that changes in the proper law of those trusts in 2007 and 2015 were void.

2 A challenge by the first to third respondents to the jurisdiction of the Court was unsuccessful, and in its judgment of 8 th October, 2015 (*Stock v Pantrust* [2015] JRC 208), at paragraph 85, the Court on its own motion took the issue of the removal of the first to third respondents as trustees as a matter of urgency. The removal issue was dealt with on 27 th October, 2015, and the first to third respondents were removed as trustees of both trusts in

favour of the fourth respondent for the reasons set out in the Court's judgment of the 6th November, 2015, (*Stock v Pantrust* [2015] JRC 223). The Court went on to deal with issues of security leading to its judgments of the 22nd January, 2016, (*Stock v Pantrust* [2016] JRC 021) and 4th March, 2016, (*Stock v Pantrust* [2016] JRC 053). By her summons dated 17th May, 2016, the representor now seeks declarations in relation to the changes of proper law.

Background

3 The Russian Trust is a discretionary settlement made between a Mr E Leimbacher, as the named settlor, and Barclaytrust International Limited ("Barclaytrust") on 20th April, 1974. At the time of its creation, it was subject to the proper law of Jersey. The economic settlor was John Dick Senior.

4 The Manor House Trust is a discretionary settlement created by declaration of trust by Barclaytrust on 15th May, 1980. At the time of its creation, it was subject to the proper law of Jersey. Again, the economic settlor was John Dick Senior.

5 The underlying relationship was between John Dick Senior and the second respondent, which goes back some 30 years, when the latter was employed by Barclaytrust. Barclaytrust retired as trustee of the Manor House Trust on 3rd April, 1984, in favour of *La Hougue Boette Société Fiduciaire avec Responsabilité Limitée* ("La Hougue"), which was beneficially owned by John Dick Senior. On 1st August, 1984, Barclaytrust also retired as trustee of the Russian Trust in favour of La Hougue.

6 It would seem that the second respondent left the employment of Barclaytrust in the early to mid-1980s to administer La Hougue from St John's Manor, which is an asset of the Manor House Trust.

7 In September 1991, the second respondent incorporated La Hougue Financial Management Services Limited to conduct his own trust business, servicing his own clients as well as trusts connected with John Dick Senior.

8 On 15th June, 2010, La Hougue Financial Management Services was continued out from Jersey as a Panamanian corporation and in August, 2007 the second respondent incorporated the first respondent, which obtained a Panamanian licence to conduct trust business. The second respondent and his son, the third respondent, went to live in Panama.

9 On 30th November, 2007, La Hougue retired as trustee of both trusts in favour of the first respondent and the proper law was changed to that of Panama. The deeds of retirement

and appointment were in identical form and we will refer to them as the 2007 DORAS.

10 The catalyst for the move from Jersey to Panama appears to have been increasing regulatory pressures in Jersey and concerns over maintaining confidentiality. The first respondent was wholly owned by the second respondent, but with John Dick Senior receiving a share of the gross income of its trust business.

11 Following complaints made to the Panamanian regulator by John Dick Senior, the licence of the first respondent to conduct trust business in Panama was cancelled by the Panamanian regulator on 13 th February, 2015, and it was prohibited from performing any operations relating to the exercise of its trust business in that jurisdiction. In addition, the first respondent was ordered by the Panamanian regulator:-

> *"(1) to notify each and every one of the Grantors or Settlors of the content of the present Resolution so that if they so decide, they may make the relevant decisions pertaining to their best interests, concerning their respective trusts managed by the trust company and (2) to proceed with the substitution of the trustee…."*

12 The first respondent proceeded to retire as trustee of both the trusts appointing the second and third respondents, as individuals, as new trustees, against the express wishes of John Dick Senior, and changing the proper law to England and Wales. Again the deeds of retirement and appointment are in identical form and we will refer to them as the 2015 DORAS.

13 The representor seeks to have the changes in the proper law in 2007 and 2015 declared void on the grounds firstly of their formal invalidity and secondly on the grounds that each was a fraud on the power. We will take the issue of their formal validity first.

The 2007 DORAS

14 Clause 12(a) of the trust deeds (which are in the same terms for each trust) provide as follows:-

> *"The Trustee may at any time or times and from time to time during the Trust Period by deed declare that this Settlement shall from the date of such declaration take effect in accordance with the law of some other state or territory in any part of the world (not being any place under the law of which (1) any of the trusts powers and provisions herein declared and contained would not be enforceable or capable of being exercised and so taking effect or (2) this Settlement would not be irrevocable and that the forum for the administration thereof shall thenceforth be the Courts of that state or territory AND as from the date of such declaration the law of the state or territory named therein shall be the law applicable to this Settlement and the Courts thereof shall be the forum*

for the administration thereof but subject to the power conferred by this Clause and until any further declaration be made hereunder PROVIDED ALWAYS that so often as any such declaration as aforesaid shall be made the Trustees shall be at liberty to make such consequential alterations or additions in or to the trusts powers and provisions of this Settlement as the Trustees may consider necessary or desirable to ensure that the trusts powers and provisions of this Settlement shall (mutatis mutandis) be as valid and effective as they are under the law of the Island of Jersey."

15 Pursuant to this, the 2007 DORAS provided at clause 4:-

"In exercise of the power conferred upon it by Clause 12(a) of the Settlement and all other powers it enabling the Retiring Trustee hereby declares that with effect from the Retirement Date the Trust shall take effect in accordance with the laws of the Republic of Panama and that the forum for the administration thereof shall be the courts of the Republic of Panama so that the law of the Republic of Panama shall be the law applicable to the Trust and the Courts thereof shall be the forum for the administration of the Trust."

16 The 2007 DORAS were executed at a time when both trusts were governed by Jersey law and both deeds are expressly governed by Jersey law. There is no question, therefore, that this Court has jurisdiction to determine the issues raised by the representor in relation to the 2007 DORAS.

17 In support of her application, the representor had obtained advice from Hatstone Abogados, a firm of Panamanian lawyers, dated 26 th August, 2015, which the Court considered in its judgment of 8 th October, 2015. Quoting from paragraph 63 to 67 of that judgment:-

"63 Hatstone further advised that for a foreign trust to come under Panamanian law, the Settlor should have been a party to the 2007 deeds of appointment and retirement. Article 40 of the Panamanian Trust Law is in the following terms:-

'Article 40 Trusts organized in accordance with a foreign law may come under Panamanian law, provided that the founder of trust and the trustee or only the latter, if it is so authorized by the trust instrument, makes a statement in that respect, submitting to the essential requirements and the formalities established in this law for the constitution of the trust.'

64 They explained the position in this way:-

'1. The Settlor should have been a party to the 2007 DORAS. Panamanian trust law is based on contractual principles and therefore a Panamanian trust is recorded as a contractual agreement made between the settlor and the trustee. The trust deeds of the [ ] and the Manor Trust are unilateral

declarations of trust and therefore the Settlor is not a party. Panamanian Trust Law does not recognize unilateral declarations of trust. With regards to The Russian Trust, which names the Settlor as E. Leimbacher and who we understand is not the economic Settlor, it is important that the contract is made with the main economic Settlor and not a minor or initial Settlor.'

65 There had also been no designation of a registered agent as required by Article 9 of the Panamanian Trust Law. Accordingly, they advised that it was very strongly arguable that the change of proper law had not been effective for Panamanian Law purposes and the Panamanian courts would be unlikely to accept jurisdiction .

66 Their advice is supported by one of the findings of the regulator namely that there was no contract between the Panamanian Trustee and the Settlor covering the requirements of Article 9, specifically the appointment and identity of the Settlors, the objects of the trust, the actual amount of the assets held in trust, the origin and source of the resources handled under the structure of the trust company and the express appointment of the resident agent for each trust .

67 Hatstone concluded that the Trusts were still governed by Jersey law and strongly recommended that any application should be made to the Jersey courts."

18 The Court went on to say at paragraphs 70–71:-

"70 When moving the proper law to Panama, it was incumbent on La Hougue (which exercised the relevant power) to ensure that the Trusts would be as valid and effective under Panamanian law as they were under Jersey law. This is particularly the case when the Trusts were being moved to a civil law jurisdiction whose trusts law is based upon contractual principles. Clause 12(a) of the trust deeds make express provision for the making of consequential alterations or additions to ensure such validity and effectiveness. The only consequential amendment made in the 2007 DORAS was to the definition of adopted persons in the trust deeds (clause 5). The findings of the regulator, following a lengthy inspection, indicate that no alterations or additions were made subsequently to ensure validity under Panamanian law .

71 On the basis of the evidence now before us (and the first director [the first respondent in these proceedings] has not yet addressed the issue) the advice given by Hatstone and the findings of the regulator, we think that the representor has the better of the argument (see *Crociani v Crociani [CA]* [2014] JLR 426 ***at pages 442–443) as to whether the 2007 DORAS were effective in changing the proper law to Panama.*** Article 12 of the Panamanian Trust Law does make reference to the nullity of one or more clauses of the trust instrument not leaving the trust without effect, unless as a result of that nullity, its compliance becomes impossible, but as matters stand

the Trusts would not appear to be valid under Panamanian law."

19 The advice of Hatstone Abogados has been confirmed by them again on 5 th July, 2016. The same issue arose in the separate proceedings brought against the first to third respondents by Anne and Werner Heinrichs in relation to the Brazilian Trust. In those proceedings, the trust concerned had been through a similar history in terms of changes of trustee and changes to the proper law in 2007 and 2015. It was effectively conceded by the first to third respondents that neither change of proper law in that case had been effective. Quoting from paragraphs 36 – 38 of the judgment (*Heinrichs v Pantrust & Others* [2016] JRC 106A):-

> ***"36 In*** *Stock v Pantrust* , ***the court had the benefit of advice from the Panamanian firm of Hatstone Abogados, dated 5th November 2015.*** The representors had obtained a further opinion from another firm of Panamanian lawyers, known as Mizrachi, Davarro & Urriola ('MD&U') which reinforces the advice given by Hatstone. The underlying point is that Panamanian trusts are contractual in nature and very substantial formal changes would have to be made to the [the Brazilian Trust] in order for it to be valid and effective under Panamanian law.
>
> ***37 Clause 11(a) of the [Brazilian Trust] dealing with the power to change the proper law is in these terms: [the same as Clause 12(a) above]*** .
>
> ***38 The power can only be exercised in favour of a jurisdiction in which the trust would be enforceable.*** There is no evidence of any consequential alterations or additions being made and the advice from both legal firms is that the [Brazilian Trust], as currently worded, is not enforceable under Panamanian law. Not only do the representors have the better of the argument on this issue, but it is effectively conceded that the power was not validly exercised and the proper law remained that of Jersey. The subsequent change from Panamanian law to English law would inevitably fail as well."

20 The first to third respondents have withdrawn their instructions to Sinels in Jersey and did not appear, but they have filed a skeleton argument supported by a sixth affidavit sworn by the second respondent. Critically, they have filed nothing to question the advice received as to Panamanian law. They say that in 2007/8, legal advice had been obtained (presumably from a Panamanian lawyer) but refused to disclose it on the grounds that it is privileged. We doubt that advice obtained in 2007/8 by the retiring/new trustees, presumably at the cost of the trust funds, about the proposed change of the proper law from Jersey to Panama is privileged, but in any event there has been nothing to prevent the first to third respondents from filing their own advice on Panamanian law, if that advice would contradict the advice the Court has now received from two firms of Panamanian lawyers. They have not done so and we can only infer that they have no grounds to challenge the advice as to Panamanian law the Court has received.

21 The remaining points raised by the first to third respondents are not germane to the first issue we have to decide, but in summary:-

(i) They say that the proceedings brought by the representor ended in November 2015 with their replacement as trustees. That is not the case. This and other relief sought in the representations have yet to be dealt with by the Court.

(ii) They challenge the *locus* of the representor to seek this relief; they say that should be a matter for the fourth respondent as the new trustee. The representor is a beneficiary of these trusts and therefore has locus under Article 51(3) of the Trusts (Jersey) Law 1984 as amended to seek this relief and she is supported in so doing by the fourth respondent. The latter did not appear in order to save costs in relation to trusts that have limited funds.

(iii) They allege that Hatstone Abogados were not independent, as they are the lawyers acting for the fourth respondent, but Hatstone Abogados have confirmed that their advice was prepared in order to be provided as evidence of Panamanian law before this Court and they are aware of their duty to truthfully set out the Panamanian law for the benefit of the Court irrespective of the interests of the parties. Furthermore, their advice is supported by the advice given by Mizrachi, Davarro & Urriola in the separate proceedings concerning the Brazilian Trust.

(iv) They say there is no evidence in support of the application other than the representor's second affidavit, which was filed last year for the purpose of the jurisdictional challenge and which they point out was undated. It is correct that the representor's second affidavit appears to be undated, but it was filed in proceedings in which the first to third respondents were represented and no point was taken. We do not regard that evidence as stale. The key issue is that relating to Panamanian law and the advice obtained in that respect is current.

(v) The first to third respondents repeat the assertion that these trusts are shams and that the only person, apart from the second respondent, who can give evidence about them is John Dick Senior, with whom they say the representor (his daughter) is colluding to avoid the payment of monies claimed by the first respondent. They say that no orders should be made until the issue of sham has been determined by the Court. However, as the Court said in its judgment of 8 th October, 2015, in relation to the allegation of sham (at paragraph 51):-

> ***"51 We venture to suggest that there would be considerable hurdles to overcome in proving that Barclaytrust were a party to any such common intention when the Trusts were established.*** Even so, there has been no finding by any court that the trust and subsequent deeds are shams. They are valid on their face and we must at this stage proceed on the basis that they are valid and to treat them as valid, unless and until a court of competent jurisdiction determines otherwise; notwithstanding that, as alleged by the [second respondent], for many years the trustee may have disregarded the trust and subsequent deeds and simply done as it was directed to do."

That remains the position and this Court will continue to exercise its supervisory jurisdiction over these trusts on the basis that they are valid Jersey trusts until such time as the Court determines otherwise.

(vi) The first to third respondents raised a number of criticisms of the litigation conduct of the representor but none were pertinent to the first issue before the Court.

Decision

22 In our view, the advice received as to Panamanian law is clear and uncontradicted. Panamanian trusts are contractual in nature and very substantial changes would have been required to these trusts in order for them to be valid and effective under Panamanian law and to which changes John Dick Senior would have been required to be a party. The first to third respondents have declined to provide the Court with the advice they say they received at the time and have failed to adduce any evidence:-

(i) Of any consequential amendments made to the deeds in order for them to conform to Panamanian law – indeed, the Panamanian regulator made it clear that there were no such subsequent deeds;

(ii) To contradict the advice received now from two firms of Panamanian lawyers.

23 We therefore find that the 2007 DORAS were ineffective in changing the proper law from Jersey to Panama. Both trusts therefore remained subject to the proper law of Jersey and to the jurisdiction of this Court. This in turn leads inevitably to the purported change in the proper law from Panama to England and Wales under the 2015 DORAS being invalid, in that both trusts were in fact governed by Jersey law at that time and not Panamanian law. In any event, the first to third respondents have conceded that the 2015 DORAS were invalid in their entirety, albeit on other grounds. As a consequence, both trusts have been subject to the proper law of Jersey throughout.

24 In the premises there is no need for the Court to go on to consider the representor's further submissions that the 2007 and 2015 DORAS are invalid as being frauds on the power and the response of the first to third respondents thereto.

25 We are satisfied that declaring the invalidity of the change in the proper law under the 2007 DORAS would not lead to the appointment of the first respondent as trustee, contained within the same document, being invalid i.e. that the two were severable. The power to appoint new trustees and the power to change the proper law are separate powers, conceptually different from one another. Neither power was expressed as being contingent or conditional upon the other taking effect.

26 Hatstone Abogados had advised that it was acceptable under Panamanian law for a trust

company based in Panama to administer and provide services to a trust governed by a law other than Panama. The appointment of the first respondent as trustee under the 2007 DORAS was valid from a Panamanian legal and regulatory perspective.

27 Furthermore, clause 9.1 of the 2007 DORAS provided as follows:-

> *"In the event that any of the terms of this Deed are deemed to be contrary to any provision of any applicable law then the remaining terms of this Deed shall be valid and binding to the extent that the same are not contrary to any provision of any applicable law"*.

28 The same general points can be made about the 2015 DORAS save that those deeds do not contain the equivalent of clause 9.1 above. The first to third respondents have never purported to rely on the 2015 DORAS — indeed they did not even produce them at the jurisdictional challenge hearing (see paragraph 68 of the judgment of the 8 th October, 2015), leading to confusion as to whether the first respondent remained as trustee or had validly retired in favour of the second and third respondents, hence the Court removing all three (see paragraph 9(ii) of the judgment of the 6 th November, 2015).

29 We therefore declare that the change of the proper law of the Manor House Trust and the Russian Trust from Jersey to Panama on 30th November 2007 and from Panama to England and Wales on 18 th May, 2015, are void and of no effect and that the proper law of the Manor House Trust and the Russian Trust has always been the law of Jersey.