

Barclays v Hsu and Others

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	06 January 2010
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Text

[2010] JRC 3A

ROYAL COURT

(Samedi Division)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and** Jurats Clapham **and** Kerley.

Between
Barclays Private Bank & Trust Limited
Representor
and

(1) Cheng-Pei Hsu, on his own behalf and on the behalf of any unascertained or future
issue of his

(2) The adult issue of Cheng-Pei Hsu, if any

(3) John-Ping Hsu, on his own behalf and on the behalf of any unascertained or future
issue of his.

(4) Benjamin Jen-Bin Hsu

(5) Daniel Jen-Dee

(6) Ju-Tung Hsu, on his own behalf and on the behalf of an unascertained or future issue of his.

(7) Jovan Gene Hsu

(8) Joey Concord Hsu

(9) Shining Jessica Hsu

(10) Keng-Nan Hsu, on his own behalf and on the behalf of any unascertained or future issue of his

(11) Christopher Jenwen Hsu

(12) Nien-Hsi Hsu, on behalf of his minor issue, if any, and unascertained or future issue of his, and in his capacity as Executor of the Estate of his mother Nai-Cheng Hu Hsu

(13) The adult issue of Nien-His Hsu if any

(14) Tsi-Yun Hsu

Parties convened

and

Nien-Hsi Hsu (on his own behalf and on behalf of his adult and minor issue, if any, and unascertained or future issue, and in his capacity as Executor of the Estate of Nai-Cheng

Hu Hsu)

Plaintiff

and

(1) Barclays Private Bank & Trust Limited

(2) Cheng-Pei Hsu (on his own behalf and on behalf of any unascertained or future issue)

(3) The adult issue of Cheng-Pei Hsu if any

(4) John-Ping Hsu

(5) Benjamin Jen-Bin Hsu

(6) Daniel Jen-Dee Hsu

(7) Ju-Tung Hsu (on his own behalf and on behalf of any unascertained or future issue)

(8) Jovan Gene Hsu

(9) Joey Concord Hsu

(11) Keng-Nan Hsu

(12) Christopher Jenwen Hsu

(13) Calvin Jennan Hsu

(14) Meghan Jenyi Hsu

(15) Jen-Jeih Hsu (known as Jerry Hsu)

(16) Tsi-Yun Hsu

Defendants

Advocate K. J. Lawrence for the Representer and Defendant.

Advocate F. B. Robertson for 6–11 Parties convened and 7–14 Defendants.

Parties convened 1–5 and 12–14 not present and not represented.

Defendants 1–6 and 15–16 not present and not represented.

Authorities

Trusts (Jersey) Law 1984, as amended.

Re Fountain Trust [\[2005\] JLR 359](#).

The H Trust [\[2007\] JRC 187](#).

IMK Family Trust [\[2008\] JLR 250](#).

IMK Family Trust [\[2008\] JLR 430](#).

Re B [\[2006\] JRC 185](#).

Royal Court Rules 2004.

Deputy Bailiff

THE

- 1 This case has had a complicated procedural history, resulting in the matters before the Court which were heard on 25th November.
- 2 These matters arise out of two sets of proceedings. The first set of proceedings is under Court File Ref: 2005/182, which are proceedings commenced by Barclays Private Bank and Trust Limited (the “Trustee”) as Trustee of the Tyzee Trust. I will refer to these as the “Trust Proceedings”. The second set of proceedings comes under File Ref: 2005/396, commenced by Nien-Hsi Hsu on his own behalf and in other capacities against the Trustee and Others, seeking various relief. I refer to these as the “OJ Proceedings”.

The Trust Proceedings

- 3 The Court was convened to determine a summons issued by Nien-Hsi Hsu, the 12th party convened, seeking an Order pursuant to Article 51 of the Trusts (Jersey) Law 1984 (the “Trust Law”) without reconsideration of the merits:-

“(1) That the judgment of the Massachusetts Court dated 10th August, 2000, between Nai-Cheng Hu Hsu and Tsi-Yun Hsu, and judgments incidental thereto, should be recognised and/or enforced against the assets presently held in the Tyzee Trust and paid to Nien-Hsi Hsu in his capacity as Executor of the estate of his mother Nai-Cheng Hu Hsu in the following sums:-

(a) pursuant to the judgment dated 10th August, 2000, the sum of US\$1,000,000 (one million United States dollars); and

(b) interest at the higher of the Royal Court rate or applicable United States Court rate from 10th August, 2000, to date of payment;

(c) further or alternatively to (b), the sum of US\$10,000 per week pursuant to the judgement of the Massachusetts Court dated 8th November, 2000, from 10th August, 2000, to date of payment;

(2) That the Restraining Orders of the Massachusetts Court be recognised and given effect to, including but not limited to the Restraining Order dated 24th February, 2000, preventing the first, third, sixth and 10th parties convened from inter alia in any way disposing of any assets of and/or proceeds from the Tyzee Trust;

(3) That costs be paid either out of the assets of the Tyzee Trust and/or by such parties as the Court shall deem fit."

- 4 This summons was issued on 22nd February, 2008. For reasons which appear below in relation to the procedural steps taken, this summons has only just come on before the Court for hearing. The date was fixed originally for 19th June, 2008, but subsequently by agreement between the parties the summons was adjourned on a number of occasions and finally fixed for hearing on 24th and 25th November, 2009. The application was that of the 12th party convened (to whom I shall refer in this judgment, without intending any discourtesy by such brevity as "Nien").
- 5 In the event, Nien did not appear before the Court for the hearing of the application which he had made. Not only has Nien not made any appearance in relation to the hearing of his application, but he has also not complied with the Order of the Royal Court of 8th February, 2008, which gave all parties leave to file an affidavit by 21st March, 2008, and directed Nien to file a skeleton argument by 18th April, 2008. This Order was subsequently varied by consent by an Act of the Royal Court dated 29th April, 2008, which gave the parties leave to file an affidavit by 28th April, 2008, and Nien to file a skeleton argument by 15th May, 2008. It was further varied, again by consent, on 6th July, 2009, when the Court ordered Nien to file his affidavit by 31st August, 2009, and his skeleton argument by 21st September, 2009, and to lodge bundles by 19th October, 2009.
- 6 Nien not having appeared and having failed to comply with any of the Court's procedural Orders to enable the Court to deal with the summons which he has issued, the Court in its discretion dismisses that summons as requested by the Trustee and by the beneficiaries for whom Advocate Robertson acts. The Court will make some further observations below in relation to the substance of the application as disclosed by Nien's summons, but it should be emphasised that the reason for the decision dismissing his summons lies in his failure to

attend Court either personally or through counsel to explain why he sought the Orders he did. That failure is, of course, compounded by the Court's inability to follow any argument he might have wished to advance as a result of his failure to comply with the procedural directions which have been made with his consent.

Background

- 7 The Tyzee Trust ("the Trust") was created by a Declaration of Trust dated 17th May, 1991, made by the Trustee. The funds were apparently provided by Mr Tsi-Yun Hsu ("Mr Hsu") and possibly two of his sons including Nien. Mr Hsu was petitioned for divorce by his wife on 14th December, 1993. The parties were divorced pursuant to an Order made by the Massachusetts Probate and Family Court on 10th August, 2000. In its judgment, which is the judgment Nien seeks to have enforced, the Court held that Mr Hsu had fraudulently transferred and concealed assets from his wife in particular by the creation of the Trust. That judgment contained the following Order:-
- "The Court finds that the Husband fraudulently transferred marital funds into the Tyzee Trust and accordingly declares so much of the Trust void so as to allow the Husband to pay to the Wife US\$1,000,000 within 30 days from the date of the judgment.*** The Husband shall take all necessary steps to effectuate the transfer. The Husband shall be solely responsible for paying any taxes associated with the withdrawal of US\$1,000,000 so that the Wife receives the funds tax free."
- 8 The Trustee exercised a Deed of Exclusion in December 1993. It is dated 6th December, 1993, but was purportedly sealed on 30th December, 1993. By this Deed of Exclusion, Mr Hsu and Nien were declared to be Excluded Persons under the Settlement. It follows that by the time the Massachusetts Court made its Order in August 2000, Mr Hsu was incapable of benefit from the Tyzee Trust; and his wife was not and has never been a beneficiary of the Trust.
- 9 The Court is advised that the Trustee was given little information about the progress of the divorce proceedings between Mr Hsu and his wife, save for some correspondence in 1999 regarding Mr Hsu's discovery obligations and in February 2000 regarding a possible basis for settlement of the matrimonial proceedings. At no stage was the Trustee convened before the Massachusetts Court, neither did it enter any appearance in those proceedings nor did it accept the jurisdiction of that Court.
- 10 Following her success, the wife evidently pressed her husband for payment of the award and subsequently took contempt proceedings against him in the United States for non-payment of the award. In a separate action she filed proceedings against her four sons who were and remain beneficiaries of the Trust, obtaining a temporary restraining Order in the United States in February 2000 preventing them from dealing with the assets of the Trust in

any way. The wife engaged Jersey lawyers, to whom in May 2002, the Trustee gave an assurance through Messrs. Ogier & Le Masurier that the assets and the administration of the Trust would remain within the jurisdiction pending an application being made to the Royal Court. No distributions have been made out of the Trust since that date other than with the consent of the Royal Court as set out below.

- 11 It is unnecessary to describe the correspondence between the various lawyers through 2003 and 2004. It appears that the wife died on 15th February, 2003, and her son Nien was appointed as Executor of her estate with grants of probate in both Massachusetts in December 2003 and in Jersey in November 2004. At all events, neither the wife nor Nien made any approach to have the judgment of the Massachusetts Court recognised and/or enforced in the Royal Court from 2000 until 2005.
- 12 On 18th August, 2005, there was an important development. The Trustee had presented a representation to the Court seeking directions in the light of the possibility of a proprietary claim to the Trust fund being advanced by Nien as Executor of his late mother. As a result, the Trustee sought directions as to how it should act in connection with the Settlement. The representation was adjourned to 18th August and the five sons (including Nien) of Mr Hsu and his wife, their issue and Mr Hsu himself were convened. On 18th August, Nien and his adult issue having appeared through an advocate, and the sixth to 11th parties convened, now represented by Advocate Robertson, having also appeared, the Court directed the Trustee to remain neutral in relation to any dispute over the ownership of the Trust assets, agreed that the Trustee could be indemnified out of the assets of the Tyzee Trust in relation to its fees and disbursements, noted the undertaking of the Trustee not to make any distributions to any beneficiary or other person, and ordered Nien as Executor of his late mother to serve any proprietary claim on the parties within 42 days of the Court's judgment. The Court ordered that if no proceedings were issued within the 42 day period, the Trustee would be directed to deal with the assets of the Trust without having regard to any possible claims by or on behalf of the estate of the wife.

The OJ Proceedings

- 13 41 days after that Order, Nien commenced proceedings by way of Order of Justice seeking a declaration that the judgment of the Massachusetts Court was binding and enforceable against the Trustee and/or the defendants, a declaration that as at the date of her death, the Trustee held part of the settlement on trust for the wife, a direction that the Trustee paid to Nien such sums as are found due by virtue of the judgment, a declaration that the Deed of Exclusion was null and void, and various other relief.
- 14 On 27th February, the Court ordered, upon the summons of the Trustee, that the claims made in paragraphs 11–15 and the fourth prayer of the Order of Justice be stayed until further Order after the determination of the balance of the Plaintiff's claims. In substance, this was an Order that the claim that the Deed of Exclusion, by which the husband and Nien

were excluded from benefit under the Trust was null and void, should be stayed until further order.

- 15 On 6th April, 2006, the fourth to fourteenth defendants, for whom Advocate Robertson acts, filed an answer. No other defences to the Order of Justice have been served.
- 16 Nien took no steps in relation to his claim until February 2008 when he served a summons for directions the main object of which was to ensure that the issue as to whether the judgment of the Massachusetts Court should be recognised and enforced against the assets held in the Tyzee Trust was transferred into the representation proceedings pursuant to Article 51 of the Trusts (Jersey) Law 1984, as amended and that it should be set down for trial on the first available date convenient to the parties after 1st May, 2008. In addition, Nien sought to have stayed any other of his outstanding claims that were not already stayed, pending trial of the said issue, and pending any further amendment of his Order of Justice. This summons gave rise to the procedural Orders which are described at paragraph 5 above. The Court did not in terms order the stay of the OJ proceedings, but in practice the parties before the Court today have accepted that this was the effect of the Court's order.

Enforcement of the Massachusetts Court Order

- 17 As I have indicated above, the Court has dismissed the application of Nien for recognition and/or enforcement of the Massachusetts Court Order as set out above for the reasons given. However it may be that it would be useful to set out in broad terms what the Royal Court's approach to any application of this kind would have been. The issue of giving effect – in one way or another – to the judgment of a foreign court where a Jersey trust or Jersey trust property is concerned has been considered in a number of cases recently, not least *Re Fountain Trust* [\[2005\] JLR 359](#), in the matter of *The H Trust* [\[2007\] JRC 187](#), in the matter of the *IMK Family Trust* [\[2008\] JLR 250](#), and on appeal at [\[2008\] JLR 430](#); and in the earlier case of *Re B* [\[2006\] JRC 185](#).
- 18 It is quite apparent from this line of authority that a key consideration is whether the Jersey Trustee has submitted to the jurisdiction of the foreign court. If the Jersey Trustee had made no submission to that jurisdiction, then the foreign Court Order would not be enforceable as such against the Trustee without a fresh hearing on the merits. There is nothing very surprising about this. It would be stretching the doctrine of comity beyond breaking point to enforce against a party in Jersey a judgment of a foreign court whose jurisdiction had not been accepted.
- 19 The second consideration however is that, although the foreign Court Order might not be enforceable as such, the Royal Court could nonetheless in its discretion give directions to the Trustee which might achieve the same result as was intended by the judgment of the foreign court. This would not be a matter of direct enforcement of the foreign judgment. It

would be an exercise of the Court's discretion to give directions to a Trustee as to the administration of the Trust and the exercise of Trustee powers. For that reason, a distinction has to be drawn between a direction to the Trustee that he do something that neither the Trust Deed nor the Trust Law allows him to do, and a direction to the Trustee which he is empowered to perform pursuant to the terms of the Trust. It is clear the Royal Court cannot exercise a discretion under Article 51 of the Trust Law to order a Trustee to do something the Trustee does not have power to do.

- 20 On the application of these principles, it seems to us that even if Nien had appeared to argue the summons which he had taken out, he would have been faced with the insuperable objections that direct enforcement was not possible because the Trustee did not accept the jurisdiction of the Massachusetts Court, and that the Royal Court would not have a discretion to exercise under Article 51 to declare the Trust void in such a manner as had been ordered by the Massachusetts Court. Nor could the Royal Court easily direct the Trustee to make a payment to Mr Hsu, the husband, as he was an Excluded Person under the Trust. Nor was it conceivable that the Court would accept a proprietary claim of a stranger to most of the Trust assets (the wife, or Nien as her Executor) without hearing from the Plaintiff, not least because it would not be in the interest of the beneficiaries to do so.
- 21 Nien's application by summons dated 22nd February, 2008, has been dismissed for the reasons set out at paragraph 6 above, but for the reasons given in paragraphs 17 to 20 above the application was in the Court's view always doomed to failure in any event.

Consequential Relief

- 22 The Trustee applied to the Court for further Orders namely:-

- (i) that the Trustee should be released from its undertaking recorded in the Act of Court of 18th August, 2005, to make no distributions from the Trust.
- (ii) That the Trustee shall henceforth administer the Trust without regard to any possible claims which might be brought by or on behalf of the estate of Nai-Cheng Hu Hsu or by any other person citing such claim as the basis for their claim.
- (iii) That if by close of business on 29th January, 2010, no Order of Justice has been served on the Trustee by Nien concerning his/or his father's exclusion as a beneficiary of the Trust, the Trustee is directed to administer the Trust without regard to any possible claim regarding such exclusion.

- 23 For the reasons given below in relation to the OJ proceedings, the Order suggested by the Trustee under paragraph 22(iii) falls away.

- 24 As to the first two of the proposed Orders put before us, the Court has considered whether

these should be made given that Nien has not received any summons indicating that these Orders would be sought by the Trustee. The closest one comes to such a summons is a letter dated 16th October, 2009, sent on behalf of the Trustee to all parties including Nien in which there appears the following passage:-

"... at the time when Nien was due to file his evidence, we were informed that his Jersey advocates had ceased acting for him. We now therefore have a hearing date scheduled for Nien's application, but understand from his former lawyers that he will not now make an appearance.

Proposal for the Hearing

The Trustee is of the view that the uncertainty over how it is to administer the assets of the Trust (it has been unable to make distributions since first notified back in 2000 of the alleged proprietary claim to the assets) must be brought to an end.

The Trustee therefore proposes that the existing Court dates which were to be used for Nien's application should now be used to make an application along the following lines:

(1) That the Trustee be directed to deal with the assets of the Trust without having regard to any possible claims by or on behalf of the estate of the late Nai-Cheng Hsu.

(2) In view of the direction in (1) the Order of Justice, the purpose of which was to detail the basis of that claim, be struck out.

There may be other applications which the beneficiaries currently represented by Messrs. Appleby wish to make, but that is a matter for them. As regards costs, the Trustee has already obtained appropriate Orders at previous hearings.

As a beneficiary of the Trust should you want to take any part in the application you are free, as you have always been, to instruct local lawyers. Alternatively you may simply wish to write to the Trustee with your views. You may chose to take no part at all (you are not obliged to), but having been convened, you will nevertheless be bound by the decision of the Court."

- 25 The question we now have to address is whether this letter is sufficient for the purposes of the draft Orders which the Trustee has put before us. It is clear that Nien received this letter as the Court was shown a copy of a letter dated 23rd November, 2009, from a Mr John Anthony Taylor, US Counsel to Nien, which refers to the letter in question.

The Court is very unimpressed with Mr Taylor's letter, the main purpose of which appears to be to threaten the Trustee with criminal investigation of its activities by the US Internal Revenue Service. There is no evidence to suggest such an investigation would be warranted, but even if that were not so, a threat of this kind amounts to notification to a trustee that it should put its own interests ahead of the interests of the beneficiaries which

the trust charges it to put first. Rightly, the trustee has drawn the letter to the Court's attention, and no further reference to the tax threats it contains is necessary. We have paid no attention to them.

- 26 The Court has also noted Mr Taylor's assertion that Nien has not appeared at this hearing because he is now unrepresented in Jersey, English is not his native language and he is unfamiliar with Jersey law and procedure. In the Court's view that is insufficient excuse for not appearing to explain or argue a summons which he himself took out, especially so in the light of his failure to comply with the procedural directions made over the last 18 months. We think this is simply a question of seeking delay for delay's sake. The excuse has to be seen against the overall delay which has taken place since Nien's mother died in 2003, which delay is in no obvious way attributable to the Trustee or the other beneficiaries but is attributable to Nien.
- 27 It is entirely usual that in Article 51 proceedings, matters arise, sometimes late in the proceedings, which require the Court to consider making an Order which differs from the relief claimed at the time the summons was taken out. This follows from the nature of the jurisdiction which the Court is asked to exercise. Article 51 provides the statutory basis for the court's pre existing equitable jurisdiction to give declaratory relief and to direct a trustee as to the proper administration of a trust, in the interests of the beneficiaries. Those interests may sometimes require that orders are made in circumstances which have changed since the date upon which the application was first made for directions.
- 28 In this case, the question is whether it is fair to Nien to make orders within the Article 51 proceedings which he has started and which would not have been in his contemplation when he did so. In our view, it is entirely fair to him to make the first two orders sought by the Trustee, namely those set out at paragraph 22 (i) and (ii) above, but not the third one set out at paragraph 22 (iii). The reasons the first and second of these orders is fair are these:-
- (i) It is clear Nien was aware of the hearing date and of the proposal to seek this relief notwithstanding the absence of any formal summons by the Trustee;
 - (ii) Nien himself was seeking orders as to the disposition of the trust property. The order the Trustee now seeks, whilst different in detail, is of the same type in principle.
 - (iii) The orders which Nien was seeking would almost certainly not have been made, even if he had appeared, for the reasons given in paragraphs 17 to 20 above. The fall back position is therefore that the Tyzee Trust would fall to be administered accordingly to its terms and there is nothing surprising in the Trustee seeking directions substantially to that effect; and
 - (iv) the dispositive administration of this trust has been effectively frozen since the Trustee first gave its undertaking in May 2002 not to make distributions from it. That cannot be regarded as falling within the intentions of the settlor when the trust was made.

29 In the premises, the Court makes orders that:-

- (i) the Trustee is released from its undertaking recorded in the Act of the Court of 18th August, 2005, (and to the extent necessary, its assurances given through its lawyers Messers Ogier in February 2002) not to make distributions from the Trust; and
- (ii) the Trustee should henceforth administer the Trust without regard to any possible claims by or behalf of the estate of Nai-Cheng Hu Hsu or by any other person citing such claim(s) as the basis for their claim.

The OJ Proceedings

- 30 That leaves over the outstanding OJ Proceedings and the order which the Trustee sought concerning the Deed of Exclusion.
- 31 As set out in paragraph 13 above, the Order of Justice contains prayers for various relief, which fall into three categories – prayers relating to enforcing directly or indirectly the judgment of the Massachusetts Court in the divorce proceedings; a prayer relating to the validity of the Deed of Exclusion; and prayers for relief ancillary to the first two categories.
- 32 Clearly the orders which the Court is now making in the Trust Proceedings carry the inevitable consequence that the OJ Proceedings cannot survive inasmuch as they claim relief to enforce directly or indirectly the judgment of the Massachusetts Court. However the claim that the Deed of Exclusion was invalid has been stayed and that claim has not been the subject of any direct argument in the Trust Proceedings.
- 33 The Order of Justice issued by Nien is clearly capable of amendment so as to restrict its ambit to the validity of the Deed of Exclusion. The Order of Justice currently exists in the records of the Court although all parties seem to have regarded it as stayed. Although the Trustee contends that the Order of Justice should be struck out as an abuse of process, in accordance with Rule 6/13(d) of the Royal Court Rules 2004, the Court does not consider that is warranted at this stage. Nonetheless the Trustee needs to know whether the assault on the validity of the Deed of Exclusion is or is not to be maintained. In the circumstances the Court hereby makes the following Orders in relation to Nien's Order of Justice:-
- (i) Nien is directed to bring an application before the Master of the Royal Court before 28th February, 2010, to amend the Order of Justice so as to remove those parts of it which claim directly or indirectly the enforcement of the judgment of the Massachusetts Court of 10th August, 2000;
 - (ii) If no such application is brought before the Master by 28th February, 2010, then in pursuance of the Court's powers under Rule 6/13(d) of the Royal Court Rules, Nien's Order of Justice issued on 29th September, 2005, is to be struck out, without the need

for a further Court process.