A Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Tibbo, Liddiard
Judgment Date:	25 January 2010
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Text

[2010] JRC 13

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Tibbo **and** Liddiard.

In the Matter of the “A” Employee Shares Trust

And in the Matter of the HWT Sub-Trust

And in the Matter of the MM Sub-Trust

And in the Matter of the AD Sub-Trust

And in the Matter of the GS Sub-Trust

And in the Matter of the GT Sub-Trust

And in the Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

Between
Equity Trust (Jersey) Limited
Representor
and
GS, GT, KO, and AD, in their capacities as former employees of a former subsidiary of A appointed to represent the interests of the beneficiaries of the head trust, as a whole.
First Respondents

and

GTh, appointed to represent the interests of the HT sub-trust, CMM, appointed to represent the interests of the MM sub-trust, GT, appointed to represent the interests of the GT sub-trust, JES, appointed to represent the interests of the GS sub-trust, AD and KO, appointed to represent the interests of the AD sub-trust,
Second Respondents

and

HT
Third Respondent

and

MM
Fourth Respondent

and

Herald Trustees Limited
Fifth Respondent

Advocate J. Harvey-Hills **for the Representor.**

Advocate S. A. Franckel **for the Third Respondent.**

Advocate D. R. Wilson **for the Fifth Respondent.**

Advocate L. J. Buckley **for the other Convened Parties.**

Authorities

Trusts (Jersey) Law 1984.

Underhill and Hayton 17th Edition.

Re Internine Trust and Intertraders Trust [2005] JLR 236.

Galley & Ors v Gordon & Ors (2004) WTLR 199.

Thomas & Hudson, The Law of Trusts, Oxford 2004.

Re Wood (1949) 1 Ch 498.

THE COMMISSIONER:

1 On 20th May 2009 the Court declared that the "A" Employee Shares Trust ("the Trust") had failed for want of beneficiaries and that the five sub-trusts created within it were invalid. We now set out our reasons.

Background

2 The Trust is on the face of it an employee benefit trust created on 21st March, 2000, on the advice of English solicitors Baxendale Walker. It is governed by English law. The Representor ("Equity") and its predecessor as trustee are resident in Jersey from where the Trust has always been administered. The Court therefore had jurisdiction to entertain the application pursuant to Article 5 of the Trusts (Jersey) Law 1984.

3 The beneficial class of the Trust is defined as follows:-

> *"the present, past and future employees from time to time of the Founder and its subsidiaries and the wives husbands widows widowers children step-children and remoter issue of such employees and the spouses and former spouses (whether or not remarried) of such children and remoter issue and 'Beneficiary' has a corresponding meaning PROVIDED THAT no Excluded Person shall be a beneficiary."*

4 The founder of the Trust was A which did not itself trade or have any employees. However, it was the parent of a trading company, IL, which carried on business as an online dating agency and did have employees. A donated £1000 to the Trust and the two principals behind A namely, Mr MM and Mr HT, donated their shares in A to the Trust.

5 IL was successful and shortly after the creation of the Trust, namely in or around May 2000, became the subject of a reverse merger with an American company called AW. Both IL and AW changed their names to variations on the neologism UD.

6 Filings with the American Security Exchange Commission and IL's annual returns show that, following the reverse merger, IL ceased to be a subsidiary of A and thereafter formally became a subsidiary of AW, albeit that a majority of AW's shares were then owned by the Trust. Accordingly, in or around May 2000, A itself had no employees and it ceased to have

any subsidiary with employees, although the significance of this was not recognised at the time.

7 In 2003, the shares in AW were sold and substantial proceeds were received by the Trust. Subsequently, five discretionary sub-trusts were created for the benefit of the families of the two principals behind A and persons who were employees of IL.

8 In 2007, English divorce proceedings, which purported to freeze the assets of the Trust, caused Equity to seek English law advice and as a consequence of that exercise, there arose a concern as to whether from an early stage the Trust had no ascertainable beneficiaries. Advice was sought from Alan Boyle QC and Dakis Hagen of Serle Court, Lincoln's Inn, who in an opinion dated 14 th October 2008 concluded that it was likely that the Trust, although initially valid, failed for want of beneficiaries some time in or shortly after May 2000 and this because A itself had no employees and around that time it ceased to have any subsidiary with employees. There would have arisen at that time a resulting trust in favour of each of the donors to the Trust in shares referable to the sums provided. As a consequence, the purported declaration of the sub-trusts was invalid.

9 Counsel referred to the relevant principles as annunciated under Underhill and Hayton 17th Edition at 29.10:-

> ***"Even though it may appear, at the time of execution, that a settlement effectively disposes of the whole of the settlor's interest in the property comprised in it, later events may nonetheless give rise to a resulting trust.*** This may be so if the beneficial interest fail for want of beneficiaries."

10 Central to English counsels' opinion was the interpretation of the definition of beneficiaries within the Trust (as set out above), in particular the words *"the Founder and its subsidiaries"*. Having referred to the principles of construction as set out by Page, Commissioner in *Re Internine Trust and Intertraders Trust* [2005] JLR 236 at 255–6, counsel thought it unlikely that a court would interpret the words *"the Founder and its subsidiaries"* so as to permit the trustee in the exercise of its discretion to appoint trust monies to persons who are past, present and future employees of a company which was, but is no longer, a subsidiary of the founder. Their principal reasons were as follows:-

> ***"(1) It would be most surprising if the Founder had intended that (among other people) "future" employees of a company of which it had disposed and with which it no longer had any connection should be eligible objects for benefit by the trustee in the exercise of its discretionary powers.***
>
> ***(2) Although it is arguable that "subsidiaries" refers only to subsidiaries as at the date of settlement of the deed, it would be surprising if the Founder (in settling an EBT) did not also intend to benefit the employees of companies it subsequently acquired during the 80 year trust period, and had to settle new EBTs with all the attendant costs in respect of each new***

company obtained. This is likely to be so because the trust was clearly set up by A (controlled by Mr HT and Mr MM) so that its assets were protected from falling into Mr HT's and Mr MMs' estates for IHT purposes. In this regard, HMRC interprets the word “body” in IHTA 1984 section 86(1) to refer to a company group as a whole (see HMRC IHT Manual IHTM42929). For the trust assets to avoid IHT, all or most of the employees of the relevant group must be beneficiaries (see IHTA 1984 section 86(3)(a)). A, therefore, very probably intended, albeit objectively, that employees of future subsidiaries would be beneficiaries. Conversely, there would be no IHT purpose in the employees of its former subsidiaries being beneficiaries.

(3) As matters stood in March 2000, the settlement was prima facie valid. The steps subsequently taken by the trustee served to eliminate the beneficial class. It does not aid interpretation to contend that A would never have wished to settle an invalid trust.”

11 Their analysis was in their view supported by reference to a New Zealand case, *Galley & Ors v Gordon & Ors* (2004) WTLR 199, an authority which related specifically to whether former employees of an employee benefit trust continued to be its beneficiaries notwithstanding that they have been made redundant. The trust instrument in question (in contradistinction to the instant case) did not expressly include former employees. O'Reagan J found as follows at 211:-

“The question is whether there is anything in the definition of an employee which would suggest whether the definition encompasses former employees, despite the fact that it refers to the term ‘employee’ in a context which makes it clear that the person must be actually employed at the relevant time. Counsel suggested that many funds of this kind refer expressly to past, present and future employees. That may well be true, but this trust deed does not do so. In my view, the natural meaning of employee, in the context in which it appears in the definition of employee, is a person actually employed with the company, or a subsidiary company, not someone who used to be employed.”

12 Counsel accepted that in *Galley* there was a specific definition which referred to a person who “is” employed. However, in their view the case demonstrated a natural reluctance on the part of the court to import words into an employee benefit trust deed when defining the beneficial class. Once the employees in *Galley* ceased to be such they in turn ceased to be beneficiaries. So too, on the facts of the instant case, once an erstwhile subsidiary was no longer owned by A its past, present and future employees probably fell outside the definition of the beneficial class.

13 Although there are no employees at the present time of A, “future employees” of A and its subsidiaries are included in the beneficial class. However, counsel pointed out that ***“the beneficiary principle requires a beneficiary with locus standi to have the trust positively enforced”*** (Underhill & Hayton 17th Edition 8.152). Furthermore, there must be

such a beneficiary ***"at all times during the existence of a trust"*** (Thomas & Hudson, The Law of Trusts, Oxford 2004 paragraph 6.14). There is currently no, nor has there been for a while, any ascertainable beneficiary with *locus standi* to enforce the Trust. The fact that there might be such persons at some stage in the future (prior to the end of the perpetuity period) was not good enough (See Harman J in *Re Wood* (1949) 1 Ch 498 at 501).

14 Counsel referred to the legal principle that if a settlor has expressly or by necessary implication abandoned a beneficial interest in the trust property there is no resulting trust; the interest vesting in the Crown as *bona vacantia*. They referred to the following clause in the Trust deed:-

> *"4.2…..The Founder hereby undertakes that any part of the Trust Fund which may arise to the Founder or any other donor by way of resulting trust or otherwise (save under Clause 10 hereof) shall immediately be settled on like trusts to those established by the trusts elsewhere declared in this Deed, so far as such settlement shall be lawful at the time that it is sought to declare and effect it."*

15 Counsel thought it unlikely that this clause evinces a necessary intention either on the part of A or anyone else who gave assets to be held on the terms of the Trust that they had abandoned any beneficial interest in the Trust property even if the Trust failed. On the contrary the clause specifically contemplates that there may be resulting trusts (which necessarily means that the donors could receive back their beneficial interest in the assets however briefly); thereafter the Trust property must be re-settled on "like" trusts. This would be impossible if the property became *bona vacantia*.

16 Counsel also considered the rights of Equity such as they are under clause 4.2. To the extent that Equity held the rights for itself absolutely, there is no reason for it to seek to exercise them. If it held the rights on trust, it could only hold them for the benefit of the beneficiaries of the Trust. There are, however, no beneficiaries of the Trust at the present time and therefore at best Equity would hold those rights on resulting trust for the same donor to whom the assets have probably resulted. They concluded therefore that the existence of the contractual rights arising under clause 4.2 was unlikely to add anything to the situation whereby the assets of the Trust and sub-trusts were held on resulting trust for the donors.

17 On counsels' analysis the five sub-trusts were likely to have been purportedly settled at a time after the assets had probably become held on resulting trust for the donors. There would have been no power under the resulting trust to make any of the appointments on the sub-trusts unless they were made at the direction of the relevant beneficiary to whom the assets in question had resulted. There was a possibility therefore, which needed to be resolved on the facts that, to the extent that assets were held for him absolutely, the beneficiary of each resulting trust acted in such a way as to exhibit an objective intention that the assets thereunder be resettled on Equity on trusts in the nature of each sub-trust.

18 There was no evidence before us and it was not contended by any of the parties that either Mr HT or Mr MM had exhibited an intention to create such a trust. Mr HT had purported to exercise his power of Protector of one of the sub-trusts to change the trustee, but as counsel pointed out an instruction that a trustee transfer his trusteeship of an invalid trust to a successor trustee, in accordance with an (invalid) power to remove and appoint trustees is likely to fall short of the required test. Such an action does not show, objectively, a sufficient intention to create a trust; rather it effectively shows an intention to exercise a power which on their analysis is probably ineffective.

19 The Court had appointed and convened named beneficiaries to represent both themselves and the interests of the beneficiaries of the Trust and each of the sub-trusts together with Mr HT and Mr MM. All of the parties other than Herald Trustees Limited accepted the advice of English counsel and their conclusions. Herald Trustees Limited did not offer any contrary view.

20 The Trust and sub-trust are governed by English law and it was therefore English law that the Court was required to apply. We accepted the opinions expressed by counsel and therefore made the declarations sought, namely that the Trust had failed for want of beneficiaries in or around May 2000 and the sub-trusts had at all times been invalid. The assets of the Trust and sub-trusts were ordered to be held to the order of the Court pending determination of the division of those assets (other than the sum of £1000 which would result back to A) as between the donors of those assets namely Mr HT and Mr MM and certain claims other beneficiaries may have against those assets.