WTHK Ltd and Valentin NZ Ltd v UBS Trustees (Jersey) Ltd

Jurisdiction:	Jersey
Judge:	Sir Michael Birt
Judgment Date:	01 July 2016
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Text

[2016] JRC 113

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Commissioner, sitting alone.

In the Matter of the Felgan and Other Trusts

Between
WTHK Limited and Valentin NZ Limited
Representors
and
UBS Trustees (Jersey) Ltd
Respondent

Advocate J. P. Speck **for the Representors**.

Advocate D. M. Cadin **for the Respondent**.

A.J. Belhomme, **Esq., Crown Advocate for the Attorney General**.

Authorities

Rep of WTHK Ltd and Valentin NZ Ltd v UBS Trustees (Jersey) Ltd [2016] JRC 099 .

Trust — application for a declaration that the representors have been validly appointed as additional trustees to three trusts.

THE COMMISSIONER:

1 This is an application by the representors for a declaration that they have been validly appointed as additional trustees of three trusts and that, if so, the position since then has been that the trustees are permitted to act by majority decision, albeit that the implementation of any decision of the trustees (whether by all or a majority of them) is a matter subject to the terms of and law applicable to any relevant contract and any other applicable law.

2 The application follows on from a very similar application made in the matter of the Antares and other trusts. The Court's judgment in respect of that application is published at *Rep of WTHK Ltd and Valentin NZ Ltd v UBS Trustees (Jersey) Ltd* [2016] JRC 099 ("the Antares judgment") and should be referred to for the detailed factual background to the application. The key distinction between this application and the Antares application is that, whereas in the previous case the assets of the trusts were held in Switzerland, the assets of the three trusts in the present case are held in Jersey. Nevertheless, the issues raised are virtually identical and, in the interests of brevity, I shall where necessary simply refer the reader to the relevant passages from the Antares judgment or repeat almost verbatim what is said in that judgment.

3 Given the similarities between the two cases, I have, with the agreement of all the parties, considered this matter purely on the papers.

Factual Background

(i) The Trusts

4 The application concerns three trusts ("the Trusts") known as the Felgan, Lucam and Paella Trusts. They were all established on 22 nd July, 2002, by a declaration of trust made by

UBS Trustees (Jersey) Ltd ("UBS Trustees") as original trustee. All of them are conventional discretionary trusts governed by Jersey law. The settlor was Adriano Riva ("the settlor") and the beneficiaries comprise the settlor and various members of the Riva family (the class is not identical in respect of each Trust).

5 Under the trust deeds, the power of appointing new or additional trustees is vested in the protector, who is currently Edo Romano.

6 Clause 3.5 of Schedule 2 of each trust deed provides as follows:-

> *"The Trustees may act in accordance with the decision of the majority of the Trustees, notwithstanding any rule of law or anything contained or implied in [this] instrument to the contrary.* Any Trustee who shall dissent from any decision of the majority of the Trustees shall nevertheless, but without being liable for any loss, concur in executing or signing any deed or document and in doing any act necessary for giving effect to such decision."

7 The assets of each of the Trusts consist of a portfolio of investments and cash held in Jersey with UBS AG Jersey ("UBS Jersey"). The assets are however registered in the name of Carini S.p.A. ("Carini"), an Italian company. That is because, as described in paras 9 – 13 of the Antares judgment, the Trusts entered into a tax amnesty programme under the law of Italy known as Scudo Fiscale ("the Scudo"). This meant that the assets of the Trusts, although remaining abroad, were to be held in the name of an Italian bank or fiduciary company whose duty was to calculate, levy and pay to the Italian tax authorities any tax in respect of the assets without disclosing the name of the ultimate principal.

8 In accordance with the Scudo, it was agreed that the assets of the Trusts should be held in the name of Carini, as the authorised intermediary in Italy, whilst actually remaining abroad. To that end, UBS Trustees, as trustee of each Trust, entered into separate but substantially identical fiduciary agreements with Carini in respect of each Trust ("the Fiduciary Agreements"). Under the terms of the Fiduciary Agreements, UBS Trustees, as 'principal' instructed Carini as 'fiduciary agent' to enter into agreements with UBS Jersey to open investment accounts with UBS Jersey.

9 The position therefore is that, although the assets of the Trusts held with UBS Jersey belong to UBS Trustees as trustee of the Trusts, legal title to the assets rests with Carini pursuant to the Fiduciary Agreements.

(ii) Subsequent events in Italy

10 The Ilva steelworks is one of the largest steelworks in Europe, located in Taranto, southern Italy. It is owned and operated by Ilva S.p.A. ("Ilva"). Ilva was apparently a state-owned entity from its establishment in 1961 until 1995 when it was acquired by the Riva Group

during a government sponsored privatisation.

11 In 2012, charges were brought against senior executives of Ilva (including members of the beneficiaries' family) in connection with alleged environmental offences committed by Ilva. These proceedings are ongoing. The defendants dispute the allegations. In December 2012, Ilva was placed into special administration by decree of the Italian government and a special administrator was appointed.

12 Quite separately from the Taranto proceedings, an unrelated criminal investigation was commenced in Milan in 2013 against Emilio Riva (the settlor's late brother) and the settlor, together with two accountants. The allegation against the defendants in the Milan investigation is that the shares in Ilva and other companies were sold at below market value to companies under the control, *inter alia*, of the settlor with the proceeds of the re-sale of those shares being settled on the terms of the Trusts. These allegations are denied by the persons under investigation and no charges have as yet been laid.

13 On 22 nd May, 2013, the Milan State Attorney's office issued a request for judicial assistance to the Attorney General in Jersey for orders that the assets of the Trusts in the name of Carini at UBS Jersey ("the Accounts") be frozen pending the outcome of the Milan investigation and any subsequent criminal proceedings. This was pursuant to a preventative sequestration order which had been granted by the judge in charge of preliminary investigations at the ordinary court of Milan on 20 th May, 2013. Although no *saisie judiciaire* has been applied for or granted, the Accounts have since then been informally frozen in that the Joint Financial Crimes Unit in Jersey ("JFCU") has issued a *"no consent"* letter i.e. the JFCU has indicated to UBS Trustees that it does not consent to any movement of the assets of the Trusts out of the control of UBS Trustees.

14 On 3 rd August, 2013, the Italian government passed a Decree (amended on 10 th December, 2013,) which enabled the special administrator of Ilva to demand funds from the shareholders of Ilva to implement measures for environmental protection. The decree also provided that, in the event that the special administrator was not furnished with those funds, he would be able to request the transfer of any funds which were subject to a seizure order in unrelated criminal proceedings against the shareholders of Ilva.

15 On 28 th October, 2014, following an application by the special administrator of Ilva, the ordinary court in Milan issued a decree ordering the transfer of the assets in the Accounts to a newly opened account in Italy held on behalf of Fondo Unico di Giustizia ("the FUG"), to be used to subscribe for shares in Ilva. The settlor and others have filed an appeal against this order.

16 The FUG is a fund established under Italian law to receive, *inter alia*, monies seized or confiscated pursuant to criminal proceedings, the application of preventative measures or the imposition of administrative sanctions. It is managed by an Italian government entity

called Equitalia Guistizia S.p.A. (“Equitalia”).

17 On 5 th January, 2015, the Italian government amended the 3 rd August, 2013, Decree to provide that the sums seized in the Milan investigation would be used by the FUG for the subscription of bonds issued by Ilva rather than for shares to be issued pursuant to a capital increase.

18 On 28 th January, 2015, Ilva was declared bankrupt.

19 On 11 th May, 2015, following an amended application by the special administrator of Ilva, the investigatory judge of the ordinary court in Milan issued a further order. This maintained the order of 28 th October, 2014, that the monies in the Accounts should be repatriated to Italy and credited to an account in the name of the FUG but amended the previous order by saying that the seized assets should now be used for the subscription of bonds issued by Ilva rather than to increase Ilva's capital (“the Transfer Decree”). The monies derived from the issue of the bonds would be used to remedy the alleged environmental deficiencies of Ilva.

20 It appears that Equitalia then instructed Carini to give effect to the Transfer Decree by issuing instructions to UBS Jersey for the transfer of the assets in the Accounts to the FUG account in Italy. Carini complied with that instruction and issued instructions to UBS Jersey on 19 th November, 2015, to transfer the monies in the Accounts to the FUG account in Italy (“the Transfer Instruction”).

21 UBS Jersey responded to Carini on 30 th November, 2015, to the effect that it could not comply with the Transfer Instruction due to the *“no consent”* direction from the JFCU.

(iii) Events in relation to the Trusts

22 On 4 th January, 2016, the protector executed deeds appointing the representors as co-trustees of each of the Trusts. These were delivered to UBS Trustees on 8 th January, 2016.

23 As in the case of the Antares matter, UBS Trustees sought information as to the suitability of the representors to act as co-trustees of these substantial Trusts. Following the provision of the information contained in the affidavits in support of the representation in the Antares application, UBS Trustees is now satisfied that the representors are in principle suitable to act as trustees of the Trusts. Accordingly UBS Trustees now rests on the wisdom of the Court.

24 For the reasons given at para 53 of the Antares judgment, I am satisfied that each of the representors has appropriate experience and standing to act as trustee and that accordingly there is no ground for concluding that the decision of the protector to appoint the representors is irrational in relation to this aspect.

25 The evidence filed on behalf of the representors asserts that the appointment of the representors was made by the protector for the following three reasons:-

(i) The desire that the trustees take action, if necessary, to prevent a total loss of the assets of the Trusts as a result of the Transfer Instruction;

(ii) The desire to preserve the status quo, whereby the assets of the Trusts remain in the Accounts at UBS Jersey subject to an informal freezing as a result of the *'no consent'* letter of the JFCU; and

(iii) A desire that a wider pool of trustees, with different experiences and expertise, be involved in decision making in relation to the Trusts.

26 These were broadly similar reasons to those given for the appointment of the representors in the Antares matter. As in that case, I consider the appointment to be valid. I shall for simplicity draw on the reasoning given in the Antares judgment applied to the facts of this case.

27 The reasons given for the appointment of the representors have to be assessed against the very unusual facts of this case. In what follows, I am conscious that I have heard no evidence from the Italian authorities. The only evidence before me comes from the representors (and from UBS Trustees in the Antares case). However, I do have the advantage of having read the judgment of the Federal Penal Court in Belinzona in relation to the Antares matter, which goes into considerable detail about the position in Italy. Nothing in that judgment appears to be inconsistent with the information with which I have been provided.

28 Subject to that qualification, I would summarise the position as follows. There is a criminal investigation in Milan concerning the actions of the settlor, his deceased brother Emilio and two accountants whereby it is suggested that, as a result of criminal offences on their part in relation to the buying and selling of shares in various companies, the proceeds of those criminal offences have ended up in the Trusts.

29 In support of that investigation and at the request of the Milan prosecutor, the assets of the Trusts have been informally frozen in Jersey by means of the *'no consent'* letter from the JFCU. Presumably, if there is subsequently a prosecution and conviction in Milan, the assets of the Trusts may be confiscated in Jersey in aid of any order to that effect made by the Milan court following conviction. On the other hand, if there is no prosecution or if there is an acquittal, the *'no consent'* will presumably have to be lifted, so that the Trusts are thereafter free to deal with their assets in the normal way. As one would expect,

confiscation of the assets of the Trusts will be dependent upon a criminal conviction arising out of the Milan investigation leading to a confiscation order.

30 But the Transfer Instruction is not given in support of the Milan investigation. It arises out of events in Taranto. There, criminal proceedings have been instituted against the settlor and other executives of Ilva relating to environmental offences allegedly committed whilst they were in charge of Ilva. There is no suggestion of any connection between the Trusts and the alleged offences in Taranto. Despite this, and despite the fact that there has been no conviction, the Italian authorities have passed legislation which provides that the assets of the Trusts must be applied in the purchase of bonds in Ilva (which is now bankrupt) so as to be used to remedy alleged environmental deficiencies by Ilva. As the Federal Penal Court made clear, such bonds are likely to be worthless or worth very much less than the value of the assets of the Trusts.

31 The effect would seem therefore to be that, despite the absence of any criminal conviction, the assets of the Trusts are in effect to be confiscated and converted into Ilva bonds which are likely to be worthless. As the Federal Penal Court indicated, this would seem on the face of it to be a breach of the European Convention on Human Rights – no Article of the ECHR is specified in the judgment but I assume that the Federal Penal Court had in mind Article 1 of Protocol 1 — and amount to a confiscation of assets without cause and without compensation.

32 In those circumstances, it is hardly surprising that the beneficiaries and the protector of the Trusts wish to ensure that the assets in the Accounts are not remitted to Italy and in effect confiscated in this way, but are kept in Jersey subject to the *'no consent'* letter. It is asserted on their behalf that they accept that the assets should remain effectively frozen in Jersey until the outcome of any proceedings in Milan. They believe that the appointment of the representors as co-trustees would assist in achieving this objective.

33 Against this background, in my judgment, on the unusual facts of this case, reasons (i) and (ii) of paragraph 25 above for appointing the representors cannot possibly be categorised as irrational or not taken in good faith in the interests of the beneficiaries as a whole.

34 I am not impressed with reason (iii) and suspect it is something of a makeweight. The fact is the protector and beneficiaries have been entirely happy to have only one trustee throughout the existence of these Trusts and it hardly seems likely that they suddenly see the need for a wider pool of trustees with different experiences and expertise.

35 Nevertheless, the decision to appoint the representors has to be considered in the round. On the facts of this case, I cannot possibly categorise the decision of the protector as being irrational or otherwise in breach of duty. In my judgment it is reasonable for the protector to wish to try and preserve the assets of the Trusts in Jersey subject to the informal freezing as a result of the *'no consent'* letter. It is reasonable for the protector to conclude that the

appointment of two trustees outside Jersey may assist in this process. I conclude therefore that the decision of the protector was taken in good faith and in the interests of the beneficiaries as a whole, it was not an irrational decision, it took into account relevant matters and only those matters and it was not taken for an ulterior purpose.

36 I therefore conclude that the appointment of the representors was valid and accordingly they have been co-trustees of the Trusts since 4 th January, 2016.

37 In the Antares matter, the representors sought further declarations that they were *'validly empowered'* to give instructions in relation to the Fiduciary Agreements and indeed to terminate those agreements. For the reasons set out at paragraphs 66 – 82 of the Antares judgment, the Court did not feel able to make such a wide-ranging declaration because of the implication that it would be lawful for the representors to give instructions in relation to the Fiduciary Agreements or to terminate them. The Court concluded that it should not make a declaration as to the criminality or otherwise of future conduct. It therefore made a more limited declaration.

38 The representation in this case builds upon the Court's decision in the Antares judgment and accordingly only asks for declarations which are consistent with the declarations made in that judgment. It is clear from clause 3.5 of Schedule 2 of the trust deeds quoted earlier that the trustees may act by a majority. Accordingly I am content to grant declarations to the following effect:-

> (i) The appointments of the representors as trustees of the Trusts on 4 th January, 2016, were valid and effective from that date.
>
> (ii) Under Jersey law and under the terms of the Trusts, the trustees from time to time of the Trusts are permitted to act by majority decision, including in relation to nominees and/or agents and such has accordingly been the position in relation to the Trusts since 4 th January, 2016.
>
> (iii) The implementation of any decision of the trustees (whether by all or a majority of them) is a matter subject to the terms of and law applicable to any relevant contract and any other applicable law.

39 I further ordered that UBS Trustees should transfer relevant trust documentation to the representors within a reasonable time, that there should be leave to disclose the Act of the Court and this judgment (redacted if necessary) (but no other documents filed in these proceedings) to the JFCU, the Jersey Financial Services Commission, UBS Jersey, Carini, the Attorney General, the relevant Italian courts and such other parties as may be agreed by all the trustees in writing.

40 I further ordered that the representors and UBS Trustees should have their costs of and incidental to the representation out of the trust funds on the usual trustee basis.