BERMUDA

COURT OF APPEAL

In the Matter of an Application for Information about a Trust [2013] CA (Bda) 8 Civ

TRUSTS - APPLICATION FOR DOCUMENTS - CONFIDENTIALITY - INFORMATION CONTROL CLAUSE - DUTIES OF TRUSTEES - ROLE OF PROTECTOR

Reasons for Decision

This Appeal arises from a judgment of the Chief Justice on the Application of a beneficiary under a Bermuda Trust. The Order of the Chief Justice required the Trustee to produce Trust Accounts and related documents to the Applicant, with safeguards intended to maintain their confidentiality and restricting the use that he may make of them. The Protector, who is also the principal beneficiary of the Trust, brought the appeal, naming the Applicant as First Respondent and the Trustee as Second Respondent.

The Applicant was a beneficiary of an absolute interest in 35% of the Trust, the assets of which are believed to be worth in the region of US$1 billion. The Appellant was the Principal Beneficiary of the majority (65%) of the Trust assets. The originating application raised the novel question of the impact of an information control clause or mechanism on this Court's supervisory jurisdiction over a Bermudian trust. However, the Appeal was dismissed, for reasons which echoed those of the Chief Justice.

It was noted to be common ground that the Court exercises a supervisory jurisdiction in order to ensure that the affairs of a private trust are conducted lawfully and in accordance with the wishes of the settlor. This enables the Court to require the production of trust documents and information to a beneficiary of the trust.

The Appellant's submitted that the Trust Deed contains express terms (Clause 9.2) which, they say, have the effect of extinguishing the right, or which at least prevent the Applicant from exercising it in the present case. In view of this, it was submitted that Clause 9.2 should be applied in accordance with its terms because the Court's fundamental duty in supervising the Trust is, so far as possible, to ensure that the settlor's wishes as expressed are both respected and given effect to. The Applicant's response was that the express terms do not preclude the Court from exercising its supervisory jurisdiction, and that it should do so in the present situation of the Trust.

The Court of Appeal held that Clause 9.2 does not go so far as to release the Trustees from their duty to make their own decision, nor does it entitle them simply to pass on the request so that the Protector can decide. With that being correct, it was further held that the Trustees are required to make their own decision, in the interests of the Trust and in accordance with the intentions of the Settlor as set out in the Trust Deed. If they are minded to release the information, they must seek the consent of the Protector before doing so. The question then arose as to what grounds the Protector's consent can properly be withheld.

In the judgment of the Court of Appeal, the Protector was bound by the same constraints as the Trustees and it was noted that Clause 9.2 encompassed the release of information to beneficiaries as well as to strangers to the Trust. It was held that there was no indication that the Settlor intended that they should be deprived of information to which they are entitled as of right under the general law. Just as the Trustees were expected to exercise their discretion accordingly, so is the Protector in deciding whether to refuse consent to a proposed release. The Protector cannot lawfully refuse consent in a case where the Settlor is taken to have approved the release, any more than the Protector can vary the terms of the Trust.

This decision is currently being appealed to the Privy Council.