

BERMUDA SUPREME COURT

***Stiftung Salle Modulable et al -v- Butterfield Trust* [2014] SC (Bda) 13 Com (21 February 2014)**

TRUSTS - WISHES OF SETTLOR - JURISDICTION AND APPLICABLE LAW - CHOICE OF LAW - LITIGATION FUNDING AGREEMENTS

The decision of the Chief Justice resulted from a six-week trial which focused on whether the Defendant Trustee had a contractual obligation to provide funding of 120 million Swiss Francs for the construction of an Opera House in Switzerland. The Trustee had withdrawn funding from the project in 2010 following the death of the settlor. The Plaintiffs were a Swiss charitable foundation which had been established for the express purpose of planning and constructing the Opera House (the "Foundation").

A key consideration in the decision was the question of whether the Trustee's contractual obligations (if any were in fact owed) were governed by Swiss or Bermuda law. In this respect, the Chief Justice held that in the absence of an express choice of law by the parties, the Court would look to either: (1) an implied or inferred choice based on the facts of the particular case or (2) the system of law with which the alleged contract has closest connection. On the facts, the Chief Justice held that Swiss law was the applicable law.

As a result of the above determination, the Chief Justice heard detailed evidence on relevant provisions of Swiss law. The Chief Justice held that the parties had entered into a "donation contract" by which the Trustee agreed to fund the costs of construction of the Opera House subject to a condition that if the project was not feasible, the contract would be dissolved. Such a concept is unknown to Bermuda law where, unless a contract is executed by deed, consideration is required to form a binding contract. The Chief Justice ordered that the Foundation was to be given a reasonable time to demonstrate that the costs of constructing/operating the Opera House were feasible. The Chief Justice also held that there would have been an implied term that if the Trustee decided that it was not willing to proceed with the

funding of the construction of the Opera House (for any, *bona fide*, reason), it would be entitled to terminate the contract upon giving reasonable notice and funding all reasonable outstanding costs. In such circumstances, the contract would be dissolved.

Of particular note, the Chief Justice highlighted that while the Settlor remained in favour of the Opera House project prior to his death, the Trustee had no legal obligation to have regard to the Settlor's wishes.

An additional point that was considered in this litigation was that of litigation funding arrangements whereby in this case the Swiss Foundations had entered into such an agreement. In this respect, the Chief Justice provided a useful indicator of the Court's approach to such agreements stating that in light of principles promoting access to the courts, such agreements should be encouraged rather than condemned. However, the argument of the Foundation, that litigation funding costs should be recovered under Bermudian law as contractual damages, was rejected.

This matter is subject to a possible appeal on the grounds that: (1) the Court did not have the power to give the Plaintiffs any further time for the production of a new feasibility study and (2) the Court should not have applied Swiss law.

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