

## BERMUDA

### SUPREME COURT

***Appleby Services (Bermuda) Ltd. (As Trustee Of The Bermuda Longtail Trust) - V- (1) Edward Karl Furtak (2) Jennie Louise Furtak (3) Colleen Nicole Furtak (4) Samantha Lauren Furtak (A Minor) (11 October 2014)***

TRUSTS - SPECIFIC PERFORMANCE - LIEN OVER TRUST ASSETS - STATUS QUO - CONTROL OF BOOKS AND RECORDS - INDEMNITY

This matter has a long procedural history, however, this summons, issued by the Plaintiff Trustee sought specific performance of the first Defendant by way of an instruction to a Costa Rican law firm to release and deliver the legal books of Fairway Hasting (a Costa Rican corporation and asset of the Bermuda LongTail Trust) to the Plaintiff's Costa Rican attorneys. At this juncture, all the Trustee was seeking to do was gain control of the books and records of the Costa Rican company for conservatory purposes.

It was uncontroversial that the Plaintiff Trustee was entitled to exercise a lien over Trust assets in respect of future liabilities. However, the first Defendant relied on various *dicta* to support its position that the lien attached only to assets in the Trustee's control. The clearest authority cited was *Wester -v- Borland* [2007] EWHC 2484 (Ch), where Norris J stated at paragraph 10: "*Nor is it controversial that the trustee has a right of lien over trust funds in his hands in support of that indemnity*". However, the Judge held, this argument unsustainable because, read in the light of other authorities, all that Norris J appears to have meant was the lien attaches to trust funds under the trustee's control prior to a transfer.

It was further argued by the first Defendant that there was a difference between the existence of the lien and a trustee being able to transfer trust assets into its name. The Judge held, this argument also lacked substance on the facts of this case where (a) it seemed clear the Trust (as opposed to the Trustee) was

listed as the Company's shareholder in the Company's books and (b) the conflict between the Trustee and first Defendant made it obvious that preventing the Trustee from gaining effective control over the assets would amount to refusing to recognise altogether the existence of the lien in relation to those assets.

In addition, the Judge gave consideration to a decision arising from an *ex parte* Order sought by the Plaintiff in the Isle of Man High Court (seeking to restrain the contending new Trustee from dealing with the trust assets). First Deemster and Clerk of the Rolls, David Doyle, granted this relief and held: "*30 I am persuaded that this Court should assist the Claimant and the Court in Bermuda and should grant the interlocutory interim relief requested. Any issue as to whether the Claimant has been validly removed as a trustee of the trust which is governed by the law of Bermuda should be dealt with in Bermuda by the courts there. It is appropriate for the status quo in respect of the assets of the trust to be preserved pending the determination of the disputed issues in the proceedings in Bermuda*".

The Judge held, the status quo was both as a matter of Bermudian law as determined by the Bermuda Court (which law governs the Trust) and Manx law (which governs the contending new Trustee) the Plaintiff had sole claim to the books and records of Fairway Hasting. The Judge granted the Order sought by the Plaintiff Trustee and ordered the Plaintiff's costs of the application to be taxed, if not agreed, on the indemnity basis.

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