IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 175 OF 2019 (IJK)

IN THE MATTER OF a Deed Constituting The Tan Kim Choo Family Scholarship Trust dated 21 October 2002 made between Tan Kim Choo as Settlor and HSBC International Trustee Limited as Trustee establishing a trust known as The Tan Kim Choo Family Scholarship Trust, as amended by a Deed of Appointment of Beneficiary dated 21 August 2009 (the "**Trust**")

AND IN THE MATTER of the Trusts Law (2018 Revision, as amended) and GCR Order 85

BETWEEN

HSBC INTERNATIONAL TRUSTEE LIMITED

Plaintiff

AND

(1) TAN POH LEE
(2) TAN POH HUI
(3) TAN BOON THIEN
(4) TAN POH YEE
(5) JCTW
(6) JCZM
(7) TJ K
(8) TJR
(9) TYT
(10) TZH

Defendants

IN CHAMBERS

Appearances: Ms Rachael Reynolds and Mr William Jones, Ogier, on behalf of the Trustee

Mr Sebastian Said and Ms Anya Martin, Appleby, on behalf of the 6th Defendant (a minor) and the Unborn

Before: **The Hon. Justice Kawaley**

Heard: **16 October 2019**

Date of Judgment: **16 October 2019**

Released for publication: **7 November 2019**

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HEADNOTE

Application by Trustee for Beddoe relief in relation to defence of Singapore proceedings seeking to terminate Cayman Islands trust-Cayman Islands governing law and trust administration clauses-grant of declarations as to effect of clauses under Cayman Islands law

EX TEMPORE RULING

Key provisions of Trust Deed

1. The Plaintiff in this matter is the Trustee of a trust known as the Tan Kim Choo Family Scholarship Trust, which was settled on 21 October 2002 (the "Trust") and for present purposes the Trust Instrument contains two clauses.

2. Firstly, clause 26 ("*PROPER LAW OF THE TRUST*"):

> "*The Trust is established under the laws of the Cayman Islands and the initial proper law of the trust shall be the law of the Cayman Islands.*"

3. Secondly, 27 ("*FORUM FOR ADMINISTRATION OF THE TRUST*") records that:

> "*The Cayman Islands shall be the initial forum for the administration of the trust. The Trustee shall have power, subject to a perpetuity, not thereby being created to carry on the general administration of the Trust, from any country, province, state or territory, whether or not the law of such country, province, state or territory is for the time being the proper law of the Trust or its court are for the time being the forum for the administration of the Trust, and whether or not the Trustee is for the time being resident or domiciled in or otherwise connected with such country, province, state or territory. The Trustee may at any time declare by deed that from the date of such declaration, the forum for the administration of the Trust shall be the courts of any specified country, state or territory provided that no such declaration shall be made, which is in perpetuity.*"

4. I should add that of peripheral relevance is clause 28, which further provides that the proper law may be changed by deed.

The Trustee's present application

5. The Trustee has applied by Originating Summons filed on 30 September 2019 for various directions, and the Court has already made certain Confidentiality Orders to anonymise the Originating Summons so that the identities of minor Defendants (and I believe also the young adult Defendants) are not revealed. The Defendants are all beneficiaries of the Trust.

6. The application arises because on 10 May 2019, the 3rd Defendant in these proceedings issued proceedings against the Trustee in the Singapore High Court in proceedings HC/S471/2019 ("Singapore Proceedings"). The primary relief that is sought in those proceedings is as follows:

"*(1) a declaration that the Trust in respect of the Settlement Fund is terminated.*"

7. The Trustee, in short, is concerned to enforce and give effect to the exclusive forum for administration clause in a clause, namely clause 27, of the Trust Deed. Initially it has applied for a stay of the Singapore Proceedings but that application, which sought time to seek *Beddoe* relief from this Court, was refused and the position appears to be that the following critical timetable exists in the Singapore proceedings. The timetable relates at this point not to the substantive proceedings but an interlocutory mandatory injunction application that the plaintiff in those proceedings has filed, seeking payment out of all of the Trust assets:

(a) the Trustee is to file its reply Affidavit by 4.00 pm on 18 October, in two days' time. Having regard to time differences, it is less than two days from the present hearing;

(b) secondly, Tan Boon Thien, the plaintiff, is to file his final response Affidavit, if any, by 4.00 pm on 31 October 2019;

(c) thirdly, the parties are to file written submissions by 4.00 pm on 5 November 2019, and

(d) an oral hearing is to take place before Justice Aedit Abdullah on 8 November 2019 at 2.30pm.

8. The present proceedings were served on all adult Defendants and I am satisfied that all significant parties have had notice of these proceedings and have chosen not to participate. The 3rd Defendant, the Singapore plaintiff, by correspondence with the Court, sought an adjournment of the proceedings on the grounds initially that he was having difficulties obtaining legal representation and secondly, on the grounds that

he was applying for Legal Aid. At the beginning of today's hearing I indicated that I would not entertain the application because it was not properly before the Court. And on the face of the record, it appeared to be an unmeritorious application in any event. Ms Reynolds for the Plaintiff herein referred to an Affidavit, sworn by the 3rd Defendant as plaintiff in the Singapore Proceedings, which set out his financial position and clearly contradicts the notion that he is impecunious and is unable to obtain legal advice.

9. An application was also made at the beginning of today's hearing to appoint Mr Sebastian Said of Appleby Cayman Limited, as Guardian ad Litem to represent the interests of the 6th Defendant, one of the two minor Defendants, and also to appoint him to represent all persons who may become beneficially interested with special regard to the position of the unborn. That application I granted, as it seemed obvious that it was beneficial and expedient to have some presentation for those interests to avoid the need to incur costs and pursue possibly hopeless attempts to get legal representation for the minors and unborn in circumstances where no other Defendant was willing to come forward and either nominate a Guardian ad Litem or, indeed, stand as representative for those interests[1].

10. The 3rd Defendant explicitly purported to represent his own son, the 7th Defendant, and in those circumstances, it was decided that it was inappropriate to appoint Mr Said to represent the 7th Defendant.

The directions sought by the Trustee

11. The various heads of relief that were sought fell into two broad categories: firstly, there was declaratory relief and, secondly, there was *Beddoe* relief. The *Beddoe* relief which was sought was limited to seeking the following broad relief.

(a) firstly, authorising the plaintiff to challenge the Singapore proceedings on the grounds of *forum non conveniens* as a preliminary issue, and

(b) in the alternative, inviting the Court in Singapore to direct that the Courts of the Cayman Islands shall act as an auxiliary Court for the purpose of determining any of the questions which were defined as follows:

(1) all questions concerning the settlor's capacity,

(2) the identity of the Trustee,

(3) the administration of the Trust,

(4) any past or future distributions from the Trust,

(5) any decision to decline a distribution, and

[1] In the event, Mr Said supported the Trustee's application.

(6) a determination of the Trust, or part thereof,

being questions which the Trustee submitted must be determined in accordance with Cayman Islands law without reference to any other law.

Legal Findings

12. I have little difficulty in approving those directions, which contemplate that, depending on the outcome of that application to the Singapore Court, the Trustee would return to this Court for further, more substantive directions if the need arose, and that eventuality would only arise if the forum challenge and alternatively the proposed auxiliary Court role for this Court were both rejected.

13. The primary legal basis for the Trustee seeking that *Beddoe* relief is statutory in nature and it arises under the trust's Trust Law (2018 Revision) and, in particular, section 90. Section 90, so far as is relevant for present purposes, provides as follows:

"*90. All questions arising in regard to a trust which appears for the time being governed by the laws of the Islands or in regard to any disposition of property upon trust thereof, including questions as to-*

(a) the capacity of any settlor;

(b) any aspect of the validity of the trust or disposition or the interpretation or effect thereof;

(c) the administration of the trust, whether the administration be conducted in the Islands or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal; or

(d) the existence and extent of powers conferred or retained including powers of variation or revocation of the trust and powers of the appointment and the validity of any exercise thereof,

are to be determined according to the laws of the Islands without reference to the laws of any other jurisdiction with which the trust or disposition may be connected."

14. Reliance was also placed on two local authorities each of which considered section 90. The first authority was a decision of Henderson J in *In the Matter of the B Trust* [2010] 2 CILR 348. In that case (at paragraph 23) he said this:

"*An order of the Hong Kong court purporting to effect a variation of the trust, whether in a matrimonial proceeding or otherwise, cannot be recognised by the trustee. That is so even if the trustees were to return to the jurisdiction of the Hong Kong court. A trust in the Cayman Islands can only be varied in accordance with the law of the Cayman Islands and only by a court of the Cayman Islands. These overarching rules provided for expressly in the Trust Law of 2009 revision in sections 90, 91 and 93.*"

15. These observations were approved by Mangatal J in *In the Matter of the A Trust* [2016] 2 CILR 416 where she said in summary this, at paragraph 33:

"*From In Re B Trust a number of principles may be seen. First, an order of the English High Court is unenforceable in the Cayman Islands whether or not the trustee submits to the jurisdiction because of the terms of the firewall legislation*[2]*. Were the trustee to submit to the jurisdiction of the High Court this could potentially create a situation where there is a conflict between its duty to observe the terms of the trust and its obligation to comply with the terms of the order of the High Court.*"

16. And her Ladyship then proceeded to quote the passage that I have just read from Henderson J's judgment in *Re B Trust*. Those cases both suggest that there is not only a statutory requirement that Cayman Islands law should be applied to the Trust where Cayman law is its governing law, but also that those issues can only be determined by the Cayman Court.

17. At this juncture, I am not in a position to decide whether the second strand of that reasoning is applicable to the present case. What is important, though, is that those decisions emphasise how important the statutory framework of the Trust Law is to Cayman Islands public policy relating to Cayman Islands trusts. That is entirely justified because the Cayman Islands is a jurisdiction which has a substantial number of highly valuable trusts, and it is not surprising that Parliament has sought to fortify that important industry by making it clear in the governing legislation that the fact that a settlor has chosen to apply Cayman Islands law to govern a trust is something that should be upheld by the Cayman Islands courts.

18. There is, I have reminded myself over the luncheon adjournment, another important general common law principle which relates to the question of the enforcement of foreign judgments. And that is the rule that enforcement of foreign judgments may be refused on public policy grounds. There are a number of cases which illustrate this

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[2] Section 93 of the Trusts Law provides that: "*A foreign judgment shall not be recognized, enforced or give rise to any estoppel insofar as it is inconsistent with section 91 or 92.*" Section 91 of the Trust Law provides, *inter alia*, that neither should a trust be set aside nor the capacity of a settlor questioned on the grounds that:

"*(b) the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship with the settlor or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests.*"

principle. In *Lakatamia Shipping Co Ltd v Su* [2017] 1 CILR, at page 416, Mangatal J considered the question of an objection being made to enforcement of an English judgment and (at paragraph 49) she referred to Dicey rule 51, which says this:

"*A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition would be contrary to public policy*."

19. So putting aside the very difficult question as to whether or not there may be statutory grounds for refusing to enforce a foreign judgment, which conflicts with the public policy expressed in sections 90 to 95 of the Trusts Law, I find that there is a freestanding common law principle that enforcement of foreign judgments may be refused on public policy grounds. And that principle has been touched upon in a variety of English cases and, just to mention, without quoting from them, two examples. One is the case of *Soleimany v Soleimany* [1998] EWCA Civ 285, and another is the judgment of McGowan J, in *Superior Composite Structures LLC-v-Malcolm Parrish* [2015] EWHC, 3688.

Directions granted

20. So having regard to the legal submissions, and I was also taken to authorities relating to the auxiliary court function as well, which were set out in the Plaintiff's Skeleton argument, I have reached the following conclusions as to the declaratory relief to grant at this stage.

21. The draft Order firstly sought at paragraph 4 "*a declaration that the trust is governed by the laws of the Cayman Islands*". That declaration should clearly be granted as there can be little doubt about that.

22. Paragraph 5 sought a declaration as follows:

"*All questions concerning the settlor's capacity, the identity of the Trustee, the administration of the Trust, any cost or future distribution from the Trust, any decision to decline a distribution and the termination of the trust or part of thereof must be determined in accordance with the law of the Cayman Islands without reference to any other law.*"

23. The legal position, as Ms Reynolds submitted with reference to section 90 of the Trusts Law, makes that declaration a very straightforward one indeed.

24. Next, paragraph 6 sought the following declaration:

"*The courts of the Cayman Islands have exclusive jurisdiction in connection with all such questions both under the Trust Instrument and as a matter of Cayman Islands law.*"

25. That question is somewhat more nuanced, but in my judgment, ultimately straightforward. In my view it is ultimately clear that the effect of section 90 combined with clause 27 of the Trust Deed means that this Court has been given exclusive jurisdiction in respect to all significant trust administration questions. That finding arises not because the Trust Deed explicitly says that the courts of the Cayman Islands shall be the exclusive jurisdiction for the administration of the Trust, but because, again, for the reasons that Ms Reynolds submitted, when one construes the words in their context it is quite clear that that is the intent of the clause.

26. The clause provides that the courts of the Cayman Islands shall be the initial forum for the administration of the trust, and that is clearly saying that this Court shall, at the outset, be the court to which administration questions should be brought, and it then provides that a deed is required to change the forum for administration. Not only that, the clause also explicitly distinguishes general administration of the Trust taking place in another country, such as Singapore, from the forum for administration. An interesting analogy is that clause 26 provides that Cayman Islands law is the initial proper law of the Trust and clause 28 permits a change of the proper law by deed.

27. It seems to me that just as it is difficult to construe the Deed as providing that Cayman Islands law is <u>not</u> the exclusive governing law of the instrument, so equally it is difficult to construe the Deed as intending to be non-exclusive in nominating the courts of the Cayman Islands as the initial forum for the administration of the Trust.

28. The next declaration that I am minded to make I take from paragraph 59(d)(i) of the Plaintiff's Skeleton Argument, and that seeks a declaration:

"*That an order of the foreign court (including a court in Singapore) directing a distribution from the Trust, ordering the termination of the Trust or changing the trustee of the Trust, where such order does not result from the application of Cayman Islands law, will not be enforced, recognised or give rise to any estoppel in the Cayman Islands.*"

29. That declaration is, in my judgment, justified because it is manifestly contrary to the public policy of this jurisdiction to recognise or give effect to an attempt by a foreign court to effectively administer a Cayman Islands trust without applying Cayman Islands law.

30. The next declaration which was sought was set out in paragraph 7 of the draft Order and this reads as follows:

"An order of the foreign court, including a court in Singapore, directing a distribution from the Trust, ordering the termination of the trust or changing the trustee of the Trust will not be enforced, recognised or give rise to any estoppel in the Cayman Islands."

31. That declaration is, in my judgment, difficult to justify making at this stage. In my judgment, it is not clear that the legal position is that a foreign court cannot under any circumstances, even applying Cayman Islands law, deal with the issues that appear to arise for determination in the present case, and in those circumstances, I would instead grant a declaration substituting the word "may" for "will" because it seems to me that the position is certainly arguable. Although the decisions of Justice Henderson in *Re B Trust* and Mangatal J in *Re A Trust* did not fully consider the question of the mandatory need for the Cayman Islands court to deal with such matters, I accept entirely that it is arguable that those decisions[3] should be followed, but I propose to adjourn these proceedings, await further argument before deciding that issue.

32. Finally, a declaration was sought that the courts of the Cayman Islands are willing to act as a court auxiliary to the court in Singapore in the proceedings for the purposes of determining any questions falling within paragraph 5 above, so as to ensure those questions are determined by the courts of the Cayman Islands and that is a declaration I have no difficulty in approving. The only *caveat* of course is that those directions contemplate that option would only be pursued as a fall-back position in the event that the *forum non conveniens* challenge fails.

Conclusion

33. So for those reasons I grant the order substantially in the terms indicated at the end of the Plaintiff's counsel's submissions.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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[3] And the common law cases on refusal of recognition and enforcement on public policy ground referred to in paragraph 19 above.