Re Beatty's WT (No 2)

Brooke and others v Thompson and others

Judgment

Christopher McCall QC and Robert Ham (instructed by *Theodore Goddard)* appeared on behalf of the plaintiffs.

Roger Horne (instructed by *Theodore Goddard)* appeared on behalf of the first to fourth defendants.

Jonathan Parker QC and *Malcolm Waters* (instructed by *Birkbeck Montagu's*) appeared on behalf of the fifth to seventh defendants.

VINELOTT J: In this application the plaintiffs seek a direction that the fifth, sixth and seventh defendants, who are the executors and trustees appointed by the will of the late Helen Gertrude Beatty, may be at liberty, if they in the exercise of their discretion think fit, to exercise the statutory power of appointment of new trustees, by appointing Hambros Channel Islands Trust Corporation Limited and two named individuals resident in Jersey as trustees of the testatrix's will, and to transfer all property in

respect of which they have made an assent, or which represents property in respect they have made an assent, in their own favour as trustees to the new trustees and an order that, upon such appointment and transfer, they will be discharged from the trusts of the will.

The circumstances in which this application is made are shortly as follows. The testatrix died on 4 January 1986. Her will dated 1 December 1983 was proved by the fifth, sixth and seventh defendants on 20 June 1986. The testatrix left a very large estate which included a valuable collection of pictures. One, Van Gogh's Sunflowers, has been sold. It was sold for 22.5 million, the world record price for a picture sold at auction. There are currently negotiations for the transfer of another picture, a painting by Cezanne, in part satisfaction of duty on the testatrix's death. The remaining pictures are also very valuable. Though not as valuable as the Van Gogh, they represent a considerable proportion of the testatrix's residuary estate.

The testatrix was the widow of Alfred Charles Beatty. There were no children of that marriage, but Alfred Charles Beatty had one child, the first defendant, Sarah Ann Thompson Jones, by a previous marriage. Mrs Thompson-Jones, who is now 54, has also been married twice. Her first husband was the Earl of Warwick. She had two children both by her first husband, the plaintiff, Guy David Greville Brooke (commonly known as Lord Brooke) and the second plaintiff, Lady Charlotte Fraser. They are 33 and 32 years old respectively. Both have infant children. Lord Brooke

married an Australian wife and has settled there with her. His only child was born in Australia. Lady Charlotte presently lives in England, but she plans to move shortly to Spain. Her health is such that she must reside in a warmer climate.

The testatrix directed that her residuary estate should be divided into three equal shares and directed that one share should be held on trust for Mrs Thompson-Jones absolutely; one in trust for Lord Brooke on attaining 35, with a substitutionary gift in favour of his children if he dies under 35 leaving children who attain 21; and the remaining share on precisely similar trusts for Lady Charlotte, with a substitutionary gift to her children. There are cross-accruers between the shares, so there is thus no possibility of an intestacy.

The will was later varied by a deed of variation made between Lord Brooke, Lady Charlotte, Mrs Thompson-Jones and the third, fourth and fifth plaintiffs, Anthony John Tenant, Hamish Wallace and Harrington Limited ('the family trustees'). The last is a trustee company incorporated and resident in Bermuda.

The deed of variation is a very elaborate document. It is sufficient to say that, under the deed of variation, a one-third share is to be held on trust to transfer it to the family trustees, to be held in trust for Mrs Thompson-Jones for life, with power to advance capital to her, with the remainder to a class of discretionary beneficiaries as she may by deed or will appoint, with remainder to her children

and remoter issue living at her death equally, and with an ultimate remainder to Lord Brooke and Lady Charlotte.

Another one-third share is to be transferred to the family trustees on Lord Brooke attaining 35, and held as to 90 per cent on trusts similar to those declared concerning Lord Brooke's one-third per cent share. The remaining 10 per cent is to be held on immediate trust for her children born before a defined closing date who attain 25 or die under 25 leaving children. The income of this 10 per cent is to be held on the same trusts pending the vesting of Lady Charlotte's share or until her earlier death.

The deed of variation contains wide powers of administration, including an unrestricted power of investment. It also includes power to appoint a person resident in any part of the world to be a trustee. As I have mentioned, one of the present family trustees is a corporation resident in Bermuda.

All the adult beneficiaries are anxious that Hambros Channel Island Trust Corporation Limited and the two individuals resident in Jersey should be appointed trustees of the will, so that the residuary estate can be transferred to them as soon as administration of the testatrix's estate has been completed. I understand that it is expected that administration will be completed shortly. They are particularly anxious that trustees resident abroad should be appointed before Lord Brooke and Lady Charlotte respectively attain 35, because when that happens there

will be a deemed disposal of his or her share and potentially a very large liability for capital gains tax, notwithstanding that Lord Brooke is now and that Lady Charlotte will shortly become domiciled and resident outside the United Kingdom.

There can be no doubt whatever that, in the circumstances I have described, trustees resident outside the United Kingdom could properly be appointed of the shares of Lord Brooke and Lady Charlotte as soon as an appropriation has been made between the three shares. However, no appropriation of the very valuable collection of pictures can be made unless and until they are sold. The question that arises is whether trustees resident outside the United Kingdom can be appointed of the unappropriated residuary estate, notwithstanding that an unappropriated one third share is held on trust to pay the income to a beneficiary, Mrs Thompson-Jones, who is domiciled and resident in the United Kingdom.

The difficulty has arisen as a result of the well known decision of Sir John Pennycuick V-C in *Re Whitehead's Will Trusts* [1971] 1 WLR 833. In that case all the beneficiaries were settled in Jersey and intended to reside there permanently, and the Vice-Chancellor made a declaration that an appointment of trustees resident in Jersey was a valid exercise of the power of appointing new trustees. However, in the course of his judgment, having held that there was no absolute bar to the appointment of persons resident outside the United Kingdom of an English trust - that such an appointment would not be prohibited by English law and would not be necessarily invalid - he said at p 837:

‘On the other hand, apart from exceptional circumstances, it is not proper to make such an appointment, that is to say, the court would not, apart from exceptional circumstances, make such an appointment; nor would it be right for the donees of the power to make such an appointment out of court. If they did, presumably the court would be likely to interfere at the instance of the beneficiaries. There do, however, exist exceptional circumstances in which such an appointment can properly be made. The most obvious exceptional circumstances are those in which the beneficiaries have settled permanently in some country outside the United Kingdom and what is proposed to be done is to appoint new trustees in that country. In those exceptional circumstances it has, I believe, almost uniformly been accepted as the law that trustees in the country where the beneficiaries have settled can properly be appointed.’

Sir John Pennycuick V-C went on to cite a passage from the decision of Bruce Knight V-C in *Meinertzhagen v David* (1844) 1 Coll NC 335, at page 345 when he said:

‘... without deciding the general question, I will assume that, in general, where there is a settlement made in England upon the marriage of English persons, though extending only to personal property, and the original trustees are English, it would be an imprudent and improper exercise of the power of appointing new trustees to appoint foreigners, or even to appoint English persons habitually resident outside England’.

Mr McCall submitted that the instant case is an exceptional case within the principle stated by Sir John Pennycuick V-C. However, he also submitted that in these circumstances it is open to the executors (as the persons in whom the power appointing new trustees is vested) to appoint the proposed new trustees, even if the circumstances are not such (because of Mrs. Thompson Jones's domicile and residence in the United Kingdom) that the court would make such an appointment.

He relied on the recent and unreported decision of Millett J in *Richard & Others v The Hon AB Mackay & Others* [now reported at (1997) 11 *Trust Law International* 22]. What was there proposed was an advancement to trustees of a new settlement, which it was proposed to make in Bermuda, of part of a trust fund held by English trustees on trusts governed by English law. The beneficiaries under the proposed new settlement were the infant children of Lord Tanlaw and although the family had international connections, Lord Tanlaw was domiciled and resident in the United Kingdom. It is unnecessary to say more about the facts of that case. Millett J, after referring to the passage in the judgment of Sir John Pennycuick V-C which I have read, said this:

'This is not a case where the family concerned or the beneficiaries have become resident abroad. The settlor and his two children live in England. Nor is it a case where the proposed new settlement is to be formed in the country where the beneficiaries reside or may be expected to reside in the future. The possibility which is

envisaged is that they may well wish to live in the Far East, whereas the seat of the proposed settlement is to be in Bermuda.'

But, in my judgment, the language of Sir John Pennycuick, which is narrowly drawn, is too restrictive for the circumstances of the present day if, at least, it is intended to lay down any rule of practice. Nor, in my view, is it accurate to equate the approach that the court adopts in the exercise of its own discretion with the approach it adopts when asked to authorise the trustees to exercise theirs.

Where the court is invited to exercise an original discretion of its own, whether by appointing trustees under the Trustee Act 1925 or approving a scheme under the Variation of Trusts Act 1958, or where the trustees surrender their discretion to the court, the court will required to be satisfied that the discretion should be exercised in the manner proposed. The applicants must make out a positive case for the exercise of the discretion, and the court is unlikely to assist them where the scheme is nothing more than a device to avoid tax and has no advantages of any kind.

Where, however, the transaction is proposed to be carried out by the trustees in exercise of their own discretion, entirely out of court, the trustees retaining their discretion and merely seeking the authorisation of the court for their own protection, then, in my judgment, the question that the court asks itself is quite different. It is concerned to ensure that the proposed exercise of the

trustees' power is lawful and within the act as ordinary, reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate.

Then he referred, with approval, to a decision of Mann J, in the Courts of Victoria in *Re K;McKinnon v Stringer* [1927] VLR 66, where Mann J identified the two relevant considerations as being:

'First, that the proposed transaction should not put the trust fund at risk or deprive the beneficiaries of appropriate protection from a court armed with the necessary powers; and, secondly, that the transfer of funds or the appointment of foreign trustees is appropriate.'

Millett J continued by summarising the circumstances which led him to conclude that the proposed advance was proper. He said:

'Certainly in the conditions of today, when one can have an international family with international interests, and where they are as likely to make their home in one country as in another, and as likely to choose one jurisdiction as another for the investment of their capital, I doubt that the language of Sir John Pennycuick is really in tune with the times. In my judgment, where the trustees retain their discretion, as they do in the present case, the court

should need to be satisfied only that, the proposed transaction is not so inappropriate that no reasonable trustee could entertain it.'

I respectfully agree with that approach.

I was also referred by Mr McCall to a large number of cases in which the same distinction has been drawn, that is, between an appointment which the court for some reason or another will not make and an appointment out of court in similar circumstances but with which the court will not interfere. I do not propose to refer to all of them.

The contrast is made in an early case, the decision of Sir John Romilly MR in *Re The Trust Estate of Armand Guibert and Ann Hayling his Wife* (1852) 16 Jur 853, where the court was asked to appoint trustees resident in France of a fund held on English trusts which had been paid into court. The fund was held in trust during the joint lives of a husband and wife, who were domiciled and resident in France, to pay the income to the wife for her separate use, then to the survivor for his or her life with the remainder to their children. The trustees had power to invest monies in the French funds. The judgment is short and I will read it in full:

'I do not think I can make the order asked for in this case. If these gentlemen are appointed, they might transfer the property into the French funds; and then I do not know but that by the law of

France the husband and wife might call upon the trustees to pay over the whole of the trust fund to them. The case of *Meinertzhagen v Davis* (1 Colt 353), which has been cited, was different from this; that was the case of an appointment by the parties themselves under the power in the settlement. That is a very different thing from this court appointing trustees. I do not think I can make the order. I will allow it to stand over, so as to enable you to search for authorities if you please, or I will refuse the order now, so as to enable you to bring it before the Lords Justices if you like.'

In *Meinertzhagen v Davis*, Knight-Bruce V-C had held that an appointment out of court of American trustees of a fund held on an English trust, the husband and wife being domiciled in America, was a valid appointment.

The case before Sir John Romilly is a strong case because trusts were not recognised in France and the trust fund would clearly be at risk. For that reason, Sir John Romilly was not willing to appoint trustees resident in France, notwithstanding that the husband and wife were domiciled and resident there. But he thought the position might have been different if the question had been as to the validity of an appointment made out of court.

The other case is the decision of Pearson J in *Re Norris* (1884) 27 Ch D 333. On the retirement of one of two trustees of a will, the continuing trustee, a solicitor, proposed to appoint his son, a

partner in his firm, as his co-trustee. The trusts of the will were being administered by the court and the approval of the court to an appointment was therefore needed. Pearson J refused to approve it. He said (at p 340):

'It is admitted that according to the ordinary practice, the court would not appoint as trustee the solicitor of the existing trustee, and I think the court would certainly not appoint as a co-trustee with that solicitor his partner, whether he was his son or some other person. The court does not look at competency of the particular person, it looks at the position which he fills, and according to the ordinary rule of court the solicitor of a trustee is not a person who should be appointed a trustee. I think it of the greatest importance that the court should adhere to the general rule, and for this, if for no other reason, that it prevents the necessity of considering in any particular case whether the solicitor is or is not a person of responsibility and trustworthy.'

However, he went on in the concluding paragraph of his judgment (at p 341):

'I am very far from saying, and I must not be understood to say that if there was a trust which was not being administered by the court and the person who had the power of appointing new trustees had bona fide appointed as trustees a father and his son who were solicitors in partnership, it would be a bad appointment, so as to render any deed executed by the trustees so appointed null

and void. I should be very sorry to hold that such an appointment outside the court would be invalid. If such a case came before me and I found the appointment had been made *bona fide* out of court, I should certainly hold that the trustees were validly appointed.'

Neither of these cases, nor any of the other cases cited by Mr McCall on this point *(Re Coombes* 108 LT 94 and *Re Stamford* (1896) 1 Ch 288) which contain statements to the same effect, was cited to the Vice-Chancellor. If they had been, I do not think he would have equated the circumstances justifying the appointment of non-resident trustees by the court, and the circumstances in which the appointment of non-resident trustees made out of court will be recognised as valid and effective.

Turning again to the instant case, there are, in my judgment, clearly circumstances which the executors can properly regard as justifying the appointment of the proposed new trustees as trustees of the will. Lord Brooke is and Lady Charlotte is about to become resident outside the United Kingdom. It is impractical to appropriate the whole residuary estate into one-third shares and impractical, therefore, to appoint trustees resident in and to administer the trusts in a single jurisdiction where all the beneficiaries are domiciled and resident. Mrs Thompson-Jones is herself willing that trustees resident outside the United Kingdom should be appointed, and she is the only beneficiary now ascertainable who is resident in the United Kingdom. It would, I think, be unjust to the non-resident beneficiaries that because Mrs Thompson-Jones is resident here they should be exposed to heavy

fiscal liabilities which will not arise if non-resident trustees are appointed.

There can be no question but that the proposed individual new trustees are responsible persons and the proposed corporate trustee is a well established and well known trust corporation.

The trustees all reside in a stable jurisdiction in which many English trusts are now administered and in which the assets and the future administration of the trusts will be fully safeguarded.

In these circumstances, I have no hesitation in giving the direction and making the order sought.


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