

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2009 No. 303

GUARDIAN LIMITED

Plaintiff

-v-

BERMUDA TRUST COMPANY
LIMITED

Defendant

REASONS FOR RULING
(in Chambers)

Date of Hearing: November 18, 2009

Date of Judgment: December 1, 2009

Mr. Paul Smith, Conyers Dill & Pearman, for the Plaintiff

Mr. Keith Robinson, Appleby, for the Defendant

Introductory

1. On November 18, 2009, I heard the Plaintiff Protectors' application for directions in relation to a trust ("the Trust") which the Defendant Trustee Supported. Because the application essentially required the Court to give a legal ruling on a point of law of general importance to the development of Bermuda trust law, I indicated that I would give reasons later. The hearing was concluded.
2. Counsel sought a further hearing later in the day at which they addressed me on the question of whether the Judgment should be published and, if so, on an anonymous basis, to protect the privacy of the beneficiaries. I indicated that I would embody my decision on this supplementary application in the present judgment, after indicating my provisional view that publication was appropriate but anonymity might equally be required.
3. I set out below my reasons for deciding (a) that the widow of the settlor of the Trust was not an excluded beneficiary by virtue of a clause excluding a "spouse", and (b) that publication of this Judgment is appropriate although disclosing the identity of the Trust and its beneficiaries is not required.

The relevant provisions of the Trust Deed and the construction question

4. Clause 1(h) of the Trust provides in material part as follows:

“‘Excluded Persons’ means:-

- (1) the Protector for the time being;*
- (2) any Settlor;*
- (3) the spouses of persons who are Excluded Persons by virtue of paragraphs (1) and (2)...”*

5. Clause 36 of the Deed provides as follows:-

“This Settlement is irrevocable and notwithstanding anything to the contrary herein contained or implied the Trust Fund and the income thereof shall henceforth be possessed and enjoyed to the entire exclusion of any Excluded Persons and of any benefit to any such person by contract or otherwise. No discretion or power conferred on the Trustees or on any other person by this Settlement or by law shall be capable of being exercised in such manner as shall cause any part of the Trust Fund or the income thereof to be paid or lent to or applied for the benefit of any Excluded Person whether directly or indirectly or in any circumstances whatever.”

6. The question of construction which was placed before the Court was whether an individual who was at one time an Excluded Person by virtue of being the “spouse” of a Settlor was excluded for all time, even after she ceased to be a “spouse” and had become a “widow”. This question was relevant to the ability of the Protector to add the widow to the list of beneficiaries and, consequentially, impacted upon the ability of the Trustee to make an appointment to her.

Applicable rules of construction and trust drafting practice

7. It appeared to be uncontroversial that trust deeds fell to be interpreted in accordance with the rules applicable to the construction of contracts. Accordingly, the subjective intentions of the draftsman were inadmissible. Mr. Robinson cited in this regard the following *dictum* of Lord Hoffman in *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38:-

“14. There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in Investors Compensation Scheme Ltd v West Bromwich Building Society [1988] 1 WLR 896, 912-913. They are well known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.”

8. In reliance on this principle, the Court was invited to take into account the fact that the draftsman deposed as to the drafting practice which existed at the time when the Trust was settled. In particular, reliance was placed on a practitioner's text, Kessler, '*Drafting Trusts and Wills Trusts: a Modern Approach*', 1st edition (Sweet & Maxwell: London, 1992) paragraph 4-068. This text in material part provides as follows:-

"It is generally necessary to exclude the settlor and his spouse from all possible benefit under their settlement. If this is not done, then trust income and capital gains may be taxed at the settlor's rates, and the settlor may be subject to inheritance tax on the settled property as if he had never given it away...The 'spouse' of the settlor means the person for the time being married to the settlor. Thus it is permissible to benefit the widow of the settlor [Footnote]...It is desirable to include the widow of the settlor as a matter of routine: see the discussion above on the class of beneficiaries. One could also safely benefit the divorcee of the settlor; but this is unlikely to correspond with the settlor's wishes."

9. The body of the text supported the primary contention that the term "spouse" in the Trust context does not include a widow or former spouse. This is because it suggests that there are fundamental tax reasons for excluding a spouse which if ignored could undermine the tax motivations underlying the very establishment of a Trust. The exclusion of the spouse may be understood as a fundamental standard Trust clause rather than reflecting an intention to exclude for all time a particular spouse of a particular settlor. The suggestion in the footnote that widows ought to be included amongst the beneficiaries is, by comparison, somewhat muted recommendation. The failure to include the widow in the present Trust as an express beneficiary at the outset might be viewed as weakening the force of the Plaintiff's primary construction argument, on the basis that the draftsman of the Trust clearly did not follow this recommendation. I did not consider the counter-argument to be dispositive in light of the fact that the Trust expressly contemplated additions to the class of initial beneficiaries.

Relevant case law

10. Mr. Smith for the Protector referred the Court to four cases considering the question of whether the term "spouse" included "widow", in the Trust context. Three supported his proposition that "spouse" did not encompass "widow", while one contradicted his main submission. Mr. Robinson for the Trustee very properly disclosed a recent English case which also contradicted the central interpretation argument. However, none of these cases were decisive as to a large extent (and quite understandably) they all turned upon a construction of particular trust instruments.
11. The Protector's counsel neatly defined the question in the present case as whether the term "spouse" refers in time to the date of the settlement, irrespective of any later change of status, or refers to such status for so long as it subsists (and no longer). In other words, in the present case, was a spouse of the Settlor excluded for all time, or was she only excluded while the marriage subsisted? In *Re Williams Settlement* [1929] 2 Ch 361

was a Court of Appeal decision where the beneficial interest of a spouse was held to have expired with the dissolution of his marriage, re-vesting in favour of the claimant's ex-wife's new husband. The unanimous view taken of the time element was that the qualifying relationship had to exist at the time when the power of appointment was being exercised, as opposed to as at any earlier time (such as the date of the settlement).

12. The Court of Appeal in *Re Williams Settlement* considered but distinguished the contrary first instance decision in *Bullmore v. Wynter* (1982) 22 Ch.D 619. In this case the bequest in a will was to “any husband with whom she might intermarry, if he should survive her”. Eve J in the later Court of Appeal case felt that “any husband” meant what it said; Lawrence LJ took the view that the fact of there having been a marriage was the controlling consideration in the earlier case. However in a case with similar facts, Kay J declined to follow *Bullmore v Wynter*: *In re Morrieson* (1988) 40 Ch.D. 30. *Bullmore v Wynter* was also doubted, over 50 years later, on similar facts: *In re Slaughter* [1945] 1 Ch. 355. The preponderance of authority placed before this Court supported the proposition that a reference to a “spouse” in a will of a Trust deed connoted a person who at the qualifying date possessed that status.
13. Mr. Robinson referred the Court to one recent decision which went against this trend, the decision of Patten J (as he then was) in *Greenwold v. Greenwold* [2008] EWHC 820 (CH). This was a case where there was a positive finding that the term “spouse” included “widow”. However, the effect of the finding was to rule that the widow was not excluded from benefitting under a settlement in which she was already a beneficiary in her capacity as spouse of a tenant for life who was also both the settlor and the beneficiary. Patten J's decision was fundamentally based on a construction of the instrument as a whole and the conclusion that no intention to exclude the widow from being a beneficiary could be found.

“30...The question is whether or not the court should regard the use of the word ‘spouse’ as limiting the entitlement of Dr. Greenwold to participate as a beneficiary to the duration of the marriage.

31. It seems to me that there are clear indications in the settlement itself that that [sic] was not the draftsman's intention. Most obviously are the provisions of clause 2. That, in terms, directs that the income shall during the tenant for life's life be paid to him and after his death to or for the benefit of - and I emphasise these words - ‘any beneficiaries as the trustees think fit.’ The words as the trustees think fit gives the trustees a discretion, but the word ‘any’, in my judgment, is intended to include the entire class of defined beneficiaries as potential recipients under the exercise of that discretion.”

14. The holding that “spouse” included “widow” was made in the context of construing an instrument which turned the situation on the Trust before this case on its head. Rather than excluding the settlor and his spouse as beneficiaries, as the Trust does, they were both included as beneficiaries from the outset. It would be inherently illogical, in light of this manifested intention, to conclude that the instrument intended the spouse to be an eligible beneficiary only during the settlor's lifetime. So *Greenwold v. Greenwold* is a case which has no persuasive weight in the context of construing the meaning of “spouse” in the

context of a Trust deed where the settlor and his or her spouse are expressly excluded from the class of potential beneficiaries.

Conclusion: construction of “spouse” in the Trust

15. Having regard to the terms of the Trust in the present case, I found that the rationale for excluding the spouse (together with the settlor) was that explained in Kessler, *Drafting Trusts and Will Trusts: a Modern Approach*, 1st edition, paragraph 4-068. Accordingly, it followed that the meaning to be assigned to the term “spouse” in the “Excluded Persons” clause clearly did not apply to a widow and only encompassed a spouse of the settlor during the latter’s lifetime.

Publication of judgments and privacy in trust cases

16. The publication of judgments for matters heard in Chambers is currently governed by the following Practice Direction:

“Ref. A/50

CIRCULAR NO. 7 of 2006

TO ALL ATTORNEYS

PUBLICATION OF JUDGMENTS & RULINGS GIVEN IN CHAMBERS

This practice direction concerns the publication of the texts of judgments and rulings of the Supreme Court which are given in Chambers.

1. *Judgments and Rulings should clearly identify whether they are given in open Court or in Chambers.*
2. *Subject to the following provisions of this practice direction, copies of Judgments and Rulings given in Chambers may go in the books of considered Judgments maintained in the Supreme Court, and accurate texts of such Judgments and rulings may be published, notwithstanding that the matter was held in Chambers.*
3. *The court may, in particular cases, prohibit the publication of such a report, or order it to be edited, when it considers it necessary and expedient to do so in the interests of:*
 - (i) *justice;*
 - (ii) *public morality, the welfare of persons under the age of 18 years, or the protection of the private lives of the persons concerned;*
 - (iii) *commercial confidentiality; or*
 - (iv) *defence, public safety or public order.*
4. *Save in the circumstances referred to in paragraph 5, an order under paragraph*

3 will normally require a specific application in that regard by the party concerned. For the limited power of the Court to make such orders, see Hodgson v. Imperial Tobacco [1998] 1 WLR 1056 CA, per Lord Woolf.

5. Without prejudice to the generality of paragraph 3, and subject to the directions of the Judge in any particular case:
- (a) the published version of any judgment or ruling concerning the wardship or adoption of a person under eighteen years of age, or the guardianship, custody, maintenance or upbringing of such a person, or the rights of access to such a person, shall be edited:
 - (I) by substituting letters for the identifies of all persons involved; and
 - (ii) by removing any information which might tend to identify the young person concerned.
 - (b) the published version of any judgment or ruling in proceedings concerning the custody or affairs of any person suffering from a mental disorder within the meaning of the Mental Health Act 1968, shall be edited:
 - (I) by substituting letters for the identities of all persons involved; and
 - (ii) by removing any information which might tend to identify the person suffering from the mental disorder.
17. In the present case, counsel indicated at the end of hearing of the present application that publication of the present judgment would be useful for the development of Bermuda Trust law. However, having regard to the fact that Bell J had ordered the sealing of the file in this matter at the interlocutory stage and concerns about breach of the privacy rights of the beneficiaries in the internet age through the publication online of this court's judgments, it was submitted that publication should be prohibited. It was suggested that the operation of the Practice Direction on the Publication of Chambers judgments should be specifically excluded from trust matters dealt with in Chambers. Alternatively, it was submitted that the judgment should be published on an anonymous basis in the sense that the identity of the Trust and its beneficiaries should be concealed.
18. It would be inappropriate in my view to reconsider the terms of a Practice Direction issued by the Chief Justice, no doubt after consultation with the Bermuda Bar Council, on the basis of submissions made in one case. The Practice Direction clearly attempts to balance the conflicting interests contemplated by section 6 of the Bermuda Constitution, namely the public interest in justice being publicly seen to be done and countervailing privacy rights. Its terms contain sufficient flexibility to meet the concerns raised by counsel in the present case, in that the Court can prohibit publication altogether under paragraph 3 (ii) with a view to promoting "*the protection of the private lives of the persons concerned.*"
19. In the vast majority of cases where trustees seek directions from this Court in Chambers, the Court's approval or refusal of the application will relate to the exercise of some discretionary power not involving any difficult point of law the determination of which will

be of practical interest to other Trust lawyers and their clients. In such cases, no question of a reasoned judgment and publication will arise. In the exceptional case, such as the present, where there is a public interest in publishing a judgment without revealing the identities of the Trust fund beneficiaries concerned, it is difficult to identify any or any cogent reason why publication should be restricted altogether:

20. Section 6 of the Constitution provides in material part as follows:

“(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.

(10) Nothing in subsection (9) of this section shall prevent the court from excluding from the proceedings persons other than the parties thereto and their legal representative to such extent as the court:

(a) may be empowered by law so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or

(b) may be empowered or required by law to do so in the interests of defence, public safety or public order.” [emphasis added]

21. Mr. Robinson made the interesting submission that the present application did not engage section 6(9) at all because the present application for directions did not constitute “*proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation*”. He relied on a holding to this effect by Sir Andrew Morritt (Vice-Chancellor) in *In re Trusts of X Charity* [2003] 1 WLR 2751, a case where the trustees sought directions in relation to pending proceedings. Without deciding this point, it seems very artificial to characterise the application in the present case, which is designed in substance to confirm a beneficiary’s entitlement to participate in trust assets, as anything other than a proceeding for the determination of civil rights and obligations. But even if the present application was purely administrative and did not engage section 6 at all, restraining the publication of Chambers judgments containing material of public interest engages another fundamental right, the right to receive information. Section 9 of the Constitution provides as follows:

“(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.”

[emphasis added]

22. Of course, the public right to receive (and impart) information and ideas may also be restricted on a variety of exceptional grounds including, under section 9(2)(a)(I), “*to the extent that may be reasonably required...for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings*”. The Practice Direction is consistent with this constitutional guarantee of the public’s right to receive information as well, providing for a starting assumption in favour of publication, with restrictions being placed upon this right only to the extent that such restrictions “*may be reasonably required*”.
23. This Court might in appropriate cases find that restricting publication of a judgment was necessary or expedient in the interests of justice (section 6(10) (a)) or was reasonably required on privacy grounds (section 9(1)) because “*it was not a practical possibility to produce an anonymised or abridged version*”: *In re Trusts of X Charity* [2003] 1 WLR 2751 at 2755B. It ought in principle to be possible for this Court to both be responsive to the interests of public justice and the privacy needs of persons involved in civil litigation, trust cases included, as well.
24. In the present case no justification for restraining publication altogether of a judgment dealing purely with a point of construction has been made out. On the other hand, accepting counsel’s representations to the effect that all interested persons will be notified of the result in this present case, it is impossible to identify any public interest in knowing the identity of the persons involved in this particular case which could possibly outweigh the involved parties’ corresponding privacy rights.

Conclusion: publication of chambers Judgment issue

25. Accordingly, I have decided to direct that the present Judgment be published, it being written in a form that does not reveal the identity of the Trust or its beneficiaries. Having regard to Bermuda’s status as an offshore trust domicile, this Court is bound not just to be sympathetic to the privacy needs of those who establish trusts here, but also to the need to promote the development of Bermuda trust law as well.

Dated this 1st day of December, 2009

KAWALEY J