

# ADAM v THEODORE GODDARD

7<sup>th</sup> March, 2000

## JUDGMENT

MR JUSTICE EVANS-LOMBE: By a deed dated 25 February 1987 ('the Settlement') Robert Ellert ('the Settlor') settled certain property on Michael David Ellert and Leslie Jonathan Sieff ('the Retiring Trustees'). The settled property comprised primarily shares in two private companies. I will refer to that property as 'the fund'. The retiring trustees have, at all material times, been resident in the UK.

In 1990 the Settlor, who was then and remains domiciled abroad, formed the intention to 'export' the Settlement in order to achieve tax advantages. In order to do so he obtained the advice of the defendants. They recommended to him as a vehicle for this purpose Adam & Company International Trustees Ltd ('AI'), a financial services company incorporated in Guernsey. AI was not a trust corporation. By a 'Deed of Retirement and Appointment of Trustees' ('the Appointment') dated 14 January 1991 the Retiring Trustees purported to retire from the trusts of the Settlement and the Settlor appointed AI as sole trustee in their place.

The tax advantages which it was the object of the export of the Settlement to achieve were relief from UK income tax and capital gains tax, in particular, on the disposition of the shares in the two private companies forming part of the fund.

It is the claimant's contention that to achieve this it was necessary that foreign resident trustees or a foreign resident trust corporation be appointed in place of the existing UK resident trustees and that these trustees, the Retiring Trustees, be discharged. They contend that the Appointment failed to achieve this because AI was not a trust corporation

with the result that the appointment of AI did not operate to discharge the Retiring Trustees in accordance with the provisions of the Settlement. If this is correct the Retiring Trustees and AI are presently liable for UK income tax and capital gains tax on transactions involving the fund since 19 January 1991. The claimants bring these proceedings against the defendants to recover damages for negligent advice in failing to ensure that the Appointment was effective to discharge the Retiring Trustees so relieving them of liability for the tax and claims against them by the Inland Revenue for interest and penalties in addition.

The application before me is brought for a declaration under Part 24 Civil Procedure Rules that as a result of the facts and matters which I have summarised the appointment was not effective to appoint AI as sole trustee of the Settlement, (nor to discharge the Retiring Trustees as trustees of that Settlement).

The material provisions of the Settlement are those relating to the appointment of new trustees at clause 9 as follows:

‘(a) That the statutory power of appointing new or additional trustees as hereinafter modified shall apply hereto and shall be exercisable by the Settlor during his life...

(b) Except where trustees include or comprise a trust corporation there shall never be less than two trustees but so that any sole trustee may act while being such sole trustee for the purpose of appointing a new trustee or trustees but (unless a trust corporation) for no other purpose;

(c) The statutory power of appointing new or additional trustees shall be modified as follows:

(i) Any person or persons (subject to (a) above) may be appointed as trustee or trustees notwithstanding that such person or persons may be resident domiciled carrying on business or (if a body corporate) incorporated outside the United Kingdom and the receipt of such person or persons for the whole or such part or parts of the trust fund as may be paid

or transferred to such person or persons pursuant to such appointment shall be a complete discharge to any other trustee or trustees accordingly...’

The statutory power referred to in clause 9 was, at the material time, that contained in ss36-39 of the Trustee Act 1925. Materially to this judgment those sections provide:

### **‘36 Power of appointing new or additional trustees**

(1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than 12 months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein or is incapable of acting, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees:

(a) The person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating a trust...

May, by writing appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in place of the trustee so... desiring to be discharged... as aforesaid.

### **37 Supplemental provisions as to appointment of trustees**

(1) On the appointment of a trustee for the whole or any part of trust property:

(c) It shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust;...

### **39 Retirement of trustees without a new appointment**

(1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust and his co-trustees and such other person, if any, as is empowered to appoint trustees by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

### **69 Application of Act**

(2) The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.'

The following are common ground between the parties.

1. Clause 9(c)(i) of the Settlement must be read as if the word ‘retiring’ appears between the words ‘other’ and ‘trustee’ in the final words of that paragraph so that they will read ‘a complete discharge to any other retiring trustee or trustees accordingly’.

2. That AI was effectively appointed a trustee of the Settlement by the Appointment. The question to be decided is whether that deed was effective to discharge the Retiring Trustees from the trusts of the Settlement.

3. That unless clause 9 of the Settlement has the effect of modifying ss36 or 37, s37(1)(c) will have effect so that the Retiring Trustees have not been discharged.

4. That s37(1)(c) as an adjunct of the power to appoint, may be excluded from application to a settlement by a contrary intention being expressed in the trust instrument by s69(2) of the Trustee Act. See LRT Pensions Fund Trustee Company Ltd v Hatt [1993] OPLR 225 at p260H.

The defendants submit that clause 9(c) was clearly intended to modify the statutory power to appoint trustees (see the opening words of the clause). Both sub-clauses (ii) and (iii) plainly do so. Sub-clause (ii) modifies s36(1). Sub-clause (iii) modifies s36(6). Clause 9(c)(i) is to be construed as discharging all retiring trustees on the appointment of a single foreign trustee whether natural or corporate. If not so construed sub-clause (i) does not modify any relevant statutory provision. The fact that, in the present case, only a single foreign trustee, not a trust corporation, has been appointed is not contrary to clause 9(b). The effect of that clause is that

such newly appointed trustee can only act for the purpose of appointing any further new trustee. It was the clear purpose of the parties to the Appointment to appoint AI as a trustee of the Settlement and to discharge the Retiring Trustees. The Court should construe the Settlement and, in particular clause 9(c) so as, if possible, to give effect to that purpose.

I have come to the conclusion that I cannot accept the defendants' contentions. I do so for the following reasons:

1. The words used in clause 9(c)(i) do not, as a matter of language, require the construction placed on them by the defendants.

2. In *Re Whitehead's Will Trusts* [1971] 1 WLR 833, Pennycuik V-C was considering s36 in the context of an application for a declaration that an appointment of offshore trustees was effective and duly discharged retiring UK resident trustees. His conclusion was that such an appointment was not prohibited by law but would not, save in exceptional circumstances, be appropriate' and thus was susceptible of restraint by injunction at the suit of a beneficiary. I accept the claimants' submission that clause 9(c)(i) is primarily directed at neutralising this possible bar to the appointment of foreign trustees and that the second part of the clause is consequential on the first (see the concluding word 'accordingly'). It must be accepted that the first part of the sub-clause does not modify the substantive law in the sense of misapplying or altering the effect of a statutory provision. It has always been lawful to appoint a foreign trustee of an English settlement (see *Re Whitehead*). It does, however modify the criteria in the light of which a power of appointment under s36 falls to be exercised in the context of the Settlement. The second part of the subclause consequentially confirms express protection for retiring onshore trustees.

3. The appointment of a single trustee, not a trust corporation, replacing all other trustees would be a breach of clause 9(b). It is no answer to say that such a single trustee could only act to appoint a further trustee. I find it difficult to think that the draftsman of the Settlement intended the route suggested by the defendants as a route for the export of the Settlement when, by the appointment of two foreign trustees or a foreign trust corporation, the Settlement could have been exported in one step as opposed to two.

4. I accept the claimants' submission that clause 9 of the Settlement would have allowed one only of the Retiring Trustees to be discharged by the appointment of AI. An appointment under s36 must be 'in the place of' a retiring trustee. It does not seem to me that s36 can be construed so that, where there are two retiring trustees, the appointment of one new trustee only in their place will be effective to discharge both of them. It follows that the only way in which the second retiring trustee can achieve a discharge must be pursuant to the provisions for retirement contained in s39. Clause 9 of the Settlement refers only to the modification of the power of appointing new or additional trustees. It does not seek to modify the power of a trustee to retire conferred by s39.

For these reasons I conclude that clause 9 does not modify the statutory power of appointment to exclude from the Settlement the provisions of s37(1)(c) of the Trustee Act 1925. I do so because it seems to me that such a construction is more likely to be in accordance with the intentions of the draftsman of the Settlement. In doing so I also bear in mind that I am deciding a preliminary issue in a case where the claimants are claiming against the defendants damages for professional negligence. The defendants were instructed by the claimants to advise on how best to export the Settlement in order to obtain relief from UK taxation. In the course of submissions I raised the question of whether the Inland Revenue had been approached to ascertain their attitude to the effect of the Appointment as a means of obtaining that relief. I was told that no such approach has been made. Nonetheless this does not seem to me to be a case where the Court, in construing a document, should bend over backwards to seek to give it a construction which the parties to it obviously intended. I am not construing the terms of the Appointment but rather whether the Appointment was effective to achieve the intention of the parties to it within the terms of the Settlement. My conclusion is that it was not effective to do so.

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