[2016 Gib LR 178]

LINE TRUST CORPORATION LIMITED (AS TRUSTEE OF THE AZIZ CONTINUATION TRUST) v. AZIZ

SUPREME COURT (Jack, J.): July 7th, 2016

Conflict of Laws—trusts—foreign matrimonial proceedings—disclosure of trust documents in English matrimonial proceedings between irrevocably excluded beneficiaries of Gibraltar trust (including claim to trust assets) not in best interests of trust

Conflict of Laws—trusts—foreign matrimonial proceedings—trustee directed not to submit to foreign court in matrimonial proceedings between irrevocably excluded beneficiaries of Gibraltar trust (including claim to trust assets)

A trustee sought directions from the court in respect of English divorce proceedings.

The claimant was the trustee of a trust settled by the defendant's father in 1995 and then governed by Isle of Man law. The main assets of the trust were three Isle of Man companies which owned shares in single purpose companies which held extensive property interests, mostly in London. The beneficiaries of the trust had initially been the defendant's father, uncle, and grandmother. The defendant's father later married the defendant's mother, and they had four children, including the defendant.

The claimant had been appointed as trustee of the trust in 2012, and the proper law and place of administration of the trust had been changed in 2013 to Gibraltar. Various parties had been added and removed as beneficiaries of the trust with the result that, when the present proceedings began, the defendant was the sole remaining beneficiary. Two of his siblings would become beneficiaries upon reaching their majority. The defendant's parents had been irrevocably removed and named as excluded persons.

The defendant's parents separated and his mother issued divorce proceedings in the English High Court, seeking financial provision and an order that the trust be varied under the Matrimonial Causes Act 1973, s.24(1)(c). That provision provided that, on granting a decree of divorce, the court could make an order "varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement . . ." The mother also challenged her removal as a beneficiary (under s.37 of the English Act). The English court ordered the trustee to provide information and documents for use in those proceedings.

The trustee sought directions as to whether it should submit to the jurisdiction of the English court and whether it should disclose the information and documents.

Held, ruling as follows:

(1) The trustee would be directed not to submit to the jurisdiction of the English court. It was arguable that the present court would not recognize any order made under ss. 24(1)(c) or 37 of the 1973 Act by the English court. The court therefore had to consider the balance of convenience. There was a risk that the trustee would face conflicting directions if it were to appear in England and submit to the English court's jurisdiction, *i.e.* the present court directing it to ignore the English order and the English court treating it (and its directors) as being in contempt. Furthermore, if the trustee did not submit to the jurisdiction of the English court, the courts of the Isle of Man would not recognize an order of the English court giving directions to the Manx companies owned by the trust. As against that, there was a risk that the English court might make orders directly against the subsidiaries holding properties in England. The trustee would be unable to argue against this if it did not appear in the English proceedings. However, the defendant was represented in the English proceedings and it was likely that his younger siblings would also be. There was, therefore, likely to be little advantage in the trustee appearing as well. The balance of convenience favoured directing the trustee not to submit to the jurisdiction of the English court (paras. 29–34).

(2) The trustee would also be directed not to disclose documents or answer any questions as to the trust or its assets. There had already been substantial disclosure by the defendant's father in the English proceedings. A clause in the 2013 deed changing the proper law and place of administration of the trust to Gibraltar prevented voluntary disclosure of documents by the trustee to the English court. Although the court had power to override that clause, it was not in the best interests of the trust to do so. Neither the mother nor the father was a beneficiary of the trust. The purpose of the disclosure was to assist the mother's claim against the trust and there was no explanation as to why disclosure would be in the best interests of the trust. The court had to consider the interests not only of the defendant, who consented, but also of all potential beneficiaries. Taking an overall view, disclosure would not be in the best interests of the trust (paras. 35–37).

Cases cited:

(1) *Agbaje* v. *Agbaje*, [2010] UKSC 13; [2010] 1 A.C. 628; [2010] 2 W.L.R. 709; [2010] 2 All E.R. 877; [2010] 1 FLR 1813, referred to.

(2) *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, applied.

(3) *C* v. *C (Ancillary Relief: Nuptial Settlement)*, [2004] EWCA Civ 1030; [2005] Fam. 250; [2005] 2 W.L.R. 241; [2004] 2 FLR 1093; [2004] 2 F.C.R. 721, referred to.

(4) *DR* v. *GR*, [2013] EWHC 1196 (Fam); [2013] 2 FLR 1534; [2013] W.T.L.R. 1123, considered.
(5) *Forsyth* v. *Forsyth*, [1891] P. 363, referred to.
(6) *Hope* v. *Krejci*, [2012] EWHC 1780 (Fam); [2013] 1 FLR 182; [2012] Fam. Law 1327, referred to.
(7) *Joy* v. *Joy-Morancho*, [2015] EWHC 2507 (Fam); [2015] 5 Costs L.O. 629; [2016] 1 FLR 815, referred to.
(8) *Nunneley* v. *Nunneley* (1890), 15 P.D. 186, referred to.
(9) *Petrodel Resources Ltd.* v. *Prest*, [2013] UKSC 34; [2013] 2 A.C. 415; [2013] 3 W.L.R. 1; [2013] 4 All E.R. 673, applied.
(10) *Quan* v. *Bray*, [2014] EWHC 3340 (Fam); [2015] 2 FLR 546; [2015] 3 F.C.R. 436; [2015] W.T.L.R. 885, referred to.

Legislation construed:

Matrimonial Causes Act 1962, s.35(1): The relevant terms of this sub-section are set out at para. 22.

Trusts (Private International Law) Act 2015, s.4(5): The relevant terms of this sub-section are set out at para. 20.

Matrimonial Causes Act 1973 (c.18), s.24(1): The relevant terms of this sub-section are set out at para. 18.

L. Baglietto, *Q.C.* and *M. Levy* for the claimant;
S. Catania and *S. Chandiramani* for the defendant.

1 **JACK, J.:** By a Part 8 claim form issued on April 27th, 2016, the claimant ("the Line Trust") seeks the directions of the court as to whether, as trustee, it should submit to the jurisdiction of the English High Court in a matrimonial dispute pending between Asif Harron Aziz and Tagilde Aziz (*née* Nascimento) under Claim No. ZC15D00268 and whether it should provide information to the English court.

2 Without disrespect, I shall refer to Tagilde by her usual name, Nina, and to the other family members by their first names.

The facts

3 The Line Trust is the trustee of the Aziz Continuation Trust ("the ACT"). This trust was originally known as the Southern Africa Investment Discretionary Trust. It was settled by Asif on June 28th, 1995 and was governed by the laws of the Isle of Man. At that time Asif was unmarried and childless. The beneficiaries at that time were Asif, his brother, Hussein, and his mother, Amina.

4 It is not entirely clear whether Asif had met Nina by this time. They had certainly met by 1996. In 1997 they went through a form of religious marriage which was confirmed by a civil ceremony in 2002. There is no

evidence that at the time of original settlement of the ACT Asif was contemplating marriage to Nina.

5 There were four children of the marriage: Ismael, born on April 17th, 1997; Omar, born on January 12th, 1998; Halima, born on February 15th, 2000; and Rahima, born on August 18th, 2001. Ismael was adopted.

6 On March 9th, 1999, Nina, Ismael and Omar were added as beneficiaries to the ACT. On June 13th, 2000 and August 14th, 2002 respectively, Halima and Rahima were added as beneficiaries.

7 On July 17th, 2008, Hussein and his legitimate issue were irrevocably removed as beneficiaries of the ACT and named as "excluded persons." Some of the assets of the ACT were settled on a fresh trust for the benefit of Hussein and his issue. No point arises in respect of this resettlement.

8 On September 18th, 2012, Asif, Nina and Amina were irrevocably removed as beneficiaries of the ACT and named as "excluded persons." Three days later, the claimant was appointed as trustee of the ACT. On January 23rd, 2013, the ACT changed its proper law and place of administration from the Isle of Man to Gibraltar. There is no evidence before me that the marriage between Asif and Nina was in difficulties at this time.

9 On January 31st, 2013, Ismael was revocably removed as a beneficiary.

10 In March 2014, Asif and Nina separated. In January or February 2015 (the precise date is not in evidence), Nina issued divorce proceedings in the English High Court and sought consequential financial provision.

11 On March 20th, 2015, all children and grandchildren of Asif were irrevocably removed as beneficiaries until they attained the age of 18. (There were various other changes, which I do not need to set out.) The effect was that only Omar remains a beneficiary of the ACT until Halima and Rahima attain their majority.

12 The main assets of the ACT are three Isle of Man companies. In turn those companies own shares in single purpose companies which in turn hold extensive property interests, mostly in London. The largest of the Manx companies is ACT Property Holdings Ltd. ("Holdings"). According to its balance sheet as at March 31st, 2015, the group had assets less current liabilities of just over £2 bn. After long-term borrowing was taken off, the net balance was about £685m.

13 For completeness, I should say that Asif had also set up another trust in the Cayman Islands called the HIRO Trust or the STAR Trust. I am not concerned with this other trust.

14 The divorce proceedings first came before Moor, J. on October 28th, 2015. He invited the Line Trust and the trustee of the Caymanian settlement voluntarily to provide documents but provided, for the avoidance of doubt, that such cooperation would not amount to a submission to the jurisdiction of the English court. He added the children as parties. He gave Nina permission to add a claim to vary the ACT and the HIRO Trust pursuant to s.24(1)(c) of the Matrimonial Causes Act 1973 and to set aside, pursuant to s.37 of that Act, her exclusion from the trusts in 2012.

15 There was another hearing before Moor, J. on April 7th, 2016, where he made an order describing the Line Trust as the sixth respondent and the trustee of the HIRO Trust as the seventh respondent. The order, so far as material, provided:

> "10 The applicant, first respondent, second and third respondents agree that the sixth and seventh respondents should provide the information and documentation referred to in para. 19 of this order and that they consider that it would be in the best interests of the trusts to do so.
>
> . . .
>
> 19 The sixth and seventh respondents shall file and serve a comprehensive response to the request contained in the letters dated 18th March 2016 from respondent [*sic*] by 4pm on 21st April 2015 [*sic*], providing all the requested information and documents.
>
> 20 There be permission to serve this order on Macfarlanes, solicitors for the sixth and seventh respondents."

16 The order was endorsed with a penal notice but was not drawn up or served until after April 21st, 2016, thus (even if it were legitimate to correct the obvious error in the year for compliance) the Line Trust is not in contempt of the English court. So far as appears, no four-day order has been made to rectify the problem of the date for compliance. No doubt the English court will consider in the light of this judgment whether considerations of comity mean that no four-day order should be made.

17 The Line Trust appears to have been added as a party on March 4th, 2016, but I have not seen the order made that day. There is to be a hearing on July 25th, 2016 to determine whether Holdings, the other Manx companies and the subsidiaries holding the properties in England should be added. In the meantime, on July 13th, 2016, there is to be a family dispute resolution hearing before Moylan, J.

Variation of the trust

18 Nina applies to the English court to vary the ACT pursuant to s.24(1)(c) of the Matrimonial Causes Act 1973. Section 24(1) provides:

"On granting a decree of divorce . . . or at any time thereafter . . . the court may make any one or more of the following orders, that is to say—

. . .

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage . . ."

19 This provision can trace its lineage back to the Matrimonial Causes Act 1859. The English courts assert that this power extends to foreign settlements governed by foreign law: *Nunneley* v. *Nunneley* (8); *Forsyth* v. *Forsyth* (5); and *C* v. *C (Ancillary Relief: Nuptial Settlement)* (3).

20 This does not, of course, mean that Gibraltar recognizes, as a matter of its own private international law, that the English court has the power to alter trusts governed by Gibraltarian law. On the contrary, Gibraltar has enacted "firewall" legislation intended to prevent such recognition. Section 4(5) of the Trusts (Private International Law) Act 2015 provides:

"Subject to section 7 below, notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a foreign court or decision of any other foreign tribunal (whether in an arbitration or otherwise) with respect to a Gibraltar trust shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that the foreign court or tribunal applied a foreign law or laws whose relevant provisions are substantively different to those which would be applicable by virtue of the choice of rules in this section. The burden of demonstrating that there is no such substantive difference shall lie on the party seeking recognition or enforcement of the foreign judgment or order."

21 Section 7 provides that primacy is given to the Hague Trusts Convention, any European legislation, and a provision of the Insolvency Act 2011. The only relevant European legislation is the Maintenance Regulation (Council Regulation (EC) No. 4/2009) but that only applies to maintenance awards, not to awards intended to give recognition to a division of property as an order under s.24(1)(c) is likely to be: *Agbaje* v. *Agbaje* (1) ([2010] UKSC 13, at para. 57).

22 Even were a decision of the English court to be described as maintenance, there would remain a question as to whether recognition of the order of the English court would be impermissible as being contrary to Gibraltarian public policy: see art. 24(a) of the Maintenance Regulation.

First, the Gibraltarian equivalent of s.24(1)(c) of the 1973 Act is more limited. Section 35(1) of the Matrimonial Causes Act 1962 provides:

> "On granting a decree of divorce . . . or at any time thereafter (whether, in the case of a decree of divorce . . . before or after the decree is made absolute), the court may make any one or more of the following orders—
>
> . . .
>
> (c) an order varying for the benefit of the children of the family any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage . . ."

There is no power to vary a nuptial settlement in favour of a wife.

23 Secondly, giving recognition to an English order would have the effect of depriving the beneficiaries of the ACT of their property. That would be an arguable breach of ss. 1(a) and 6 of the Constitution.

24 Thirdly, the 2015 Act itself may be an assertion of Gibraltarian public policy against recognizing decisions of foreign courts exercising exorbitant jurisdiction.

25 I do not need to determine these points. In giving directions to the Line Trust, it seems to me that I should apply the well-known *American Cyanamid* principles applicable to the grant of interlocutory injunctions (see *American Cyanamid Co.* v. *Ethicon Ltd.* (2)).

26 For completeness, I should add that there is likely to be an issue in the English court as to whether the ACT is in fact a nuptial settlement. When the settlement was originally made, Asif was unmarried and there appears to have been no contemplation of marriage to Nina. Accordingly, at that stage it was not an ante-nuptial settlement. Whether adding Nina as a beneficiary in 1999 can have the effect of "nuptializing" the ACT is the subject of divergent views at first instance in England: *c.f. Quan* v. *Bray* (10) ([2014] EWHC 3340 (Fam), at para. 60) and *Joy* v. *Joy-Morancho* (7) ([2015] EWHC 2507 (Fam), at para. 109). There may be an issue as to whether the religious marriage is valid as a matter of English or Gibraltarian law, but I have no evidence about that. (If it were not valid then there would be a question whether the 1999 settlement was in contemplation of the civil marriage in 2002.)

27 Similarly, there may be an issue as to whether, assuming the ACT did become nuptialized in 1999, it became de-nuptialized in 2012 when Asif and Nina were irrevocably removed as beneficiaries. The Court of Appeal accepted that this was possible in *C* v. *C (Ancillary Relief: Nuptial Settlement)* (3) ([2004] EWCA Civ 1030, at para. 44). I do not need to determine these issues.

28 Nina also attacks her removal as a beneficiary in 2012. She relies on s.37 of the 1973 Act (avoidance of actions intended to prevent or reduce financial relief). I have seen no evidence in support of this application. Moreover I have had no citation of authority as to whether s.37 applies to the actions of third parties, such as the Isle of Man trustees, when they removed Nina as a beneficiary.

Directions to the Line Trust

29 I turn then to the directions which I should give to the Line Trust. I find that there is an arguable case that this court will not recognize any order made under ss. 24(1)(c) or 37 by the English court. I therefore need to consider the balance of convenience, in accordance with *American Cyanamid* (2).

30 If the Line Trust enters an appearance in England and submits to the jurisdiction, there is a risk that it will face conflicting directions: this court directing it to ignore the English court's order, the English court treating the Line Trust (and its directors) as being in contempt. Further, it appears that if the Line Trust does not submit to the jurisdiction of the English court, the courts of the Isle of Man will not recognize an order of the English court giving directions to the three Manx companies owned by the ACT.

31 Against this, there is a risk that the English court will seek to take steps directly against the subsidiaries holding the properties in England. There was a historic bifurcation in the approach of the Chancery Division and the Family Division where family assets were held by companies, the latter being prepared to make property adjustment orders against third party companies on the basis of the reality of "ownership," whereas the former held to a strict line that the assets of a company were not the assets of the shareholders. In *Petrodel Resources Ltd.* v. *Prest* (9), the UK Supreme Court approved the Chancery approach.

32 Prior to *Prest*, the Family Division took a similar approach in applying s.24(1)(c): *Hope* v. *Krejci* (6). Whether that is now possible is doubtful in the light of *Prest*. However, Mostyn, J. in *DR* v. *GR* (4) (in a judgment handed down after the Court of Appeal decision in *Prest* but before the Supreme Court judgment upholding the Court of Appeal's majority decision) held that the Family Division approach should continue to apply in s.24(1)(c) cases. In that case, a Jersey trust held assets through a Liberian company. The judge held ([2013] EWHC 1196 (Fam), at para. 66(ii)) that the English court could charge the English assets of the settlement with the moneys payable to the wife.

33 If Mostyn, J.'s view of s.24(1)(c) is right then the English court may be able to make orders having direct effect against the English properties (or the subsidiaries holding them). If the Line Trust does not appear in the

English proceedings, it will be unable to argue against this result. However, Omar is represented in the proceedings (with indeed a very full legal team, including two Queen's Counsel) and, following the hearing before Moor, J. on April 7th, 2016, it is likely that Halima and Rahima will be represented by solicitors instructed by a litigation friend. Thus there is likely to be little advantage in the Line Trust appearing as well.

34 The balance of convenience in my judgment favours directing the Line Trust not to submit to the jurisdiction of the English court.

35 I turn then to the question of disclosure of documents. There has already been substantial disclosure of documents by Asif in the English proceedings. Clause 37 of the deed of January 23rd, 2013 prevents voluntary disclosure of documents by the Line Trust to the English court. I note that Nina's solicitors, DWFM Beckman, in their letter of May 23rd, 2016, assert that "the trustees continue to be obstructive whilst seeking to assert that they are being co-operative." I disagree: the Line Trust is behaving perfectly properly in honouring the terms of the ACT.

36 I have the power to override cl. 37 but I need to consider whether it is in the best interests of the ACT. Neither Nina nor Asif are beneficiaries under the ACT. The purpose of the disclosure is to assist Nina in making a claim against the assets of the ACT. I have noted the terms of para. 10 of the order of April 7th, 2016 but there is no explanation of why disclosure should be in the best interests of the ACT. I have to consider the interests not just of Omar (who consents) but also of the other potential beneficiaries. Taking an overall view, it is not in my judgment in the best interests of the ACT to grant voluntary disclosure to the English court. Accordingly I shall direct that the Line Trust should not disclose documents or answer any questions as to the ACT or its assets.

Conclusion

37 I shall therefore direct that the Line Trust should not submit to the jurisdiction of the English court and should not disclose documents or answer questions as to the ACT or its assets.

38 Nina should be given an opportunity, if so advised, to apply to vary these directions. I shall accordingly include a provision in my order giving her permission to apply within four weeks for an order to that effect. Any such application will need to be supported by evidence. The Line Trust should serve any evidence in reply within two weeks thereafter. I am willing to list the matter for hearing in August in view of the possible urgency.

Ruling accordingly.