Ogier succeeds for UK administrators in securing a multi-million pound fraud judgment against a trus

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In its judgment in *Cohen & Crooks as Joint Administrators of the Estate of James Donald Hanson & Anor v Arbitrage Research and Trading S.A. & Ors*, the Royal Court has made findings of fraud against the former trustee of a Jersey trust. The Royal Court has also revisited the test for determining whether a trust is a sham and also considered, for the first time, when it might be appropriate to exercise its statutory jurisdiction to save a trust which is wholly or partially unlawful.

Facts

Ogier represented the plaintiffs in a ten-day trial.

The case involved the estate of the late James Donald Hanson (the **Estate** and **Mr Hanson** respectively).

During his lifetime, Mr Hanson had been the second most senior figure globally within the accountancy firm Arthur Andersen. He died in England and Wales in October 2014, leaving a multi-million pound estate. The first plaintiffs are partners of BDO, Malcolm Cohen and Shane Crooks, Joint Administrators appointed by the High Court of England and Wales to administer the Estate after relations between Mr Hanson's appointed executors broke down. The second plaintiff is an English limited company wholly owned by the Estate, Creditforce Limited (**Creditforce**), which had been Mr Hanson's private investment vehicle during his lifetime.

The only defendant to defend the case was the Fourth Defendant (**Mr O'Leary**). Mr O'Leary had had a long career as an investment manager with various private banks, and had acted in that capacity for Mr Hanson and Creditforce. He was also a personal friend of Mr Hanson during his lifetime.

At the heart of the case was a purportedly charitable trust called the S.R. Charitable Trust established in Jersey in 2004 (the **Trust**). The plaintiffs' case in relation to the Trust was as follows:

1. It was settled by Mr Hanson using a series of nominees, who were connected to him personally
2. It was never really intended to be a charity, but rather a personal tax avoidance measure by Mr Hanson for his personal investments
3. It was in any event invalid as a charitable trust under Jersey law due to the definition of charity in its deed
4. It was a sham trust (i.e. never being intended, in reality, to operate to benefit charity, but rather Mr Hanson and/or Creditforce)
5. As a result, its assets were at all times held on bare trust for the Plaintiffs; and
6. It assets had been misappropriated by its last trustee, Mr O'Leary, who had transferred them to a private interest foundation in Panama in 2014

At the time of its settlement, the Trust had three trustees: Anchor Trust Company (a Jersey fiduciary services business, which was replaced as trustee by its principal, Mr Shelton, after it was refused a licence to carry on trust company business by the Jersey Financial Services Commission); Ms Joyce Bonney, an accountant and personal friend of Mr Hanson; and Mr O'Leary.

The Trust was purportedly settled by a Ms Susan Ruddick, a personal acquaintance of Mr Hanson. Its sole asset comprised shares in a Jersey company called Arbitrage Research and Trading Ltd (**ART**). ART was worth some £20m at the date of settlement, and a good deal of that value had originated with funding from Creditforce.

The deed establishing the Trust contained very broad charitable objects, which enabled its assets to be applied for purposes which were charitable according to the laws of any jurisdiction in the world.

Sham trusts

Previously decided cases in Jersey (citing English and Commonwealth authority) held that in order for a trust to be declared a sham, the following must be proven:

1. the settlor and trustee(s) intend for the assets of the trust to be held on terms other than those set out in the trust deed **or** that the trustee(s) went along with the settlor's intention without knowing or caring (the case-law refers to this as "reckless indifference"); and

2. that both the settlor and the trustee(s) intended to give a false impression of the position to third parties or to the Court

On the basis of extensive oral and documentary evidence at trial, the Royal Court concluded that:

1. Mr Hanson was the true settlor of the Trust (having used Ms Ruddick as a nominee to conceal his connection with the Trust), and further that:
   a. Mr Hanson regarded and treated the assets held within the Trust as his own
   b. Mr Hanson had established the Trust to shelter assets from UK taxation
2. Mr Hanson (as settlor) and Mr O'Leary (as lead trustee) never intended for the Trust to be a genuine charitable trust, and shared a common intention to mislead third parties, including HMRC; and
3. Mr Shelton and Ms Bonney were recklessly indifferent to Mr Hanson's intention that the assets of the Trust be held otherwise than on its terms

The Court went on to consider whether, as an additional requirement to their reckless indifference, Ms Bonney and Mr Shelton had shared a positive intention with Mr Hanson and Mr O'Leary to give a false impression to third parties. The plaintiffs argued that an utterly incurious trustee (one who is recklessly indifferent to the intention of the settlor) should be taken to have the settlor's intention to mislead third parties, relying on a number of English authorities as well as established Jersey authority on sham trusts, including *Re Esteem Settlement*.

Following detailed argument, the Court concluded that, despite judicial developments, the law of Jersey required that there be a positive intention to mislead third parties on the part of the settlor and each individual trustee, including where that trustee is recklessly indifferent as to the intention of the settlor that the assets of the trust be held otherwise that on its terms.

Having reviewed the evidence before it, the Court found that there was insufficient evidence for it to conclude that Mr Shelton and Ms Bonney intended to give a false impression to third parties or the Court, despite their reckless indifference to Mr Hanson's true intentions.

Invalidity of the Trust – the proper definition of "charitable purpose"

The Royal Court went on to consider whether the charitable objects of the Trust were so widely drafted that it was invalid as a matter of Jersey law. The result of such invalidity would be that the Trust's assets were held at all times on bare trust for its true economic settlor(s), Mr Hanson and/or Creditforce.

"Charitable purposes" was defined in the trust deed as: "any purpose which is charitable under either the law of Jersey or under the law of the jurisdiction where such purpose is being or is to be carried out". The plaintiffs argued that this wording rendered the trust invalid, because it expressly intended that the Trust's assets could be applied for purposes which might be charitable under the laws of a foreign jurisdiction, but not charitable under the laws of Jersey.

Given that matters affecting charities were being considered, the Royal Court convened the Attorney General to make submissions. The Attorney General agreed with the plaintiffs that the definition of charitable purpose did, on its face, render the Trust invalid. The Court came to the same conclusion.

The Attorney General went on to argue that, applying Article 11(3) of the Trusts (Jersey) Law 1984 (**TJL**), the Royal Court could and should save the Trust, being, he argued, one which had been created for two or more purposes, of which some are lawful and some of which are unlawful. The operative division in this case being those purposes which were valid Jersey charitable purposes, and those which were not.

This was the first time that the Court's powers under Article 11(3) TJL had been the subject of legal trial.

The Royal Court held that its power to save a trust was discretionary and that it would usually wish to exercise its discretion to save a trust:

1. where there was evidence of a genuine charitable intention at the time that the trust in question was settled; or
2. if evidence of a charitable intention at the outset was lacking, where there was evidence that the trust had been used to the benefit of charitable causes

Applying this approach, the Royal Court was "in no doubt" that it should refuse to exercise its discretion to "rescue" the Trust, given its findings on the evidence that the Trust had, in reality, been "a vehicle to conceal Mr Hanson's wealth from HMRC".

As a result, the Court held that the Trust's property had been held at all times for Mr Hanson and Creditforce.

Mr O'Leary's fraud

After extensive expert evidence on the laws of St Kitts and Nevis and Panama, and four days' cross-examination of Mr O'Leary, the Royal Court "unhesitatingly" found that Mr O'Leary had fraudulently misappropriated the Trust's assets.

Specifically, it found that during the course of 2013 and 2014, at a time when Mr Hanson's health

was in serious decline, Mr O'Leary, as sole remaining trustee, resolved to transfer the entirety of the assets of the Trust to vehicles first in St Kitts, and ultimately Panama, which he had established, via a host of questionable advisers, for the benefit of himself and his family.

In view of these findings, the Royal Court ordered Mr O'Leary to pay equitable compensation to the Estate and Creditforce. The plaintiffs were awarded the quantum of equitable compensation they sought: the value of the assets of the trust at the time of the fraud, plus compound interest at a rate which matched the average annual growth of the assets of the Trust from the date of its inception to the date of the fraud.

Discussion

The judgment raises a number of interesting points for practitioners and trustees alike.

Sham

Had Mr O'Leary been the sole trustee from the outset, the sham case would have prevailed. The Court also made clear that if reckless indifference was applicable both to the intention of the settlor and the intention to mislead third parties, it would have held that Ms Bonney and Mr Shelton had shared the requisite intention, and the Trust would have been a sham.

Cases of sham are legally and evidentially difficult, and rarely brought. The current state of the law, following this judgment, is that even a trustee who is recklessly indifferent to the intentions of the settlor must, independently, have a positive intention to mislead third parties. There is arguably a logical disconnection here: if it is the settlor's intention to mislead third parties by settling a trust whose operation will be different from its terms, then it is arguable that reckless indifference to that intention ought to suffice to make a trustee party to a sham.

The Royal Court appears to have left the door ajar in relation to this argument, which may raise its head again in future cases.

Discretion to save a trust

On the question of when the Royal Court might intervene to save a trust which is partly for lawful purposes and partly for unlawful purposes, the judgment is particularly useful as it is the first occasion on which the Royal Court has sought to lay down applicable principles.

As regards charitable trusts specifically, the main yardstick will be the intention of the settlor when the trust was settled. A genuine intention to benefit charity will be sufficient for the Royal Court to exercise its discretion to intervene and save the trust in whole or in part. If evidence of intention is lacking, then the Royal Court can look to how the trust has been operated since it was settled, and will strive to uphold a trust which has been operated to benefit charitable causes.

Equitable compensation

The Royal Court set out a very helpful statement of the principles governing the award and quantum of equitable compensation for breach of trust.

Specifically in relation to fraudulent breach of trust, the judgment adopts into Jersey law recent English authority that an award of compound interest is the standard order against a fraudulent trustee.

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