

Exclusive jurisdiction clauses: a startling proposition? *Crociani v Crociani* [2013] JRC 194A

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In this case the Royal Court of Jersey considered the effect of an exclusive jurisdiction clause in a deed changing the trustees of a trust. The Royal Court held that this did not have the effect of placing any restriction on the ability of beneficiaries to bring claims against former trustees for the recovery of trust assets, nor did it retrospectively change the law governing the actions of former trustees.

The facts

The origins of this case lie in the breakdown in relationship between the first plaintiff (**Cristiana**) and her mother, the first defendant (**Edoarda**). In particular, a dispute arose in relation to a trust established by Edoarda in 1987, known as "The Grand Trust". Broadly speaking the trust was divided into two funds, one for the benefit of Cristiana, and the other for the benefit of her sister. The trustees were empowered to pay income and capital to Cristiana and her sister during their lifetimes from their respective funds. However, the trustees also had more flexible powers such as the ability to transfer the whole or any part of the trust fund to another trust.

At the heart of the matter was a difference of opinion over the purpose of the trust. Cristiana and her co-plaintiffs (her two minor children, acting through their father as guardian *ad litem*) asserted that the trust had not been created with the purpose of providing any benefit to Edoarda. They also claimed that Edoarda, acting with the other defendants (the former and current trustees), had taken steps to cut her off financially from the substantial family wealth and to starve her of funds. The defendants for their part asserted that it had always been Edoarda's intention to be able to benefit from the assets, which she had settled into the trust, and that the trustees had at all times acted properly.

Originally the trust had been established under the laws of the Bahamas, but the proper law had been changed to Jersey prior to the actions in question. The plaintiffs therefore sought relief in Jersey to compensate them for their perceived loss from the trust. In particular, they sought:

- equitable compensation for a number of distributions made out of the trust which (they alleged) ultimately made their way to Edoarda;
- the setting aside of an appointment out of the trust to another trust called "The Fortunate Trust" over which Edoarda had a power of revocation (which she subsequently exercised in her favour) (the **2010 Appointment**);
- the setting aside of a deed whereby the then trustees (Edoarda and the second and third defendants) purported to retire in favour of the fourth defendant (a trust company based in Mauritius) and to change the proper law from Jersey to Mauritius (the **2012 Retirement**); and
- the setting aside of a further appointment out of the trust, this time by the fourth defendant, by which the property that was subject to the 2010 Appointment, to the extent that such appointment had been invalid, was appointed to a new trust called "The Agate Trust" (the **2012 Appointment**).

Before the substantive issues above could be heard, counsel for the defendants sought a stay of the proceedings on the grounds of *forum non conveniens*, which application is the subject matter of this briefing. Of particular importance to the defendants' application was "Clause Twelfth" of the original trust document (the **Exclusive Jurisdiction Clause**), which is worth setting out in full as follows but with emphasis in the salient places:

*"Notwithstanding any of the trusts, powers and provisions herein contained **the trustees shall have power at any time or times and from time to time before the Distribution Date and without infringing the rule against perpetuities at the absolute discretion of the trustees by any irrevocable deed or deeds to resign as trustees and to appoint a new trustee or new trustees outside the jurisdiction at that time applicable to the trusts hereunder as trustees hereof and to declare that the trusts hereof shall be read and take effect according to the laws of the country of the residence or incorporation of such new trustee or trustees and upon such appointment being made the then trustee or trustees shall immediately stand possessed of the Trust Fund upon trust for the new trustee or trustees as soon as possible so that the Trust Fund shall continue to be held upon the trusts hereof but subject to and governed by the law of the country of residence or incorporation of such new trustee or trustees and thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder (but so that nonetheless the then trustee or trustees or the new trustee or***

trustees may by deed declare that the trusts hereof shall continue to be read and take effect according to the laws of the said Commonwealth of The Bahamas as provided by Clause FIFTEENTH hereof) and Clause FIFTEENTH hereof shall take effect and be subject to the provisions hereinbefore declared by this Clause."

Essentially the defendants' argument was that the above clause meant that the matter would be better heard before a court in Mauritius.

The law

It was common ground between the parties that the Royal Court would, in its general approach to forum challenges, apply the same principles as stated in the House of Lords decision of Spiliada Maritime Corporation v Cansulex Limited [1987] 1 AC 460. These could be summarised for the present facts as follows:

- where the defendants have been properly served within the jurisdiction, as was the case here, the burden of proving that the proceedings in Jersey should be stayed was on the defendants;
- the defendants therefore had to show that Mauritius was a court of competent jurisdiction which was "*clearly or distinctly more appropriate*" than Jersey for the trial of the action;
- in considering whether Mauritius was the clearly more appropriate forum, the Royal Court would consider with which forum the issues in the action have the most real or substantial connection, including factors such as the relevant law which governs the issues, where the causes of action arose and the convenience of witnesses and the location of evidence; and
- if the defendants failed to show that Mauritius was clearly the more appropriate forum then a stay would ordinarily be refused, but if they succeeded then the burden would fall on the plaintiffs to show that justice nevertheless required that the proceedings continue in Jersey.

Ultimately the question was whether the case should be tried "*more suitably for the interests of all the parties and for the ends of justice*" in Jersey rather than Mauritius.

The judgment

Counsel for the defendants did not seek to argue that, absent the provisions of the Exclusive Jurisdiction Clause, Mauritius was clearly or distinctly a more appropriate forum than Jersey. Certainly the Royal Court had no difficulty in concluding that the plaintiffs' claims, absent such provisions, had their closest and most real connection with Jersey. This was because the impugned transactions (with the possible exception of the 2012 Appointment) all took place when the trust was administered in Jersey, by a Jersey-based professional trustee, when the trust was governed by Jersey law. Furthermore the 2010 Appointment and the 2012 Retirement were stated as being

subject to Jersey law and the defendants expressly submitted in those documents to the non-exclusive jurisdiction of the courts of Jersey.

On that basis, the Royal Court's view was that the defendants' application for a stay in favour of Mauritius was premised entirely upon the Exclusive Jurisdiction Clause. Therefore the first real task of the Royal Court was to consider whether, on its true construction, the Exclusive Jurisdiction Clause applied at all.

| The Exclusive Jurisdiction Clause

The Royal Court noted that there was no case that had considered the effect of a change in the proper law of a trust on the rights of its beneficiaries. However, quoting the Jersey Court of Appeal judgment in *Koonmen v Bender* [2002] JCA 218, it was "*a question of the court construing the document to derive from it the presumed intention of the parties*". As (unsurprisingly enough) Edoarda was not able to provide any guidance in relation to the intention behind the Exclusive Jurisdiction Clause and its effect on the rights of the beneficiaries, it was to the deed itself that the Royal Court had to have regard.

The defendants had submitted that the words "*and thereafter the rights of all persons... shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country*" were exceptionally broad in scope, with the said rights extending to past, present and accrued rights and any claims to enforce those rights. Therefore it would cover the rights of the plaintiffs as beneficiaries to bring the proceedings, which they said with effect from the 2012 Retirement were governed by Mauritius law and subject to the exclusive jurisdiction of the Mauritius courts. The defendants pointed to the use of the words "*thereafter the rights*" as opposed to "*the rights thereafter*" as supporting that interpretation.

The Royal Court did not find this proposition to its liking. There was no exclusive jurisdiction clause when the trust was established, nor was there any restriction on action being taken outside the Bahamas by a beneficiary to recover trust assets. It would seem odd to impute such an intention specifically to the Exclusive Jurisdiction Clause as a result. As the Royal Court noted:

"Can it have been the intention of the parties to the Grand Trust that on a change of the proper law to a new jurisdiction, the right of a beneficiary to bring such an action should be restricted to the courts of that new jurisdiction, thus preventing the beneficiaries from actioning that trustee in the jurisdiction of that trustee, where any judgment could be immediately enforced?"

As significantly perhaps can it have been the intention of the parties to the Grand Trust that on changing the governing law to a new jurisdiction, the law governing previous transactions and the rights of the beneficiaries (and presumably former trustees --"all persons") thereunder, would change to that of the new jurisdiction—a somewhat startling

proposition?"

The Royal Court therefore concluded that the rights of the plaintiffs and the defendants in relation to the impugned transactions, which the defendants accepted were governed by Jersey law at the time they were entered into, must be judged by Jersey law and not any other. It followed that the Exclusive Jurisdiction Clause was not intended to apply to such transactions:

"it cannot have been intended by the parties to the Grand Trust to place any restriction on where claims against former trustees for the recovery of trust assets could be brought or to purport to change the law governing the actions of former trustees and the rights of beneficiaries thereunder; if that is the case then the Exclusive Jurisdiction Clause has no application at all. The law governing the impugned transactions remains Jersey law and the Mauritius courts do not have exclusive jurisdiction.

... In our view the purpose of the Exclusive Jurisdiction Clause is to make it clear that where a foreign trustee is appointed and the proper law changed to the jurisdiction of that new trustee, then from that point onwards the domicile of the trust moves from the old to the new jurisdiction, which then becomes the forum for its administration."

The Royal Court acknowledged that the 2012 Appointment took place after the 2012 Retirement. The fourth defendant, being a Mauritius-based entity, could legitimately expect to be actioned in its own jurisdiction. However, the fourth defendant's role was relatively minor. The principal dispute was between the plaintiffs on the one hand and the first three defendants on the other. The fact that the fourth defendant was a party should not be allowed to dictate where the dispute as a whole should be tried: *"that would be allowing the tail to wag the dog and we decline to allow that"*.

The Royal Court's discretion

To the extent that its construction of the Exclusive Jurisdiction Clause was wrong, and it did apply to the plaintiff's claims, the Royal Court considered whether it should in any case exercise its discretion to override those provisions. It held that this would indeed be appropriate on various grounds, including the following:

- in the absence of the Exclusive Jurisdiction Clause, most of the principal claims of the defendants had their closest and most real connection with Jersey;
- the defendants' case as to the exclusive jurisdiction of the Mauritius court was based entirely upon the 2012 Retirement, but this was a document the validity of which was itself an issue in the substantive proceedings; and
- the 2012 Retirement was expressed to be governed by the law of Jersey and the parties submitted to its non-exclusive jurisdiction, therefore as the defendants had at that time

agreed that Jersey law governed any issue as to its validity they should be held to what they had agreed.

Comment

This is a welcome clarification on an area of law previously lacking judicial insight. As a general rule it cannot be right that the change of proper law that might accompany an appointment of trustees in a new jurisdiction should prejudice the rights of beneficiaries to bring actions against former trustees in the original jurisdiction. Nor should it be the case that actions of former trustees are no longer assessed under the law of the original jurisdiction.

Beneficiaries should find this certainty comforting, but so should trustees. To act in accordance with local trust laws is no easy task, but it would surely be worse if trustees were also expected to act in accordance with the laws of some as yet unknown future jurisdiction that may later become the proper law of their trust.

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