

14.8.09

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

3
4 CAUSE NO. 555 OF 2008
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6
7 BETWEEN:
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- 10 (1) HELMSMAN LIMITED
- 11 (2) THE HOTHAM TRUSTEE COMPANY
- 12 LIMITED

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14 Plaintiffs
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17 - and -
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20 THE BANK OF NEW YORK TRUST COMPANY
21 (CAYMAN) LIMITED
22

23
24 Defendant
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27 Appearances: Mr. Robert Ham Q.C. &
28 Mr. Carlos de Serpa Pimentel of
29 Appleby for the Plaintiffs/Respondents
30

31 Mr. Simon Taube Q.C. instructed by
32 Ms. Lindsay Luttermann of Walkers for the
33 Defendant/Applicant
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36 Before: Hon. Justice Henderson
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39 Heard: June 11, 2009
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RULING

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4 1. This application is for a stay of proceedings on the ground that the
5 action should be tried in England. I must consider whether a forum
6 clause in 2 trust deeds assigns exclusive jurisdiction to the courts of
7 that country and, if not, whether it is the most appropriate forum in
8 any event.

9 10 11 Facts

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13 2. The action is for damages for breach of trust in relation to three
14 settlements over which the Defendant, the Bank of New York Trust
15 Company (Cayman) Limited (“BNY Cayman”) was trustee: the
16 Beverley settlement, the Howden settlement, and the London
17 settlement. BNY Cayman was the sole trustee of the Beverley and
18 Howden settlements from June, 1999 until February, 2005 and
19 trustee of the London settlement from March, 2000 until
20 November, 2002. The First Plaintiff, Helmsman Limited, is a
21 Bermudian company and now the sole trustee of the Beverley and
22 Howden settlements. The Second Plaintiff, the Hotham Trustee
23 Company Limited, is an English company and now sole trustee of
24 the London settlement. The action is essentially a claim in
25 negligence arising from the alleged failure of BNY Cayman to

1 supervise adequately the investment of the trust funds by the
2 investment manager (BNY in New York) and by the investment
3 advisor (Mr. Howard Parker), who was resident in Florida at all
4 material times.

5
6 3. The settlor of all three trusts, Mr. Malcolm Healey, resides in
7 England. Mr. Parker had been his investment advisor for a
8 considerable period of time.

9
10 4. The relevant terms of the Beverley and Howden settlements are
11 substantially identical. In each case, the proper law of the
12 settlement is the law of England and Wales. Clause 3(2) of each
13 deed provides:

14 "The forum for the administration of this Settlement
15 shall (subject and without prejudice to any change
16 made under the power conferred by paragraph 5 of
17 the Second Schedule in the forum and administration
18 of this settlement) be the courts of England and
19 Wales."

20
21 Shortly after its own appointment, BNY Cayman appointed BNY
22 in New York as investment manager and custodian. Mr. Healey
23 appointed an English accountant, Mr. Grocott, as protector.

24 In 2001 Mr. Timothy Wheldon, a solicitor, was appointed as
25 protector.

1 Mr. Grocott in turn appointed Mr. Parker as the investment
2 advisor; in practice, it appears that Mr. Parker was the primary
3 source of investment advice.

4
5 5. The alleged investment losses (which exceed U.S. \$68 million
6 dollars for the Beverley and Howden settlements) are said to have
7 resulted from investments in “tech stocks at the time of the so
8 called dot com bubble” in the early years of this decade. The
9 plaintiffs claim that BNY Cayman adopted a “passive or inert
10 stance” and failed to monitor the activities of the investment
11 advisor and the investment manager. There is no allegation that
12 BNY Cayman’s employees or officers in the Cayman Islands were
13 themselves involved in the investment decisions.

14
15 6. The London settlement was on different terms. It is governed by
16 the law of the Cayman Islands and its forum of administration is
17 this Court. In practice, the process for deciding upon and
18 managing investments was similar to the regime described above.

19
20 Issues

21 7. There are two issues:
22

1 I. With respect to the Beverley and Howden settlements, do the
2 courts of England and Wales have exclusive jurisdiction? and

3
4 II. Is England the more appropriate forum for the trial of the
5 action?
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7 Issue 1: Exclusive Jurisdiction

8 8. BNY Cayman says that clause 3(2) of the Beverley and Howden
9 settlements (quoted above), construed properly, confers exclusive
10 jurisdiction on the English Court to adjudicate disputes between it
11 and the beneficiaries. Since Helmsman, the successor trustee, is
12 claiming on behalf of those beneficiaries it cannot stand in a better
13 position than the beneficiaries themselves. Since the proper law of
14 the settlements is English law, the English Court would, in the
15 absence of any jurisdiction clause at all, have had non-exclusive
16 jurisdiction as the forum for administration. If clause 3(2) was
17 intended by the settlor to confer only a non-exclusive jurisdiction
18 on the English Court, its presence would be otiose. Therefore, to
19 give effect to the clause, it must be viewed as intended to confer an
20 exclusive jurisdiction upon the English Court: see *Dicey, Morris &*
21 *Collins on the Conflict of Laws*, 14th edition, at paragraph 12 – 092.
22 This conclusion is reinforced by the use of the word “shall”, which
23 is usually but not invariably used to convey a mandatory direction.

24 In June 1999 (when the Beverley and Howden settlements came

1 into existence) the clause would have been understood in this way
2 because the English Court would accept jurisdiction even against a
3 foreign trustee where “the claim is brought to execute the trusts of
4 a written instrument being trusts that ought to be executed
5 according to English law and of which the person to be served with
6 the writ is a trustee ...”: *English Rules of the Supreme Court*,
7 Order 11, Rule 1(1) (j).

8
9 9. Clause 3(2) does not, on its face, confer jurisdiction on the English
10 Court over any and all claims related to the trusts; rather, it makes
11 that Court the “forum for the administration of” the settlements.
12 Can an action for breach of trust by negligent failure to supervise
13 investment decisions brought by the current trustees against a
14 former trustee be characterized accurately as a question of
15 administration of the trusts?

16
17 10. This is not a question which has received much judicial
18 consideration. I have been referred to two decisions – *Koonmen v.*
19 *Bender et al* [2007] WTLR 293 (Jersey Court of Appeal) and
20 *Green et al v. Gernigan et al* 2003 BCSC 1097 – in which the court
21 accepted, without analysis, that the phrase has application to any

1 dispute arising under a trust. There is much to be said, however,
2 for the following view of Professor Paul Matthews, expressed in
3 “*What is a Trust Jurisdiction Clause?*” [2003] JLR 232, that the
4 phrase in its ordinary meaning does not extend to contentious
5 breach of trust litigation:

6 “21. ...The ‘forum for administration’ of a trust is a quite
7 different concept from an exclusive jurisdiction for the
8 resolution of disputes (whether arising from trusts or
9 otherwise). The administration referred to here is not
10 intended to include contentious breach of trust litigation. On
11 the contrary, it is concerned with aspects of the
12 administration of the trust which, for one reason or another,
13 require the assistance of the court. These might well include
14 trustees seeking to clarify the true construction of the trust
15 terms (for example whether they might invest in such and
16 such an investment), or trustees seeking a direction as to
17 whether they might safely distribute assets when there are
18 contingent claims from third parties still in the air, whether
19 they should disclose trust documents or information to
20 beneficiaries, or whether they should take or defend legal
21 action against third parties (so called ‘Beddoe’ applications).
22 Indeed, it might even involve an application to remove a
23 trustee from office and appoint another. This is the
24 ‘domestic jurisdiction’ of the Chancery Court, which under
25 the old Rules of the Supreme Court 1965 in England was
26 represented by the provisions of Order 85. The predecessor
27 of that Order itself was introduced in order to avoid the need
28 in every case to have a full action to administer the trust – a
29 so-called ‘administration action’. This jurisdiction – usually,
30 but not invariably, invoked by the trustees – continues today
31 in England. A similar jurisdiction exists in Jersey and, for
32 that matter, in Guernsey.

33
34 22 Hence, the phrase ‘forum for administration’ referred
35 directly back to the nineteenth century (and earlier) idea of
36 the court which would take on the administration of the trust
37 if need be. The most usual forum for that, of course, was the

1 forum of the proper law. So strictly there was no need to
2 state the forum for administration. And it is doubtful that
3 selecting a different forum from that of the proper law could
4 require the trustees to seek directions only from the
5 nominated court. But such an administration action was in
6 effect procedural rather than substantive. It was a means of
7 dealing with matters of administration and construction. It
8 was not – could not be – used to deal with breach of trust
9 issues, characteristic of the kind of hostile trust litigation for
10 which an exclusive jurisdiction clause might be needed. So
11 there could not be any suggestion that this ‘forum for
12 administration’ was automatically intended also to be the
13 exclusive jurisdiction for the resolution of contentious
14 disputes involving beneficiaries. As the leading cases in
15 England show, that was an entirely different question,
16 resolved – in the days before the adoption of *forum non*
17 *conveniens* as a part of English law – by a straightforward
18 application of the ordinary rules of national jurisdiction. In
19 England and other common law countries this depended
20 initially on where the defendants were to be physically
21 found, and a similar rule was originally applied in Jersey.
22 Thus it mattered who the defendants were. They might or
23 might not have been the trustees, but the important point to
24 notice is that it is the plaintiffs who would have had to make
25 that decision, and they would probably not have been the
26 trustees. Accordingly, the use of the phrase ‘forum for
27 administration’ could not, with respect, support the
28 interpretation placed on clause 1 by the Court of Appeal.”
29

30 Order 85 Rule 1 of the English Rules of the Supreme Court defines
31 an “administration action” as an action “for the administration ...
32 under the direction of the court of a trust.” Rule 2 makes specific
33 reference to the types of relief available in an administration action
34 including: the resolution of “any question arising in ... the
35 execution of a trust”; the resolution of any question regarding the

1 composition of a class of beneficiaries; any question as to the rights
2 of an individual beneficiary; an order to a trustee to furnish and
3 verify accounts; an order requiring a trustee to pay money into
4 court; an order directing a trustee to do or abstain from doing a
5 particular act; and an order approving any sale or purchase by the
6 trust. Conspicuous by its absence from this list is any reference to
7 a claim for damages for breach of trust or negligence.

8
9 11. Rule 4 does say that “in an administration action ... the court may
10 ... grant any relief to which the plaintiff may be entitled by reason
11 of any breach of trust, willful default or other misconduct of the
12 Defendant ...”. Viewed in context, this provision confers an
13 entitlement to deal with breach of trust claims in the course of
14 providing the sort of relief described in Rule 2 and within the
15 framework of a properly constituted administration action and is
16 not an endorsement of the right to bring a free standing breach of
17 trust claim under Order 85. Rule 4 also states expressly that the
18 power to grant relief in relation to a breach of trust is without
19 prejudice to the court’s jurisdiction to order that the act be
20 reconstituted as a writ action. A breach of trust action like the

1 present one which raises potentially complex issues about
2 investment strategy would likely be converted into a writ action.

3
4 12. In the result, I find it unnecessary to decide whether the language
5 of clause 3(2) was intended by the settlor to dictate the forum for a
6 breach of trust action after the administration of the trust (by the
7 trustee Defendant) had come to an end. That is because the
8 plaintiff trustees, who have always had the power to change the
9 forum for the administration of the trusts “at any time or times”
10 (see paragraph 5 of the Second Schedule), have now elected to
11 change the forum for administration to the Cayman Islands. This
12 was done on November 25, 2008 just one day before the writ in the
13 present action was issued. Clearly, the intent of the change was to
14 pre-empt the very argument I am now considering.

15
16 13. BNY Cayman refers in its written argument to this act as a
17 “purported change” and says it cannot operate retrospectively so as
18 to clothe this Court with jurisdiction over the trusteeship of BNY
19 Cayman which ended over four years ago. No authority is cited for
20 this proposition. It seems to me to raise the same question, albeit
21 viewed from a different angle. If a breach of trust action against a

1 previous trustee by a current trustee is, indeed, one which must be
2 tried in the forum for administration of the trust, I see no reason
3 why a trustee currently charged with that administration should be
4 prevented from exercising the discretion it has been given to
5 change the forum for the resolution of such disputes. On the other
6 hand, if (as I suspect) Professor Matthews is correct and a breach
7 of trust action is not an aspect of the trust administration at all, then
8 the change of forum on the eve of this litigation has no effect for
9 present purposes. In either event, the result is the same: BNY
10 Cayman can obtain no assistance on this issue from the clause.

11
12 14. The plaintiff trustees do not argue that their recent selection of the
13 Cayman Islands as the forum for administration gives to this Court
14 exclusive jurisdiction over the present action.

15
16 15. For the reasons given above, I am satisfied that clause 3(2) cannot
17 now be viewed (even if it could have been so viewed in the past) as
18 assigning exclusive jurisdiction to the English Court. The result is
19 that there is no Court with exclusive jurisdiction over this dispute
20 and I must turn my attention to the question of which is the most
21 appropriate forum.

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Issue II: Is England the most appropriate forum?

16. BNY Cayman has been served with proceedings within the Cayman Islands and jurisdiction is therefore founded here as of right. The question, then, is whether BNY Cayman (which bears the burden of persuasion) has satisfied me that England is “clearly or distinctly” the more appropriate forum: *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] 1 AC 460 (HL) at page 477.

17. BNY Cayman has no presence at all in England. Its parent company is located in New York but neither party has suggested that New York is a more appropriate forum.

18. The plaintiffs and current trustees are located in Bermuda (the trustee of the Beverley and Howden settlements) and London (the trustee of the London settlement). The plaintiffs, however, consider that the Cayman Islands is the only appropriate forum.

19. The proper law of the trusts resulting from the Beverley and Howden settlements is the law of England and Wales; with respect

1 to the London settlement, the proper law is the law of the Cayman
2 Islands. BNY Cayman argues that this is a factor supporting its
3 contention that the most appropriate forum is the English Court. It
4 says that that court may take judicial notice of the legal principles
5 governing the Beverley and Howden trusts (which is true) and that
6 this court would have to receive expert evidence on the subject
7 from English solicitors (which I doubt). Foreign law is always a
8 question of fact and must be proved by evidence like any other
9 fact. However, the Cayman Islands is a British Overseas Territory,
10 English law was received here some considerable time ago, and in
11 most areas our law differs very little from that of England and
12 Wales. I doubt that a trial judge in the Cayman Islands would view
13 English law as “foreign law” and require that it be proved as a fact.
14 That has not been the practice here. With respect to the London
15 trust, the proper law of the trust is that of the Cayman Islands. If,
16 as BNY Cayman seems to suggest, the English Court cannot take
17 judicial notice of the law in a British Overseas Territory then
18 expert evidence on Cayman law would have to be tendered in any
19 proceeding in England.
20

1 20. A number of the witnesses are located in the United States.
2 Relevant documents are also to be found there. The settlor lives in
3 England but it is not clear that he has any relevant evidence to give.
4 The protector, Mr. Wheldon, is resident in England. Mr. Dally, a
5 director of BNY Cayman at the material time, is resident in the
6 Cayman Islands. On balance, it seems to me that the most
7 important witnesses and documents will be found in the United
8 States. The convenience of the witnesses is not a factor which
9 argues strongly for conducting the proceeding either in England or
10 in the Cayman Islands.

11
12 21. As I said above, the forum for administration of the Beverley and
13 Howden trusts was, during the entire time of BNY Cayman's
14 trusteeship, the Court in England. The London settlement, whose
15 forum for administration has always been the Grand Court of the
16 Cayman Islands, has suffered only about 10 percent of the total
17 investment loss. BNY Cayman has agreed to permit the dispute
18 concerning the London settlement to be tried in the English Court
19 together with that concerning the Beverley and Howden
20 settlements in order to avoid a multiplicity of actions. To an
21 extent, it would be natural and appropriate for the Court which was

1 charged with the administration of the trusts during the relevant
2 period to be the arbiter of a claim that the trusts were breached at
3 that time. The force of this argument is much diminished,
4 however, by the fact (as was conceded during argument) that no
5 question involving any of the trusts was ever referred to the
6 English Court while BNY Cayman was trustee.

7
8 22. BNY Cayman says that it wishes to claim contribution or
9 indemnity from Mr. Howard Parker under the *English Civil*
10 *Liability (Contribution) Act* of 1978. That would permit all of the
11 liability issues to be decided within a single proceeding. It seems
12 that such a course might not be open to BNY Cayman if the trial is
13 conducted in the Cayman Islands. Proceeding in that way in
14 England would only be of help to BNY Cayman if any resulting
15 judgment is enforceable in the State of Florida, where Mr. Parker
16 resides. I have expert evidence on the law of the State of Florida in
17 affidavit form before me from two attorneys who practice there. It
18 appears from this evidence that an English judgment against Mr.
19 Parker would not be enforceable in Florida unless he can be taken
20 to have submitted to the jurisdiction of the English Court. BNY
21 Cayman's expert asserts that he has done so by agreeing to serve as

1 investment advisor to the settlements at a time when the forum for
2 administration of two of the settlements was the English Court.
3 The general rule is that an agreement to submit to the jurisdiction
4 of a foreign court must be express and cannot be implied: *Dicey,*
5 *Morris & Collins on the Conflict of Laws* (14th edition), volume I,
6 paragraph 14 – 072. Nothing in the deeds of settlement amounts to
7 an express agreement to attorn to the jurisdiction of the English
8 Court. Clause 3(2) embodies an agreement by the trustees to
9 submit questions of administration to that court but it is not
10 suggested that Mr. Parker was entitled to participate in the process
11 directly. Any question involving investment strategy would have
12 had to have been submitted by Mr. Parker to the trustee which
13 would then, if it was so minded, have submitted the question to the
14 English Court for resolution. It is therefore questionable whether
15 an English judgment against Mr. Parker would be enforceable in
16 Florida and, consequently, questionable whether BNY Cayman
17 will derive any juridical advantage from the transfer of this action
18 to the English Court.

19
20 23. There is one way in which the law of England and the law of the
21 Cayman Islands differ in relation to choice of the most appropriate

1 forum: the question of public policy. In the Cayman Islands, the
2 Court may take public policy considerations into account when
3 deciding *forum non conveniens* issues: *Telesystem International*
4 *Wireless Incorporated et al v CVC/Opportunity Equity Partners et*
5 *al*, 1 August 2002, C.A.; *KTH Capital Management Ltd* [2004-05]
6 CILR 213 (Smellie, C.J.); *in Re Cairnwood Global Technology*
7 *Fund Ltd*, 17 May 2007 (Foster J); and *TCB Creditor Recoveries*
8 *Ltd v Arthur Andersen LLP*, 1 August 2007 (Levers J). BNY
9 Cayman was and is licensed to conduct business in the Cayman
10 Islands and is regulated by the Cayman Islands Monetary
11 Authority. There is a significant public policy concern to be
12 addressed when it is alleged that a Cayman Islands trust company
13 has committed a breach of trust by failing to carry out its fiduciary
14 obligations. The natural forum for the trial of such a claim is the
15 Grand Court of the Cayman Islands. It is appropriate in the general
16 case that breaches of trust said to have been committed here are
17 adjudicated upon by our courts. This is by no means an
18 overwhelming consideration; if there is a substantial reason to
19 favour a transfer of this action to the English Court, domestic
20 public policy would not prevent that. However, in a case such as
21 the present, where neither forum can clearly and obviously be said

1 to be the natural one, the public policy interest is sufficient to tip
2 the scales against the applicant.

3

4 24. I find that BNY Cayman has not discharged its obligation of
5 persuading me on the balance of probabilities that the English
6 Court is a more appropriate forum for the trial of this action. The
7 application is dismissed.

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9 Dated this 14th day of September, 2009

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Henderson, J.

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Henderson, J.
13 Judge of the Grand Court
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