

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2016-404-3115
[2017] NZHC 25**

BETWEEN

LOW HOCK PENG
GOH GAIK EWE
LOW MAY LIN
LOW TAEK SZEN
LOW TAEK JHO
Plaintiffs

AND

ROTHSCHILD TRUST (SCHWEIZ) AG
First Defendant

ELEPHANT SUN LIMITED
Second Defendant

STARS TOWER LIMITED
Third Defendant

BOLUO INVESTMENTS (US) LIMITED
Fourth Defendant

GLOBAL ONE REAL ESTATE
LIMITED
Fifth Defendant

INDIGO MANAGEMENT LIMITED
Sixth Defendant

Hearing: 20 January 2017

Appearances: N W Ingram QC and M T Kyriak for plaintiffs
D Bigio QC and Z C Ellwood for the defendants

Judgment: 20 January 2017

ORAL JUDGMENT OF TOOGOOD J

Introduction

[1] The High Court of New Zealand exercises a supervisory jurisdiction over New Zealand trusts. In particular, the exercise of trustees' powers is subject to the provisions of the Trustee Act 1956. Provisions related to the High Court's supervisory jurisdiction are contained in that Act and in the settled principles of equity developed from the exercise of the High Court's inherent jurisdiction relating the administration of trusts.

[2] This judgment addresses the relatively narrow issue of whether certain trustees of trusts named in the proceedings should be replaced by trustees nominated by the ultimate beneficiaries of the trusts and, if so, what if any ancillary or related orders should be made.

[3] I am aware of considerable news media interest in this case, generated by allegations made by the United States Government in proceedings instituted in the United States District Court for the Central District of California (CDCA). In those proceedings the US Government seeks forfeiture of certain assets held in trust for the benefit of the plaintiffs. If the assets are forfeited to the US Government, the beneficiaries stand to lose their interests in the assets which are said to be valued at approximately US \$265,000,000.

[4] I make it clear at the outset that the case in this Court does not concern the merits of the allegations made by the US Government in the California proceedings; it is not necessary for this Court to form any view about the merits of the Government's allegations. Nor is this Court required to form a view about any defences which may be made by the interested parties in those proceedings or their likely prospects of success.

[5] The plaintiffs seek an order from this Court replacing the current trustees who have control of the assets which are subject to the US forfeiture actions, with new trustees who will have standing to oppose the US Government's claims. This case is

concerned only with the conventional application of settled legal principles regarding the replacement of trustees. I will explain those principles in due course.

[6] The evidence before the Court is comprised principally in affidavits sworn by Mr Daniel Zaheer, an attorney practising in California whose firm has been retained by the plaintiffs, as the ultimate beneficiaries of the trusts that own or control the assets at issue in proceedings before the CDCA. No evidence has been filed by or on behalf of the defendants, who are the relevant trustees of the trusts, but the defendants have filed a statement of defence which summarises their position regarding the plaintiffs' allegations.

[7] The brief summary of the background facts which is set out in this judgment is taken from the uncontested affidavits filed by Mr Zaheer and other witnesses on behalf of the plaintiffs, and from the submissions of counsel. So far as I can see, there is no disagreement between the parties about the background. It appears also that although the defendants do not consent to the relief sought, they are not opposed in principle to being replaced by the trustees nominated by the beneficiaries. They seek certain protections in relation to costs they have incurred to date as trustees and which they may incur in giving effect to any order replacing them.

Background facts

The parties

[8] Low Hock Peng and Goh Gaik Ewe, the first-named plaintiff and second-named plaintiff, are the parents of the third-named, fourth-named and fifth-named plaintiffs Low May Lin, Low Taek Szen and Low Taek Jho. All plaintiffs support this proceeding. It is convenient to refer to them collectively as “the Low family”.

[9] The defendants are part of the Rothschild banking group which provides professional trustee services to certain trusts of which the members of the Low family are the ultimate beneficiaries. The first defendant, Rothschild Trust (Schweiz) AG (Rothschild Trust) is a company incorporated in Switzerland. Elephant Sun Limited, Stars Tower Limited and Indigo Management Limited are

companies incorporated in New Zealand. Boluo Investments (US) Limited and Global One Real Estate Limited are companies incorporated in the British Virgin Islands. Although the roles of the fourth and fifth defendants are different from those of the other defendants, the differences are immaterial.

The nature of the trusts

[10] The relief sought by the plaintiffs includes orders affecting the trusteeship of some 26 other trusts. As part of a complex trust and corporate structure, the trusts own various assets located in the United States, the United Kingdom, Singapore, France and Hong Kong.

[11] As succinctly summarised by Mr Bigio QC, counsel for the defendants, Mr Zaheer's comprehensive evidence establishes that the ownership structures adopt a similar form. A special purpose company owns a particular asset. The shares of that company are owned by a holding company. In turn, the shares of the holding company are owned by a trust, the beneficiary or beneficiaries of which are either the members of the Low family or another company. The shares of a beneficiary company are held by another trust of which the Low family members are the beneficiaries.

[12] I mention in passing that there are also, within the overall structure, Cayman Island trusts of which Virtue Trustees (Switzerland) is or has been the trustee, occupying a similar position in the structure to that occupied by the defendants. Evidence filed shortly before the hearing of this case establishes that the Grand Court of the Cayman Islands has made orders for the substitution of Virtue Trustees in a proceeding similar to the one before this Court.

California forfeiture actions

The nature of the proceedings and allegations

[13] On 20 July 2016, the US Government filed complaints in the CDCA seeking civil forfeiture of properties or rights forming the ultimate assets of the trusts

managed by the defendants. The assets which are the subject of those proceedings include:

- (a) A Bombardier Global 5000 jet aircraft;
- (b) The Viceroy L'Ermitage Hotel, Beverly Hills; and
- (c) Real estate located at Columbus Circle, New York; Greene Street, New York and Oriole Drive, Los Angeles.

I refer to these, as counsel have done, as “the forfeiture assets”.

[14] The US Government's complaints were filed on the ground that the forfeiture assets were derived from violations of United States law, including money laundering offences. It is contended that the assets are traceable to an international conspiracy, said by the Government to involve Mr Jho Low in particular, to launder money misappropriated from 1Malaysia Development Berhad (1MDB), a strategic investment and development company wholly owned by the Government of Malaysia. 1MDB aims to promote Malaysian economic development through global partnerships and foreign direct investment and to strengthen Malaysia's ties to important economic partners.

[15] It is said on behalf of the plaintiffs, however, that the Attorney-General of Malaysia has issued an official statement, responding to the US Government's allegations, saying that:

There has been no evidence from any investigation conducted by any law enforcement agencies in various jurisdictions which shows that money has been misappropriated from 1MDB.

[16] The proceedings in the CDCA comprise a civil forfeiture action, pursuant to that Court's *in rem* jurisdiction, to obtain title to the assets alleged to be the fruit of specified unlawful activities. The US Government has filed a verified complaint and informed those persons who might potentially claim an interest in the forfeiture assets. A claimant with a possessory or ownership interest in the asset and who

wishes to contest the civil forfeiture action must file a claim before the CDCA identifying the asset concerned, the claim and the claimant's interest in the asset.

[17] In the absence of a timely claim opposing the making of the forfeiture orders sought, all rights, title and interest to the assets may be forfeited to the US Government by way of a default judgment. I am informed that such a default judgment would generally prevent any person with an interest in the asset from contesting the Government's allegations on the merits or from recovering the properties the subject of the order.

[18] The forfeiture assets are not the only assets which the beneficiaries perceive to be under potential threat of similar forfeiture proceedings. Other trusts, of which members of the Low family are the ultimate beneficiaries, own real property in Singapore, Hong Kong and the United Kingdom.

The response to the allegations

[19] The beneficiaries took steps to challenge the forfeiture proceedings in California by filing claims, but the US Government has taken the position that only the direct owners of the forfeiture assets have the right to intervene in the forfeiture proceedings and defend against forfeiture by default. Although the plaintiffs have brought a number of actions in the courts to intervene and defend the Government's claims, their applications have been opposed and there is no judicial decision permitting any of the plaintiffs to oppose the orders sought.

[20] The defendants, as trustees of the trusts identified in the proceedings, have not taken any steps to defend the forfeiture proceedings. In particular, they have given no directions to any entity controlled by them and which directly owns any of the relevant assets to take steps to defend the forfeiture proceedings.

[21] As a consequence, the forfeiture proceedings remain undefended. In respect of three of the properties concerned, a clerk's default judgment has been entered. That is a first administrative step towards the entry of final default judgment which, if entered, would preclude any contest of the claimed forfeitures on the merits by the

relevant entities within the trust structures, unless the US court exercises its discretion to allow a late claim.

[22] If the forfeiture assets are forfeited to the US Government, the beneficiaries stand to lose their interests in assets which are said to be valued at approximately US \$265,000,000.

[23] The defendants apparently maintain concerns that any action they took as trustees to challenge the forfeiture proceeding might be viewed by the US Government as a money laundering transaction. The Government, it is said, has done nothing to disabuse them of that notion. In opposing the claims by the beneficiaries in the California proceedings, the Government has refused to confirm that the trustees would not be permitting a criminal offence by advancing claims in the forfeiture proceedings or causing potential claimants to do so. It is said also that the defendants are not prepared simply to resign as trustees because they have not received any assurance that the US Government would not consider such an action itself to be improper.

[24] It might be argued that merely resigning as a trustee having effective control over assets which are the subject of forfeiture proceedings based on allegations of improper dealing could not reasonably involve any complicity on the part of the trustees in unlawful activity related to the acquisition of the assets. I accept as established, however, that notwithstanding what others might consider to be an overly cautious approach, the defendants as trustees have refused to authorise the taking of any steps and currently have refused to resign.

[25] I am not required to reach a view on the merits of the trustees' position and do not express any.

The nature of the proceeding in this Court

The plaintiffs' application and proposals

[26] The plaintiffs' application before this Court involves not only a request that the current trustees be removed but also that certain new trustees be appointed in their place. The plaintiffs seek the substitution of a trustee company, FFP (Cayman) Limited (FFP Cayman) and a New Zealand private trust company, FFP Trustee (NZ) Limited (FFP NZ) as trustees in place of the various defendants. An order to that effect under s 51 of the Trustee Act 1956 could be made, it is submitted, because the current trustees are unwilling or unable to take steps to protect the assets. A replacement trustee willing to do so could cause the potential claimants (that is, the direct owners of the assets) to file claims in the forfeiture proceedings the effect of which would be to enable the proper determination on the merits by the CDCA of the arguments about whether the assets should be forfeited to the US Government.

[27] The evidence indicates that once a replacement trustee is appointed, a "waterfall effect" could result in the appointment of appropriate professional directors for each of the intermediary entities, giving the new trustees effective control of the proposed claimants who could then be directed to file claims in the forfeiture proceedings.

[28] The evidence is that proposed replacement trustee for the first defendant is licensed by the Cayman Island Monetary Authority under the Banks and Trust Companies Law (2013 Revision). Its principals are said to be insolvency practitioners and forensically qualified specialists who currently act as officers of the Grand Court of the Cayman Islands appointed to a number of high-value insolvent estates' contentious disputes, generally with significant cross-border elements. FFP Cayman, or members of its staff, frequently act as replacement directors, officers, trustees, general partners and liquidators to offshore and onshore entities which have encountered serious legal and/or regulatory difficulties. It is proposed that FFP NZ will be the replacement trustee for the second, third and sixth defendants.

[29] FFP Cayman and FFP NZ have confirmed their willingness to be substituted as trustees in place of the defendants and to appoint replacement directors and other officers or agents where necessary in the underlying structures that are registered or incorporated outside the United States, including for each of the potential claimants. They have provided this Court with undertakings that they would not take any steps to impair or undermine the *in rem* jurisdiction of the CDCA except as to the proper advancement of a claim in the forfeiture proceedings to an interest in the relevant assets.

[30] Although the assets of the other trusts are not subject to forfeiture proceedings it is submitted that in light of the replacement of the defendants it is expedient to replace the defendants as trustee of all of the trusts to which the plaintiffs are the ultimate beneficiaries.

The defendants' positions

[31] Although the defendants have filed a statement of defence in this proceeding, they do not oppose the orders sought by the plaintiffs and have indicated they will abide the Court's decision. They filed no evidence and do not intend to do so. There is no contest, therefore, to the evidence provided by Mr Zaheer and others on behalf of the plaintiffs and I accept it. The defendants do not consent to the orders sought but they have no objection in principle to their replacement as trustees and, so long as the plaintiffs satisfy their obligations to the current trustees, the defendants do not actively oppose the applications.

[32] The defendants, however, seek orders protecting their interest in the recovery of costs related to the administration of the trusts, these proceedings, and the implementation of any orders the Court might make. They seek orders for the retention of a lien over trust assets to protect their costs and expenses claimed. It is acknowledged on both sides that the common law and relevant statutory provisions provide the trustees with indemnities for all costs and expenses reasonably incurred in connection with the performance of their duties and the exercise of powers and discretions as trustees. It is agreed also that the general right of indemnity entitles a former trustee to an equitable lien over trust property. The trustees have been

concerned, however, that the trust assets in this case may not be available to satisfy the trusts' obligations to the trustees in that regard. They have sought orders requiring the plaintiffs to provide indemnities or security for costs out of assets other than those which are the subject of the forfeiture proceedings in the United States or which are potentially under threat of similar proceedings in the United States or elsewhere.

Jurisdiction of the High Court of New Zealand

[33] I am satisfied that New Zealand is the appropriate forum for the hearing and determination of the present proceeding on the grounds advanced by Mr Ingram QC in his submissions on behalf of the plaintiffs:

- (a) All of the relevant trust deeds state that their settlement is governed by the laws of New Zealand;
- (b) No objection has been made to the jurisdiction of the Court to hear and determine these proceedings pursuant to r 5.49 of the High Court Rules or otherwise; and
- (c) There is a real and substantial connection with New Zealand in so far as the proceedings seek the substitution of trustees of New Zealand foreign trusts.¹

[34] In seeking the orders for the replacement of the current trustees, the plaintiffs rely on s 51 of the Trustee Act which provides the Court the power to appoint new trustees. So far as is relevant, it reads:

51 Power of court to appoint new trustees

- (1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees, either in substitution for or

¹ See *Export Trade Corporation v Irie Blue New Zealand Limited* [2012] NZCA 675 at [39] applying *Spilianda Maritime Corp v Cansulex Limited* [1987] 1AC 460 (HL) at 476-484 per Lord Goff.

in addition to any existing trustee or trustees, or although there is no existing trustee.

...

- (3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

...

- (5) Every trustee appointed by the court shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

[35] The plaintiffs have standing to bring an application for such an order by reason of their having a beneficial interest in the properties which are subject to the trusts at issue in this proceeding.²

[36] All of the parties likely to be affected by the proceeding have been served.

[37] Mr Ingram QC also relies, to the extent that it is necessary to do so, on the inherent jurisdiction of the Court derived from the Court's general supervisory powers in equity relating to the supervision of trusts for the welfare of beneficiaries.³

The requirements of s 51 of the Trustee Act

[38] Looking at the first limb of s 51(1), relevant factors for consideration by the Court in exercising its discretion that it is expedient to replace trustees are the welfare of the beneficiaries⁴ and the security of trust property and satisfactory execution of the trusts.⁵ I accept Mr Ingram's submission that expediency is a lower threshold than necessity and imports considerations of suitability, practicality and

² Trustee Act 1956, s 67(1).

³ *Hunter v Hunter* [1938] NZLR 520 (CA), *Kain v Hutton* CA 246-01, 25 July 2002 at [18], *Green v Green* [2015] NZHC 1218 at [599] - [600].

⁴ *Hunter v Hunter*, above n 3, at 529- 530 per Myers CJ and at 552 per Callan J.

⁵ *Miller v Cameron* (1936) 54 CLR572 (HCA) at 580-581 per Dixon J.

efficiency. I also accept that misconduct, breach of trust, dishonesty or unfitness is not required to be established.⁶

[39] As to the second limb of s 51(1), whether it is inexpedient, difficult or impracticable to make an order substituting trustees without the assistance of the Court is dependent upon the particular facts and circumstances of the particular case.⁷ As I have said, it is arguable that the current trustees are taking an unduly cautious approach to the potential consequences for them of resigning as trustees and permitting the appointment of replacement trustees without the intervention of the Court. I am satisfied, however, that in this case it is neither necessary nor appropriate for the Court to question the trustees' decisions in that regard. Given the absence of any assurances from the US Government that the current trustees would not be implicated in allegations of improper dealings by directing a defence of the forfeiture proceedings, I am satisfied that the trustees' views are genuinely held.

[40] As I said at the outset, this case is not about the merits of the allegations made by the US Government in the California proceedings and it is not necessary for this Court to form any view about the merits of any defences which may be made by the interested parties in those proceedings or their likely prospects of success.

[41] It is sufficient that I am satisfied that assets located in the United States, valued in excess of US \$250,000,000, are likely to be forfeited to the US Government by default order of the CDCA unless parties properly authorised to do so, who have a sufficient interest in the assets, take the procedural steps available to them at law to oppose the making of the orders.

[42] It follows that I am satisfied that the replacement of the current trustees with trustees who are willing to ensure that proper legal steps are taken in the California proceedings is not only expedient but necessary to safeguard the trust assets in the meantime; to protect the interests of the beneficiaries and to ensure that the trusts are properly implemented so far as the law permits.

⁶ *Harsant v Menzies* [2012] NZHC 3390 at [55], *R v Leitch* [1998] 1 NZLR 420 (CA) at 428-429 (as to the meaning of 'expedient').

⁷ *Harsant v Menzies*, above n 6, at [57].

[43] Moreover, I am also satisfied that, given the attitude of the current trustees, there is no expedient or practicable way in which the proposed new trustees could be appointed without the assistance of the Court. The grounds under s 51(1) of the Act, therefore, are made out.

Undertakings

[44] The undertakings offered by the proposed new trustees are appropriate and necessary, in my view. The acceptance by the Court of such undertakings, solemnly given, has the same effect as an order of the Court. That ameliorates any risk that, intentionally or unintentionally, the US forfeiture proceedings might be frustrated by the appointment of replacement trustees. I accept that, as Mr Ingram QC put it crisply in his submissions, it is not the intention of the new trustees to frustrate the United States proceedings but simply "to enable a fair fight on the merits of (the) case and prevent the loss of assets worth hundreds of millions of US dollars by default."

[45] I am satisfied that the substantive orders sought in the amended statement of claim are appropriate.

Ancillary orders sought by the defendants

[46] The parties have agreed on the terms of any ancillary arrangements and no such orders or orders as to costs are necessary. Not all involved parties have signed the agreement at the time of delivery of this judgment, however.

Orders

[47] For the reasons given, I make orders in terms of the relief sought by the plaintiffs in paragraphs (a), (b) and (c) of the prayer for relief in the first amended statement of claim dated 20 January 2017.

[48] I reserve leave to any party, including any new trustee, to apply to the Court for further directions as to the implementation of the substantive order.

[49] The making of these orders is conditional upon the filing of a joint memorandum of counsel confirming that agreement has been reached about ancillary matters and that no orders are required. The orders are to lie in Court and are not to be sealed until that memorandum is filed.

Toogood J