

Gibraltar Supreme Court confirms that the supervisory jurisdiction to administer trusts cannot extend to forcing a director of a corporate director of a private trust company to undertake duties which as a matter of law fall upon the trustees.

Contentious Trusts and Private Wealth Disputes Partner Elliott Phillips and Associate Ligia Bob of Signature Litigation successfully acted for the Second and Fourth Defendants together with XXIV Old Buildings' David Brownbill QC.

This month the Supreme Court of Gibraltar handed down its judgment in the case of Lemberga-v- Serillo (PTC) Ltd & Ors [2020]. Whilst recognising the importance of the court's inherent jurisdiction to supervise and intervene in the administration of trusts, Gibraltar's Chief Justice, Anthony Dudley held that the supervisory jurisdiction cannot extend to forcing a director of a corporate director of a private trust company to undertake the duties which as a matter of law fall upon the trustee.

Background

The Claimant was a beneficiary of the Cerise Trust (the "Trust"), a Guernsey law trust. The First Defendant, Serillo (PTC) Limited ("Serillo"), a BVI company was the corporate trustee of the Trust. The Third Defendant, Canrif Limited ("Canrif") was the sole corporate director of Serillo. The Fourth Defendant, Fiman Limited ("Fiman") was a director of Canrif alongside the Claimant. Fidux Trust Company Limited ("Fidux"), a Gibraltar corporate service provider and was the parent company of the Fourth Defendant and Finom Limited.

The Claimant sought directions under the Court's supervisory jurisdiction over trusts, that Fidux and Fiman take certain steps in relation to the distribution of trust assets and terminate the Trust. The Claimant asserted that Fidux administered the trust structure since it was created in 2009 through its de facto control of the corporate director Canrif. The Second and Fourth Defendants agreed to assist and take certain steps under the comfort of an indemnity which the Claimant submitted that the Second and Fourth Defendants were not entitled to.

The matter came to a head and Fidux and Fiman sought to strike out the claim, *inter alia*, on the basis that there was no direct cause of action against Fidux or Fiman nor any duties owed by Fidux and Fiman to the Claimant; and that Fiman as co-director (together

with the Claimant) of Canrif (as corporate director of the PTC) owed no duty to the Claimant. Fidux and Fiman submitted that the Claimant was in complete control of the entire trust and corporate structure and she could, acting alone without the assistance of any other party or importantly the court, achieve the steps the Claimant sought in the claim.

The Judgment

Adopting the reasoning of the English Court of Appeal in Bath v Standard Land Co [1911] 1 Ch 618, Dudley CJ, held that there was "clear authority for the proposition that the directors of a corporate trustee owe no fiduciary duty to the beneficiaries of a trust." The Court also agreed with the decision in HR v JAPT [1997] Pensions LR 990 which confirmed that no direct fiduciary relationship between the directors of a trustee company and the beneficiaries of the trust exists. Further, Dudley CJ, also considered the decision in Gregson v HAE Trustees Ltd [2008] EWHC 1006 (Ch) in which the High Court of England and Wales discussed the viability of the "dog leg claim" citing the Privy Council decision in Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378. Dudley CJ applied the analysis of Robert Miles QC sitting as a Deputy Judge of the High Court who did not accept the submissions advanced in support for a "dog leg claim" on the basis that, *inter alia*, the decision in Tan was that the director could only be liable as an accessory to the trustee's breach if he was shown to be dishonest.

In granting the Fidux and Fiman's application for strike out Dudley CJ held:

"not only is the dog leg claim not advanced but in so far as Fiman is concerned, it is one step removed. Serillo is the one trust company and Canrif is its director. In the traditional analysis of a dog leg action the claim would lie against Canrif. Here it would have to be further extended to the director[s] of the director. In those circumstances, in my judgment, what is at best a tenuous proposition of law, would if it



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were to be relied upon, be an argument that would be bound to fail.”
The Claimant relied upon the Judgment in Kawaley CJ in the Supreme Court of Bermuda in Re X Trust [2018] SC (BDA) 56 Civ (12 July 2018) in which Kawaley CJ found that whilst the court had no jurisdiction to direct the removal of one or more of the directors, it could make findings indicating that it would be “desirable” for one or more of them to resign.

However, Dudley CJ held as follows:

“That the Court’s inherent jurisdiction to supervise and intervene in the administration of the trust affords it a very broad discretion cannot be doubted and indeed if the court were to signify that Fiman should resign, I would be surprised if as a regulated entity, it would not act accordingly. But the court’s supervisory jurisdiction cannot extend to forcing a director of the corporate director of a one trust company to undertake the duties which as a matter of law fall upon the trustee.... Moreover, there is no ignoring that the relief being sought relates to the administration of the Cerise Trust in circumstances in which the corporate structure allows Lemberga to seize control of the trust.”

In so far as the claim against Fidux is concerned, Dudley CJ held that:

“The difficulty with Lemberga’s case against Fidux is that its administration of the Cerise Trust is clearly referable to the Client Service Agreement, and particularly in the context of a trust / corporate structure which is evidently designed to afford Lemberga ultimate

control over the Cerise Trust and its assets, something much more than loose language in invoices and a letter to a bank to explain provenance of funds, would be required to properly advance the argument that Fidux had impliedly accepted to be trustee of the Cerise Trust.”

The practical implications of the Judgment

This is an important Gibraltar judgment regarding the court’s inherent jurisdiction to supervise and intervene in the administration of a trust. The Court held that this power cannot extend to forcing a director of the corporate director of a trust company to undertake the duties which as a matter of law fall upon the trustee.

Another important finding in the judgment, in relation to the corporate service providers in this industry, is that the administration of the Trust by Fidux, a corporate service provider, by virtue of a Client Service Agreement, does not mean that Fidux has impliedly accepted to be the trustee of the Trust.

The Court has granted the Claimant’s permission to appeal its decision to strike out the claim both against Fidux and Fiman. Watch this space.

Signature Litigation is a specialist firm handling major complex litigation, arbitration and regulatory investigation. Signature also specialise in private wealth and fiduciary disputes with a heavy emphasis on offshore contentious trusts and estates.



Partner Elliott Phillips, leads the firm’s practice in Gibraltar specialising in private wealth disputes, contentious trusts and estates, civil fraud and financial services and regulatory disputes. Elliott is a leading litigator and has lead on all complex and very high value trusts disputes in Gibraltar

in the last decade. 2019 published cases securing a victory in GibFibreSpeed v Gibraltar Regulatory Authority [2019] CivApp 7 before the Court of Appeal in a first of its kind challenge under the Communications Act 2009. Permission has been granted for the matter to proceed to the Privy Council in London. In 2019 Elliott was recognised as one the world’s leading private client lawyers and trust and estate litigators, comprising of those individuals who are most revered by the Private Client Global Elite community.

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Associate Solicitor Ligia Bob has particular expertise in matters relating to the protection of confidential information and other business interest both on behalf of employers and individuals and with disputes involving financial services and banking, professional negligence, shareholders

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