



In The Supreme Court of Bermuda

**CIVIL JURISDICTION
COMMERCIAL COURT
2018: No. 389**

IN THE MATTER OF THE P TRUSTS

Before: The Hon. Chief Justice Hargun

Appearances: Mr Jeffrey Elkinson and Ms Britt Smith of Conyers Dill & Pearman Limited for the Plaintiffs

Mr Keith Robinson and Mr Oliver MacKay of Carey Olsen Bermuda Limited for the First-Named Second Defendant, Third and Sixth Defendants (other than the Second-Named and Fifth-Named)

Ms Fozeia Rana-Fahy of MJM Limited for the First, Fourth and Eighth Defendants

Mr Matthew Watson of Cox Hallett Wilkinson Limited for the Seventh Defendant

Mr Mark Chudleigh and Ms Laura Williamson of Kennedys Chudleigh Ltd for the Second-Named Second Defendant, Second-Named Sixth Defendant, Fifth-Named Sixth Defendant and the Ninth Defendant

Date of Hearing: 1 September 2022

Date of Ruling: 30 September 2022

RULING

Category (2) Public Trustee v Cooper application seeking approval of the trustee's decision to implement a settlement agreement between the principal beneficiaries; whether the settlement agreement is liable to be rescinded; whether the rescission issue to be determined in a separate writ action

HARGUN CJ

Introduction

1. By Originating Summons dated 22 November 2018, the Plaintiffs seek an order approving the actions of the First Plaintiff, Company A, in its capacity as Trustee of three Settlements ("the Trustee") and the Second Plaintiff in his capacity as Protector of those Settlements established by -

- (1) The deed dated 27 December 2006 and made between PRP as Settlor (the "Settlor") and Company A as Trustee and known as the P Family Settlement (2006) ("**the Family Settlement**");
- (2) The deed dated 27 December 2006 between PRP as Settlor and Company A as Trustee and known as the JP Family Settlement ("**the JP Settlement**"); and
- (3) The deed dated 27 December 2006 between PRP as Settlor and Company A as Trustee and known as the JE Family Settlement ("**the JE Settlement**") (collectively referred to as the "**the Settlements**"),

which actions were to give effect to the agreement entered into between the primary beneficiaries of the Settlements (PDP, JP and JE) on 13 July 2018 ("**the Settlement Agreement**") such that the collective assets of the Settlements may be redistributed to the Settlements in accordance with the Settlement Agreement and the wishes of the respective adult beneficiaries.

2. The application made by the Trustee is in the nature of a *Public Trustee v Cooper* category (2) application. The Trustee contends that its decision to accept and implement the terms

of the Settlement Agreement is a momentous decision and, in the circumstances, it is appropriate that the Trustee should seek the sanction of the Court.

3. In the preamble, the Settlement Agreement records that:

(1) The Settlements primarily benefit the children and remoter issue of the Settlor, who died on 6 March 2014. The Settlor's descendants comprise three families ("**the Families**");

(a) his daughter JE ("**JE**") and her children and remoter issue ("**JE's Family**");

(b) his son PDP ("**PDP**") and his children and remoter issue ("**PDP's Family**"); and

(c) his son JP ("**JP**") and his children and remoter issue ("**JP's family**")

(2) The signatories to the Settlement Agreement ("**the Signatories**") are all the adult members of the Families. The signatories are (i) PDP, deceased, his daughter and his son; (ii) JP and his two sons; (iii) JE, her two sons and her daughter.

(3) The Signatories have reached an agreement between themselves as to how they would wish the assets of the Settlements to be disposed of, and then distributed, for the benefit of the Families, and how the assets should be managed pending distribution.

(4) The Signatories intend that the terms of the Settlement Agreement will form the basis on which the Trustee will be invited to exercise its powers to procure the distribution of the assets of the Settlements.

(5) It is proposed that the transactions described in the Settlement Agreement will be implemented in accordance with a detailed timetable to be agreed with the Trustee and approved by an order made by the Supreme Court of Bermuda.

4. In clause 20 of the Settlement Agreement, dealing with "*Future Steps*" the Signatories agreed that:
 - (1) The implementation of the proposals contained in the Settlement Agreement, if accepted by the Trustee, will require the approval of this Court.
 - (2) In any Court proceedings brought to secure the approval, the Signatories will support the implementation of the proposals described in the Settlement Agreement.
 - (3) To the extent that the implementation of the proposals contained in the Settlement Agreement requires the agreement of the Signatories to further documentation, they will negotiate in good faith to secure the necessary agreement.
5. In clause 21 of the Settlement Agreement, dealing with "*Order of transactions*", the Signatories acknowledged that the order of and timing of the appointment and transactions which they have agreed to request the Trustee to implement, will be a matter for agreement with the Trustee, in light of the need for Court approval, save and except that the II transaction as detailed in clauses 3 and 19 must be completed on or before 16 July 2018.
6. By clause 3 of the Settlement Agreement, the Signatories agreed that the Trustee will procure the sale of 477,666 shares of common stock in II owned by KIL (a company owned indirectly as to 4/7ths of its common stock by JE's Settlement and as to 3/7ths by JP's Settlement) to II for a cash consideration of US \$17,303,080.
7. By clause 19 of the Settlement Agreement, the Signatories agreed that, as part of the agreement as a whole, II shall purchase JP's personal holding of 319,667 shares in II for US \$17,369,533 in cash.
8. By Order dated 19 July 2022, the Court ordered that:
 - (1) Any Defendant who wishes to assert that the Settlement Agreement is legally

invalid shall inform the Court and the parties of their position by 4 p.m. on Tuesday, 16 August 2022.

(2) If any Defendant takes the position that the Settlement Agreement is legally invalid, the Court will hear further directions in relation to how that issue is to be dealt with and paragraph 3 of this Order [dealing with directions leading to the hearing of the Originating Summons] shall stand in abeyance.

9. Following the Order dated 19 July 2022, certain Signatories to the Settlement Agreement have advised the Court that it is their position that they consider the Settlement Agreement to be legally invalid because it is voidable: they were induced to enter into it by an implied representation (which was false) that no sale of II was in the offing. This Ruling deals with the issue whether it is necessary and/or desirable that the Court determines the validity of the assertion that the Settlement Agreement is invalid and if so, whether the determination should be made in these proceedings ("**the Trust Proceedings**") or whether it should be determined in a separate writ action in which the issues can be properly identified and pleaded, proper discovery can be provided in relation to those issues, and relevant witnesses can be examined by the parties in court.
10. The existence of the Settlement Agreement appears to be the foundation of the Trustee's application to this Court. The Settlement Agreement expressly contemplates that the Trustee will be making an application to this Court seeking the Court's approval to the implementation of the provisions of the Settlement Agreement. The Trustee's position, as set out in the letters from Conyers, its Bermuda attorneys, dated 17 August 2020 and 8 October 2020 to Cox Hallett Wilkinson, attorneys for the 7th Defendant, *guardian ad litem* to the named minor children, and to Kennedys, representing the Second-Named Second Defendant, the Second-Named Sixth Defendant, the Fifth-Named Sixth Defendant and the Ninth Defendant ("**Kennedys Beneficiaries**"), is that the Trustee has taken a considered decision to implement the Settlement Agreement with the support of the Court because the Trustee believes it is in the best interests of all the beneficiaries of the three Settlements as a whole. The Trustee asserts that it has approached the matter on the basis that if the persons who it recognises to be the three senior beneficiaries under the three Settlements were able (with the benefit of professional advice) to come to a negotiated settlement as to the

appropriate division and distribution of the trust funds, based on an agreed share price, and in the process achieve a resolution of the protracted dispute between them, then - absent good and sufficient reason to the contrary - the Trustee would seek to assist the senior beneficiaries by exercising the powers vested in it in order to take all steps necessary or expedient to effect the same.

11. In the letter from Conyers dated 8 October 2020 to Kennedys it is said that the Trustee is aware that there has been a subsequent sale of shares in II. The Trustee still believes, absent any information to the contrary, that the implementation of the Settlement Agreement with Court approval is in the best interests of the beneficiaries of the three Settlements as a whole.
12. The Trustee's current position is summarised in paragraph 177 of Mr Peter Pearman's Fifth affidavit dated 24 February 2022. Mr Pearman states that the Trustee is a neutral party and is not adverse to any of the Defendants. It still believes that it was, and is, in the best interests of the beneficiaries of the three Settlements that a resolution to the long-standing disputes was agreed, with the Settlement Agreement being that resolution. The Settlement Agreement made express provision that a *Public Trustee v Cooper* application be made. The Trustee is facing opposition to this application, but such a position appears to the Trustee to be in the face of the Settlement Agreement, reached after many years of bitter disagreement amongst the Family. Mr Pearman states that the three principal beneficiaries state that they support the approach taken by the Trustee.
13. In fact, the position of certain Signatories who are principal beneficiaries of the Settlements has changed over time. In her affidavit sworn on 9 January 2020, JE states in paragraph 7 under the heading "*My Position*":

"Having considered the matter and having taken Leading Counsel's advice, without in any way waving privilege over that advice, I can confirm that I support the trustee's application for implementation of the Settlement Agreement."
14. In his affidavit dated 15 January 2020, JP summarised his position in paragraph 5 using the identical language set out in paragraph 7 of JE's affidavit set out above.

15. JE and JP continued to take the position that they supported the Trustee's application for implementation of the Settlement Agreement until the letter from Carey Olsen dated 16 August 2022. In that letter, they now take the position the Settlement Agreement is legally invalid and advised the Court as follows:

"The [JP] and [JE] Adult Beneficiaries hereby inform the Honourable Court that they consider the Settlement Agreement to be legally invalid because it is voidable: they were induced to enter into it by an implied representation (which was false) that no sale of [II] was in the offing.

At the time they executed the Settlement Agreement, and on the dates that the affidavit of [JE] and the affidavit of [JP] was sworn in these proceedings ...the [JP] and [JE] Adult Beneficiaries were not aware of the fact that representation was false. They subsequently became aware of that following inter-alia a review of documentation disclosed to the parties by counsel for the PDP Family (MJM Limited).

*Whilst the Settlement Agreement is liable to be set aside, the [JP] and [JE] Adult Beneficiaries do not intend to make any rescission application. This is because our clients do not consider that the question of the legal validity of the Settlement Agreement is an issue that requires determination by the Honourable Court, either before the Trustee can pursue its Public Trustee v Cooper application (prior to the hearing, it was not suggested that might be the case) - or, indeed, at all. The Settlement Agreement is very limited in its scope - the only significant obligation imposed on the parties is to support the implementation of the proposals described in that agreement (clause 20.2). The Trustee and the Protector are not parties to it. Not being parties, they must simply decide, in exercising their own discretions, what weight to give to the views expressed in that Agreement by those who are parties to it. **It is self-evident that if, as has transpired to be the case, the views of at least some parties - the [JP] and [JE] Adult Beneficiaries - were induced by misrepresentation, those views should be entirely discounted...***

*On that basis, we consider that, notwithstanding the notification given in this letter, the parties can proceed to file evidence according to the timetable set out in paragraph 3 of the Order: **to the extent that the Settlement Agreement and misrepresentation in***

relation to it needs to be addressed, that can be included in evidence filed in response to the Trustees Originating Summons. The Trustee and Protector will have an opportunity to adduce responsive evidence and make legal submissions during the hearing. Our clients can see no reason to determine separately the validity of the Settlement Agreement, which would serve no useful purpose and can only create further delay..." (emphasis added).

16. Kennedys, on behalf of their clients, submit that the issue whether the Settlement Agreement is legally valid or invalid is a question of peripheral relevance within the context of these proceedings as the Trustee (and the Court) is not bound by the Settlement Agreement. In the letter dated 16 August 2022, Kennedys go on to state that whether the Settlement Agreement could be validly rescinded would depend on the assessment of the available evidence, including as to:

- (1) The information that was known to the parties to the Settlement Agreement as of 13 July 2018;
- (2) Any material information that was known to some- but not all- parties to the Settlement Agreement as at 13 July 2018;
- (3) Any representations that were made by a party or parties to the Settlement Agreement to the other parties prior to 13 July 2018;
- (4) Whether the party or parties asserting rescission relied on any representation and were induced to enter into the Settlement Agreement (at all or on particular terms that were agreed) by reason of such representations; and
- (5) Whether the party or parties asserting rescission would have entered into the Settlement Agreement (or would have entered into it on the particular terms that were agreed) *but for* any disclosure of material information by another party or parties.

17. Kennedys state that it is the position of the Kennedys Beneficiaries that there exists a *prima facie* basis for rescission of the Settlement Agreement which at least justifies further investigation. The letter concludes that the *prima facie* basis for rescission is supported by

the facts and matters set out in the letter from Kennedys to Conyers Dill and Pearman dated 25 March 2022.

18. In the Kennedys letter to Conyers dated 25 March 2022, they assert, on behalf of their clients, the following specific matters in support of their contention that the Trustee should not adopt the Settlement Agreement:

- (1) That the process leading to the execution of the Settlement Agreement and the sale of the KIL shares to II appears to have been tainted by serious conflict of interest and non-disclosure on the part of SLR, a senior solicitor, who was engaged jointly by PDP, JP and JE in relation to the settlement negotiations leading to the Settlement Agreement.

That the arrangement contemplated by the Settlement Agreement is contrary to the Letter of Wishes, including (amongst several other matters) the Settlor's *"overriding concern regarding the benefits that will ultimately go to [his]children through these Settlements ...or other commercial structures that exist"*, the Settlor's concern *"to ensure that the children and issue benefit as equally as possible given their different circumstances"* and the Settlor's wish that PDP and his issue *"should not benefit from [KIL]'s income from Family- Controlled Companies (including [Company G]where [KIL] is a shareholder even if those companies are sold and the income arises from the resulting cash proceeds."*

- (2) That PDP contrived to become controlling shareholder of II contrary to an undertaking he had given to the Settlor, which led the Settlor to redress the consequences of PDP's actions by establishing the Settlements and by stating his wishes as he did in the Letter of Wishes;
- (3) That PDP and TM acted in bad faith when negotiating the Settlement Agreement, misrepresented to the families of JE and JP their intentions for II and failed to disclose the highly material fact that II was going to be sold to a third-party purchaser, facts which render the Settlement Agreement liable to being rescinded;

- (4) That PDP's and TM's bad faith conduct, misrepresentation and material non-disclosures induced the families of JE and JP to enter into the Settlement Agreement and that, but for such conduct on the part of PDP, they would not have entered into the Settlement Agreement; and
- (5) That PDP sold II for a significant profit shortly after the share purchase from KIL and thus he and his family (including TM) have benefited financially, to a significant extent, from their failure to act in good faith and their misrepresentations and non-disclosures.

19. In relation to the issue of conflict of interest, Kennedys state that it appears that SLR was privy to an arrangement that prevented the Trustee (via KIL) acquiring knowledge of the pending sale of II (the terms of which, as a shareholder, KIL would have become aware) by ensuring that "*[PDP]'s portion of the [KIL] shares would actually be transferred to him so that he would not have to worry about dealing with [KIL] [i.e. the Trustee] in relation to voting them in favour of the [II] sale or delivering them to the [II] buyer*".
20. Kennedys contend that, contrary to Rules 6.4 and 6.5 of the English Solicitors Regulation Authority Code of Conduct, SLR had a clear and undisclosed conflict of interest in that it was in the interests of his client, PDP, to conceal the fact and details of the pending II sale from JP and JE (as it would have led to II, and by extension PDP, paying more for KIL shares) whereas it was in the interests of his other joint clients, JP and JE, to be informed of the pending II sale and its terms (such information would have assisted them in negotiating a higher price for their families through the sale of KIL's shares).
21. In their letter dated 25 March 2022, Kennedys conclude that on any view, it is clear that the Trustee - who is not bound by the Settlement Agreement - should not be implementing or defending the terms of an agreement that was arrived at in circumstances where material facts were misrepresented and/or not disclosed and where the solicitor engaged to mediate and implement a settlement appears to have been acting under a conflict of interest and to have failed to disclose material facts to JP and JE. Kennedys maintain that the Trustee should ignore the Settlement Agreement entirely.

22. The position advanced by Carey Olsen and Kennedys on behalf of their respective clients is rejected by MJM, acting on behalf of the First Defendant (ZP), the Fourth Defendants (SP and TM) and the Eighth Defendant (TM acting as *guardian ad litem* of ECM). In their letter dated 14 May 2019 to Conyers, MJM assert that the terms of the SPAs were negotiated at length with the benefit of extensive legal advice on all sides. The price was agreed on an arm's length basis in January 2018, on the basis of the so-called "JE Family proposal", which was advanced on 14 January 2018, and was not changed thereafter. It would appear, MJM assert, that any representations complained of by JP took place after the price was agreed. Following the agreement on price, there were extensive discussions about whether there should be a price adjustment mechanism. The very fact of those negotiations, MJM contend, shows that JP and JE were well aware of the possibility that II shares might be resold at a higher price in future. MJM contend that JP and JE wanted an upward only price adjustment mechanism and they were offered a standard upward and downward mechanism. However, JP and JE declined the upward and downward mechanism, apparently preferring the certainty of the fixed price rather than run the risk of a downward adjustment. They then executed the relevant SPAs, each of which had a standard form entire agreement clause which stated:

"...this Agreement contains the entire agreement among the Parties with respect to the transactions contemplated hereunder, and no representation, promise or agreement, oral or written, between any of the Parties and not incorporated herein shall be of any force or effect."

23. MJM assert that the SPAs contain no representations or warranties on the part of PDP (or anyone else) about any dealings with the II shares after the completion of the SPAs. In the circumstances, MJM contend, the outcome was that the arm's length deal for the sale of the II shares was struck (i) on the basis of the price proposed by JP and JE; (ii) which was at their request, fixed (even though a price adjustment mechanism was on offer) and; (iii) on the basis that the sellers (including JP and JE) acknowledged, in effect, that they could not rely on any representations not in the SPAs.

24. As stated earlier, the existence of the Settlement Agreement appears to be the foundation

for the Trustee's decision to make this application to this Court. The Settlement Agreement itself contemplates that the Trustee would be required to make the application to the Court. Mr Pearman's Fifth Affidavit confirms that the Trustee believes that it was, and is, in the best interests of all the beneficiaries of the Settlements that a resolution to the Families' long-standing dispute was agreed, with the Settlement Agreement being that resolution.

25. In the circumstances, in the Court's view, the legal validity of the Settlement Agreement is a relevant issue to the Court's consideration of whether it should approve the implementation of the terms of that same Settlement Agreement. It seems to the Court, the Trustee's decision to make this application and continue to pursue it, is premised on the assumption that the Settlement Agreement constitutes a binding resolution of the differences between the principal beneficiaries and that it is in the interests of all the beneficiaries of the Settlements that the Court should approve the implementation of its terms.
26. Both Carey Olsen and Kennedys urge the Court, on behalf of their clients, to ignore the Settlement Agreement on the basis that it is voidable on grounds of, *inter alia*, misrepresentation, non-disclosure, conflict of interest and bad faith. It seems to the Court that in the circumstances, the Court is required to deal with the assertion whether the Settlement Agreement is indeed voidable. The Court does not consider that it can properly not deal with the issue or take the view that the issue whether the Settlement Agreement is legally valid or invalid is a question of peripheral relevance within the context of these proceedings.
27. In concluding that the legal validity of the Settlement Agreement is *a* relevant factor in the Court's consideration of whether to approve the decision of the Trustee, the Court does not consider that it is the sole issue which the Court should take into account in consideration of the Trustee's application. The relevant Defendants are entitled to advance all the relevant arguments in support of their contention that, in the circumstances of this case, it is not appropriate for the Court to approve the decision of the Trustee.
28. The allegations in support of the claim that the Settlement Agreement is voidable are fact sensitive and serious in nature. They are allegations of deliberate wrongdoing and bad faith. In one instance, they involve allegations of professional misconduct on the part of SLR. In the Court's view, exercising its case management powers and discretion, these allegations cannot

properly be dealt with in these Trust Proceedings. It appears to the Court that if the claim for rescission of the Settlement Agreement is to be pursued by any of the Defendants, it must be properly pleaded so that the other parties can understand precisely what is alleged against them. The nature of the allegations made requires, in the Court's view, that there be proper discovery of documents in possession of the parties and that there be full opportunity to examine the witnesses who have been tendered to give evidence in relation to those allegations.

29. The Court notes that this approach accords with the suggestion made in correspondence by the Kennedys Beneficiaries. In the letter dated 17 February 2020 to Conyers, Kennedys assert that where there is a dispute of this nature, it would be expected that the parties' positions would be articulated in the pleadings or other documents that enable the parties to understand the nature of the issues between them. Kennedys go on to state that the parties would expect there to be disclosure of relevant documents before they are required to file witness evidence in the form of affidavits or witness statements. Kennedys conclude that the deficiencies in disclosure to their clients and the attempt to railroad the parties to an earlier hearing, lead them to the conclusion that these proceedings would be better suited to a writ action procedure with the provision for discovery and witness evidence that can be challenged through cross-examination. Kennedys reserved the right (after full consultation with their clients) to apply, pursuant to RSC Order 28, Rule 8, for an order that these proceedings be continued as if begun by writ.
30. In the circumstances, the Court directs that if the claim for rescission of the Settlement Agreement is to be pursued by any of the parties, it must be pursued in separate proceedings by way of a writ action. The Court will assist the parties by ensuring that such an action can be concluded on an expedited basis.
31. Accordingly, the Court directs the parties who contend that the Settlement Agreement is liable to be rescinded and wish to pursue that claim, must do so by a separate writ action dealing with that claim. In this regard the Court notes that any such challenge is not limited to the parties to the agreement (see *Hiram Edwards v The Minister of Finance* [2013] Bda LR 24 at 100) per Hellman J; and *Rolls-Royce pie v Unite the Union* [2010] 1 WLR 318 at [120] per Aikens LJ). Any such claim must be filed within six weeks of this Ruling.

Pending the determination of any such action, the present application by the Trustee is stayed with liberty to apply.

32. In the event that the relevant Defendants elect not to pursue the claim for rescission in separate proceedings within the next six weeks, the Court will proceed with the Trustee's present application but will do so on the basis that the Settlement Agreement is a valid and binding agreement in accordance with its terms. As stated earlier, any Defendant is entitled to make any other relevant submission to the Court bearing upon the issue whether the Court should approve the decision of the Trustee.

33. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 30th day of September 2022



NARINDER K HARGUN
CHIEF JUSTICE