The Republic of Trinidad and Tobago

In the High Court of Justice

Claim No: CV 2012 - 02649

BETWEEN

(1) ANGELA BHAWANIE
(2) MAGDALENE GUPPY
(3) PATRICIA FAROUK

Claimants

AND

CHRISTOPHER GUPPY

Defendant

Before the Honourable Mr Justice James C. Aboud

Dated: 20 January 2014

Representation:

- For the claimants: Mr A K Fitzpatrick SC leading Mr J Mootoo instructed by Byrne & Byrne
- For the defendant: Mr D Mendes SC leading Mr C Kangaloo instructed by Fitzwilliam, Stone, Furness-Smith, & Morgan

JUDGMENT

1. De Paul and Popolin Guppy ("De Paul" and "Popolin") each owned 25,000 shares in their company, Guppy's Service Centre Limited. This represented all the company's shareholding. They attended the offices of their Attorneys-at-Law on 19 March 1997 and signed two identical deeds of settlement. The deeds were prepared by an experienced commercial lawyer in the firm and made provision for their property, including the shares.

2. The claimants, who are the siblings of the defendant, claim that by the deeds of settlement De Paul and Popolin constituted themselves as trustees of the shares, and that, from the date of their execution, the shares were held by them in favour of the beneficiaries named in the deeds. The claimants are three of the named beneficiaries. The claimants say that the beneficial interest in the shares passed to the beneficiaries and that De Paul and Popolin were thereafter unable to dispose of the shares in any other manner than that set out in the deeds of settlement. Moreover, they say that if De Paul or Popolin (or their legal personal representatives) purported to deal with or distribute the shares otherwise than in accordance with the terms of the settlement the transferee would take the shares on a constructive trust in favour of the named beneficiaries.

The deeds of settlement

3. Both deeds of settlement named the third claimant (Patricia Farouk) as "the original trustee". De Paul's deed recited that he was the beneficial owner of 50% of the shares in the company and that he intended to transfer his shares, among other property, into the name of the original trustee to be held on the trusts declared in the deed. Popolin's deed of settlement was drafted in the same way.

4. The deeds contain identical recitals. They recite that De Paul and Popolin are the beneficial owners of the shares (it is not disputed that they were also the legal owners) and that they are the parents and grand-parents of certain named persons, among them, the claimants and the defendant. All their assets are said to form part of a trust fund. Two recitals follow thereafter:

(3) The settlor intends shortly to transfer the trust fund into the name of the original trustee to be held by the original trustee upon the trusts hereinafter declared.

(4) The settlor desires that the settlement made by this deed should be irrevocable and take effect immediately upon the execution of this deed

5. What follows below the recitals is the operative part of each deed. Basically a bundle of obligations is set out for the original trustee to comply with. Various instructions are given in relation to all the property comprised in the trust fund, including the shares. The operative part begins like this:

> "1. The original trustee should hold the trust fund upon trust to retain the same in their present state of investment and shall, with the consent of the settlor during his [or her] lifetime invest the same and any other monies from time to time requiring to be invested under the provision of this deed in the name of the original trustee in manner authorized by this deed…"

6. The settlors thereafter in their respective deeds, and in identical terms, lay out what percentile of their shares are to be held by the original trustee in trust for the individual beneficiaries. Certain powers are set out that define what the original trustee can do to realize the goals of the trust.

7. At clause 3 of both deeds, each settlor makes provision for who shall be the officers of the company in these words: "I declare that the officers of the company shall be as follows ..". The names of certain children are thereafter given alongside the offices that they are intended to occupy. The third claimant (the original trustee) is designated as the president.

The first claimant and the defendant are to be directors. The second claimant is to be the company secretary.

8. Clause 9(1) provides:

> "The settlor during his [or her] lifetime shall have the power to appoint a new trustee or trustees other than the settlor or the wife [or the husband] of the settlor in place of the original trustee."

9. The transfer of shares to the original trustee never took place. De Paul died intestate on `19 December 1999 and his shares were transferred to the legal personal representative of his estate as follows:

   (a) as to 8,333 shares to Popolin ("the additional shares").

   (b) as to 16,667 shares to his seven children (including the claimants and the defendant) equally. This amounted to 2,381 shares per child.

10. By a deed of appointment made on 24 October 2000 Popolin revoked the appointment of the third claimant as the original trustee and substituted the first and second claimants and the defendant.

11. On 8 April 2008 Popolin transferred her 25,000 shares and the additional shares to the defendant.

12. On 15 October 2011 Popolin died. In her will, she declared that her shareholdings had been transferred to the defendant during her lifetime for his own absolute use and benefit.

The Proceedings

13. The claimants' Fixed Date Claim form seeks a determination by the court whether, upon a true construction of the two deeds, the respective shares were held by the settlors upon the trusts declared in the two deeds. They further ask whether the defendant holds Poplin's shares and the additional shares upon the same trusts. The claimants seek an order directing the defendant to transfer 2,619 shares to each of the claimants. The defendant, by his defence has denied that the claimants are entitled to this relief and has counterclaimed for a declaration that neither of the settlors' shares were subject to or held by them upon the trusts referred to in both deeds.

Issue to be decided

14. The claimants are contending that De Paul and Popolin constituted themselves as trustees of their own property. It is not disputed that the trusts originally intended to be constituted by the two deeds failed because the shares were never transferred to the original trustee or the replacement trustees. Of course, De Paul and Popolin could not be compelled to transfer the shares to the trustees, as the beneficiaries are mere volunteers. The claimants are relying exclusively on recitals 3 and 4 as evidence of the settlors' intention to declare themselves as trustees of their respective shares. The issue is whether such an intention is manifest on a true construction of the deeds.

The Law

15. In order for property to be constituted as trust property the settlor must either validly transfer the property to the trustee, or, if it remains in his hands, declare himself as the trustee of the property (see *Underhill & Hayton,* Law of Trusts and Trustees, 18th ed. Art 7.1, p 107). If the settlor declares himself as the trustee of his own property, he must use clear words that indicate a change in the terms by which he holds his property. He must, in the words of Sir James Bacon VC in *Warriner v Rogers* (1873) LR 16 Eq 340, 348, "have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."

16. As long as the declaration of trust is valid a settlor may constitute himself as a trustee of his own property, depriving himself of its beneficial ownership. As Jessel MR said in *Richards v Delbridge* (1874) LR 18 EQ 11, "…he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." I interpret this as providing the court with authority to consider the context in which a declaration is made. However, a court must never read into a donor's actions or inactions anything more than what they might reflect about his express words, using their ordinary meaning. In my view, this encapsulates what Jessel MR referred to as "doing something equivalent to" an outright declaration.

17. In *Shah v Shah* [2010] EWCA Civ. 1408, the settlor addressed a letter to the intended beneficiary in these terms:

> "This letter is to confirm that out of my shareholding...in the above company I am as from today holding 4,000 shares...for you subject to you being responsible for all tax consequences and liabilities [arising] from this declaration and letter."

Lady Justice Arden asked the question "...did the words used convey an intention to give a beneficial interest there and then or an intention to hold that interest for [the beneficiary] until registration [of the shares]?" She held that the intention of the maker was ascertainable only by virtue of the express words in the context of all the relevant facts. She further gave great weight to the words "I am ... holding" and the fact that he called the document "a declaration" which signified a declaration of trust instead of a gift.

18. As the authors of *Underhill and Hayton* point out at Art. 9.15, p 212, a declaration of trust will be presumed to be irrevocable and the reservation of a power to revoke it during the life of the settlor will not make the trust testamentary. *Dicta* suggesting that the declaration must be a "present declaration" and also be "irrevocable" (see *Grant v Grant* (1965) 34 Bear 623 at 625, and *Re Cozens* [1931] 2 Ch 478 at 486) is questioned by the learned authors, who do not doubt that the word "irrevocable" in these *dicta* is meant "to indicate merely that the settlor must have made a final binding unequivocal decision to take upon himself forthwith the role of trustee rather than that the incorporation of a power of revocation prevents the constitution of any valid trust." In the case before me, the recitals to the deeds of settlement express the desire that the trusts should be irrevocable and take effect immediately. There is no power of revocation expressed in either of the deeds. It seems to

me that a statement that an intended trust is to be irrevocable does not, by itself, prove that a trust was created. A perfectly valid trust can be created even where the settlor reserves a right of revocation. In the same way, the absence of a right to revoke does not, by itself, prove the trust.

19. A trust document cannot be two things at the same time. In other words, if it is the settlor's intention to create a trust by constituting a person as a trustee, he can give effect to his intention by a valid declaration and the transfer of the property to the trustee. If it is that his intention is to declare himself as the trustee then his words will conform with and give effect to that intention. Neither of these two modes can co-exist with a document that on a true construction, is intended to take effect as a gift or an intended gift. As Jessel MR said in *Richards v Delbridge* "...for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise." A manifest intention to gift property to another or to transfer it upon trust for a purpose is incompatible with an intention that the settlor shall himself hold the property on trust (see *Milroy v Lord* (1862) 45 ER 1185).

20. There are cases that have held that a settlor has constituted himself as a trustee of his own property for the duration of the time before the property is actually transferred to the trustee or the intended donee. This has been described as an interim measure that is nonetheless binding on the settlor. Three cases were cited by and relied upon by the claimants: *Shah v*

Shah, to which I have already referred, *Re Ralli's Wills Trusts* [1964] Ch 288, and *T. Choithram International SA and Ors v Pagarani and Ors* [2001] 1 WLR 1

21. In *Shah,* Arden LJ cited with approval a passage taken from Maitland's Lectures on Equity (1909):

> "I have a son called Thomas. I write a letter to him saying 'I give you my Blackacre Estate, my leasehold house in the High Street, the sum of 1,000 [pounds] standing in my name, the wine in my cellar.' This is ineffectual – I have given nothing – a letter will not convey freehold or leasehold land, it will not transfer government stock, it will not pass the ownership in goods. Even if , instead of writing a letter, I had executed a deed of covenant – saying not I do convey Blackacre, I do assign the leasehold house and the wine, but I covenant to convey and assign – even this would not have been a perfect gift. It would be an imperfect gift, and being an imperfect gift the court will not regard it as a declaration of trust. I have made it quite clear that I do not intend to make myself a trustee, I meant to give. The two intentions are very different – the giver means to get rid of his rights, the man who is intending to make himself a trustee intends to retain his rights but come under an onerous obligation. The latter intention is far rarer than the former. Men often mean to give things to their kinsfolk, they do not often mean to constitute themselves trustees. An imperfect gift is no declaration of trust."

22. *Shah* involved an arrangement between brothers who had become subject to an adverse finding of a court as to their shareholding in a family company. Arden LJ was able to decipher an intention on the part of the writer to constitute himself as a trustee of his shares for one brother pending the execution of share transfer forms. She relied on the plain language of the letter, which I have referred to above. She also considered the observation of the Privy Council in *Choithram,* that it is open to a court to adopt a "benevolent

construction" to declare a trust, provided that such interpretation is permissible as a matter of construction. In the circumstances of *Shah,* unlike *Choithram,* a benevolent construction was not required, as the letter was held to be clearly intended as a declaration of trust.

23. In *Re Ralli's Wills Trusts*, the settlor, by her marriage settlement, covenanted to settle all her "existing and after-acquired property" on certain trusts (which failed) and ultimately on trust for the children of her sister. By one of the clauses she covenanted that if she became seized or possessed of any property of more than £500 she would "as soon as the circumstances will admit and to the satisfaction of the trustees" convey the property to them. Another clause stipulated that all property, including after-acquired property, was intended to be "subject in equity to the settlement hereby covenanted to be made thereof ..." Buckley LJ held that this operated as a declaration of trust and that, pending the transfer of the property the settlor would hold it on the trusts declared in the marriage settlement.

24. In *Choithram*, a fatally ill donor signed a trust deed setting up a foundation in which he was one of the trustees and then simply made an oral declaration of gift of all his wealth to the foundation. Included in his assets were shares in several companies. He told the companies' accountant that he was to transfer the deposit balances and the shares in the companies to the foundation. Some of the other trustees signed the trust deed that day and the others did so subsequently. Later, on the same day, the donor orally reported that he had established the foundation and that he had gifted his wealth to it. Resolutions were passed that the trustees were the holders of the shares gifted to the foundation by the donor. However, the shares were never transferred before he died. Lord Browne-Wilkinson, giving

the judgment of the Board held that although the donor's words appeared to be words of outright gift, in their context they were words of gift on trust of property to the trustees to be held on trust for the purposes stated in the foundation trust deed. The donor could not resile from his declaration of a trust in favour of a foundation of which he himself was one of the trustees. In the circumstances, the transfer of the shares to the trustees of the foundation after the donor's death was valid.

25. In coming to this finding Lord Browne-Wilkinson noted that a perfect gift could be made in one of two ways: (a) a transfer of the gifted asset to the donee, accompanied by the requisite intention; or (b) by the donor declaring himself to be a trustee of the gifted property for the donee. If, in case (a), the donor does not do everything necessary to transfer the asset the gift would be incomplete since a donee has no equity to perfect an imperfect gift (*Milroy v Lord).* The courts below had relied on the words used in the gift in *Choithram* ("I have given all my wealth to the foundation") to strike down the assertion that a trust was created.

26. Lord Brown-Wilkinson said this at p 11G:

> "Though it is understandable that the courts below should have reached this conclusion since the case does not fall squarely within either of the methods normally stated as being the only possible ways of making a gift, their Lordships do not agree with that conclusion. The facts of this case are novel and raise a new point. It is necessary to make an analysis of the rules of equity as to complete gifts. Although equity will not aid a volunteer, it will not strive officiously to defeat a gift. This case falls between the two common form situations mentioned above. Although the words used by [the donor] are those normally appropriate to an outright gift – "I give to X" – in the present context there is no breach of the principle in *Milroy v Lord* if the words of [the donor's] gift (i.e.

> to the foundation) are given their only possible meaning in this context. The foundation has no legal existence apart from the trust declared by the foundation trust deed. Therefore the words "I give to the foundation" can only mean "I give to the trustees of the foundation trust deed to be held by them on the trusts of the foundation trust deed." Although the words are apparently words of outright gift they are essentially words of gift on trust."

27. *Choithram* turned on a unique set of circumstances that included the fact that the gift was to a foundation of which the donor was also one of the trustees. Lord Brown-Wilkinson posited that there was no distinction in principle between the case where the donor declared himself to be sole trustee for a purpose and a case where he declares himself to be one of the trustees for that purpose:

> "In both cases, his conscience is affected and it would be unconscionable and contrary to the principles of equity to allow such a donor to resile from his gift. Say, in the present case, [the donor] had survived [his fatal illness] and tried to change his mind by denying the gift. In their Lordship's view it is impossible to believe that he could validly deny that he was a trustee for the purposes of the foundation in light of all the steps that he had taken to assert that position and to assert his trusteeship. In their Lordship judgment in the absence of special factors where one of out of a larger body of trustees has the trust property vested in him, he is bound by the trust and must give effect to it by transferring the trust property into the name of all the trustees."

Construction of the De Paul and Popolin deeds:

28. The trusts in the two deeds failed because the settlors did not in their lifetimes transfer the shares in the company to the original trustee, or the replacement trustees named in Popolin's deed of appointment. No reason has been advanced by any party why this is so. In fact, the circumstances that led to the execution of the deeds and the actions or inactions that

followed were mostly excluded from the evidence. Many contextual facts that might have shed light on the settlor's intentions in the deeds are excluded. The court must therefore construe the deeds solely on the plain meaning of the words used in the deeds, devoid of any contextual framework as in *Shah* and *Choithram*.

29. The gift having been imperfect, the question arises as to whether, by recitals (3) and (4), the settlors constituted themselves as trustees of the shares to hold them upon the trusts set out in deeds pending their transfer to the original trustee or any successor trustee. For convenience I will again set out the recitals:

> (3) The settlor intends shortly to transfer the trust fund into the name of the original trustee upon the trusts hereinafter declared.
>
> (4) The settlor desires that the settlement made by this deed should be irrevocable and take effect immediately upon the execution of this deed.

30. A first point to note is that there is no question of an outright gift. The operative parts of the deeds only set out the bundle of obligations that the original trustee has bound herself to fulfil. There is no declaration of trust there. In recital (3) the settlors do not say that they are giving the shares to the original trustee, only that they intend shortly to do so. A present or immediate gift is therefore removed from the equation. As to whether the statement of an intention to do something is the same as a declaration that it has been done, or will be done, I have many doubts. Many statements of intention to do something fall short of a covenant to do so. The fact that the time-frame for carrying out the intention is stated to be "shortly" and that it was never carried out by either settlor before their deaths (in De Paul's case for two years and in Popolin's case for 14 years) is noteworthy. This long passage of time suggests something about the self-imposed force or weight of the language used in

expressing the intention although, and I must be clear, events or non-events occurring after the deeds' execution are not part of the exercise in construing their intentions on the day that the deeds were executed. Recital (3) is a statement of an intention to do something shortly, and nothing more.

31. Recital (4) expresses the "desire" that the settlement made by the deed "should be irrevocable and take effect immediately" upon the execution of the deeds. A desire is something suggestive of a future wish rather than an existing state of affairs. What is said to be irrevocable is the settlement contained in the operative part of the deed, what Griffith CJ in *Davidson v Chirnside* (1908) 7 CLR 324 described as "the charter of future rights and obligations with respect to the property comprised [in the deed of settlement]." It is this charter of future rights and obligations, created in the deeds, that is irrevocable, and not any other charter governing present or existing rights in the shares. The expression of a desire that the charter of future rights "should" be irrevocable does not disclose anything material about present rights, namely, the interest they intended to have in their own property before it was transferred.

32. Irrevocability does not by itself raise a supposition of a trust any more than revocability disputes it; see *Harpur v Levy* [2007] VSCA 128, a case decided by the Supreme Court of Victoria Court of Appeal, for a discussion of this. The desire that the future charter should be irrevocable and that it should take effect immediately, does not readily lend itself to a finding that De Paul and Popolin intended to constitute themselves as trustees pending the transfer of the shares. The plain meaning of recital (4) is that the future charter would not be

revoked and that it would, in its irrevocable state, take effect upon execution of the deeds. The use of the words "immediately take effect" must refer to the charter of future rights and not to any charter of present rights in the shares, namely the interest that the settlors had in them. The expression of the charter's irrevocability or that it shall have immediate effect falls short of an intention to immediately alter the settlors' legal and equitable interest in the shares pending their transfer. There has been no parting with an interest in, or a change in the right to, the shares. The deeds do not, whether by the recitals or the operative parts, express the intention of the settlors to become trustees or to alter the manner, fiduciary or otherwise, in which they held their shares pending the intended transfer: *Richards v Delbridge.* The position would be otherwise if unequivocal words of gift were expressed, accompanied by suitable declarations of trust, such as were found in *Re Ralli's Wills Trusts*, *Choithram*, and *Shah*.

33. There is nothing by way of context or language to permit a more benevolent construction and the court is not striving officiously to defeat a gift. Unlike the facts in *Choithram*, where the events transpired on one day and without the attention to details that lawyers bring to a transaction, the deeds of settlement in this case were prepared by an experienced commercial lawyer. There is no evidence that they were hurried or even *ad hoc* documents. It would have been supremely easy for such a lawyer to have chosen different words and to expressly create the declarations that the claimants say were created; it would have put the matter beyond all doubt. Insofar as the wording of the recitals is circumspect or, as the Americans say, does not "go the whole nine yards", I can only assume that the lawyer was conforming to the instructions of his clients.

34. Finally, I take note, looking at the deeds as a whole, that clause 9 specifically provides that after the transfer the settlors are prohibited from being trustees of the settlement. It seems to me to be somewhat incongruous that I should interpret the two recitals as constituting an immediate declaration that they hold their shares on trust prior to the intended transfer, but that after the transfer the settlors are prohibited from being or becoming trustees. While it is true that the prohibition only arises after the transfer and not before, it nevertheless signals an express desire that they did not themselves wish to become trustees. If that is the position after the transfer, and it is expressed in plain language, would it not require something more than implication or inference for a contrary position to be advanced for their status prior to the transfer? In construing a document the court must look at its four corners to discover the intentions of the parties.

35. In my view the argument that De Paul and Popolin intended that, pending the transfer, they were to hold the shares on trust for the purposes set out in the deeds is not borne out by the words used in the deeds, according to their ordinary meanings. Accordingly, De Paul's legal personal representative lawfully distributed his estate to his beneficiaries, and Popolin's *inter vivos* transfer of the additional shares, and her own shares, to the defendant was valid

36. In the circumstances, the Fixed Date Claim Form is dismissed with costs and I make the following declarations:

    (a) The shares of De Paul and Popolin Guppy were not and are not subject to the trusts set out in the deeds of settlement made on 19 March 1997 and were not held by them as trustees.

(b) The defendant is the absolute owner of 35,714 ordinary shares in the company.

37. I will now hear Senior Counsel on the question of costs of the claim and the counterclaim.

James Christopher Aboud
Judge