Interim Executives (Guernsey) LTD & Others v. Positive Approach Services LTD & Others

David Fletcher, St John's Chambers

David Fletcher, of our Commercial Dispute Resolution Team, acted for the trustees of a Guernsey-based offshore pension scheme in this complex Chancery pension action. The scheme sought to recover pension assets wrongfully removed by a pension-holder.

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IMPORTANT RULING ON SEYCHELLES COMPANY LAW

The pension-holder had executed a Deed agreeing to invest his shareholding in PAS Ltd, a UK company valued at £1m, in a Guernsey pension scheme in order to gain the tax advantages of an offshore pension. The trustees of the scheme took action when they discovered that the shares had been improperly re-registered in the name of the pension-holder and members of his family.

The principal defence to the claim was that there had been mis-selling of the tax advantages of the scheme by marketing agents. This defence failed. In addition a series of technical legal defences were raised asserting that the Trustees, who were Seychelles companies, lacked legal capacity to carry out trust business under Seychelles law, and that the scheme was not properly regulated under Guernsey law. After considering expert evidence on foreign law, these defences failed. The court ordered reimbursement to the trustees of the cash equivalent of the pension assets (£1M).

In giving judgement Richard Spearman QC, sitting as Deputy Judge of the Chancery Division, gave a ruling on a disputed and troublesome issue of statutory interpretation of Seychelles company law, an issue on which there is as yet no ruling from the Seychelles courts, and a point of considerable importance to those carrying on international trust business through the vehicle of a Seychelles-registered International Business Company.

The circumstances which gave rise to this issue of Seychelles corporate law were that in 2011 1XG Ltd, the principal employer for the purposes of the IXG pension scheme, exercised powers to remove the trustees, a dispute having arisen with the Guernsey-based trustees then acting. For the sake of convenience IXG appointed as new trustees two limited companies registered in the Seychelles ("the Seychelles trustees"). The Seychelles trustees continued to act as trustees and, together with other parties were claimants in the Chancery case and sought, amongst other remedies, reimbursement to the pension-holder of the value of the shares which he had wrongly re-registered in his own name. In the course of the litigation the Defendants discovered that the Seychelles trust companies had a limitation in their Memoranda of Association which precluded them from carrying on "trust business". This was a standard limitation imposed on the registration of all International Business Companies ("IBCs") in accordance with s.5(1)(c) of the International Business Companies Act 1994 (the "IBCA 1994") and required to be inserted in all companies' memoranda by s.12 of that Act.

The Defendants relied on this limitation as a defence to the claim, their case being that it precluded the Seychelles companies from acting as trustees, and that representations ought to be implied from representations made to the pension holder that the trustees would have legal trust powers.

It was contended for the Claimants that there was a complete answer to this defence, namely that s.10(1) of the IBCA 1994, being based on similar provisions in the UK Companies Acts 1985 and 2006, abolished the "ultra vires" rule for the purpose of Seychelles law. The effect of this provision, it was argued, was that a limitation on the powers in a company's memorandum did not invalidate any act of the company in relation to a third party. The judge's view however

was that the abolition of the ultra vires rule did not completely answer the defence raised, so that it was necessary to determine, as a matter of Seychelles law, the proper meaning of the phrase "trust business".

The interpretation of the exclusion of "trust business" required a careful analysis of Seychelles legislation since 1994 in relation to international business and trusts. In 1994 the Seychelles emerged as a democracy, and the Seychelles Parliament passed a number of laws designed to promote the Seychelles as a provider of international business and financial services, and to cater for the offshore business sector. Notably, the Seychelles Parliament established the Seychelles International Business Association ("SIBA"), with the objects of monitoring, supervising and ensuring that international business activities are transacted in conformity with the laws of the Seychelles and in such a manner as to maintain the good repute of the Seychelles as a centre for international business activities.

In 1994 the Seychelles Parliament passed a raft of business legislation, in particular (a) the International Business Companies Act ("IBCA") which established the International Business Company ("IBC") as the corporate vehicle for all offshore business activities (b) the SIBAA, which as stated established SIBA as the regulatory authority (recently renamed the "FSA") (c) The International Trusts Act ("ITA") which introduced the concept of an "international trust" into Seychelles law for the first time. Since the Seychelles legal code was based on the Napoleonic Code Seychelles law prior to 1994 did not recognise the concept of a trust, and a precise definition of the split between legal and beneficial ownership was therefore given in the ITAA

The Claimants contended that having regard to the scheme of the 1994 legislation as a whole, the intention of the Seychelles Parliament in imposing an exclusion on "trust business" in the case of all IBAs, must have been to preclude IBAs from carrying on activities for which they would require a licence from SIBA, namely providing trust services for the formation, registration and administration of international trusts. This construction of s.5(1)(a) the Claimants contended was supported by the following propositions:

(1) A construction that meant that IBAs could not act as trustees of an international trust would be inconsistent with the provisions of the ITAA,

since that Act expressly provided that an international trust must have either a resident trustee or an IBC authorised by SIBA to act as trustee. Furthermore s.22(1) of the ITAA also expressly provided that international trusts could be administered by a corporate trustee. It followed that the construction of s.5(1)(c) contended for by the Defendants would be directly in the conflict with the provisions of the ITAA. As a matter of construction this legislation should be considered having regard to the legislative scheme overall and to the context of the legislation. (see **Sawyer v R** [2016] SCCA15 Seychelles Court of Appeal).

(2) Regard could properly be had to subsequent amending legislation in considering the proper construction of the 1994 Act. In 2009 the IBCAA was enacted, being an Act amending the IBCA. The reference to "trust business" was then replaced by a provision that IBCs should not engage in "international corporate services, international trustee services or foundation services". "International trustee services" means the business of setting up, administering and organising international trusts. Thus, following the 2009 amendment it became clear that the purpose of the "trust business" exclusion was simply to preclude IBAs when carrying on international trust business from providing trustee services for which a SIBA licence was required, and which were required to be provided by domestic Seychelles companies operating within the Seychelles jurisdiction. It was successfully argued that the 2009 amendment could properly be taken into account in construing the 1994 legislation on the basis that the purpose of that amendment was to clarify the existing law, not to amend it.

(3) The final point relied on by the Claimants was that there could be no discernible purpose in the Seychelles Parliament legislating in 1994 to preclude the newly created IBCs from carrying on international trust business as trustees. This would be counter to the entire purpose of the new legislative regime.

In the result therefore the Chancery court accepted the above legal arguments and ruled that Seychelles IBCs did have capacity to act as trustees of international trusts. This ruling has clarified a point of Seychelles corporate law on which the Seychelles courts have never ruled. It is a helpful ruling in terms of the importance of international business to the economy of the Seychelles.

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