IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT

CAUSE No. 555 of 2005
CONSOLIDATED WITH CAUSE No. 80 of 2007
CIVIL APPEAL No. 9 of 2009

BETWEEN:

TASARRUF MEDUATI SIGORTA FONU
Appellant/ Plaintiff

- and -

1. **MERRILL LYNCH (CAYMAN) LIMITED**
2. **KAFFEE LIMITED**
3. **BARLA FINANCE LIMITED**
4. **CUNUR CASH LIMITED**
5. **MEDRO LIMITED**
6. **YAHYA MURAT DEMIREL**

Respondents/ Defendants

BEFORE: **THE RT. HON. SIR JOHN CHADWICK, P.**
THE HON. MR. JUSTICE MOTTLEY, J.A.
THE HON. MR. JUSTICE VOS, J.A.

Appearances: Mr Stephen Moverley-Smith Q.C. instructed by Mr Christopher Russell of Ogier for the Plaintiff.

Mr. Colin McKie instructed by Ms Jane Clarkson of Maples & Calder for the 1st to 5th Defendants.

Mr Nigel Meeson QC, instructed by Mr Stephen Leontsinis of Conyers Dill & Pearman for the 6th Defendant, Mr Demirel.

Heard: 3rd & 4th September, 2009. Judgment given: 9th September, 2009

Vos J.A.

Judgment

Introduction

1. On 30th April 2008, the Plaintiff ("TMSF") obtained judgment in the Grand Court against the 6th Defendant ("Mr Demirel") for US$30 million together with interest and costs. In a separate judgment of this Court to be delivered immediately before this one, Mr Demirel's application for leave to appeal against that judgment was dismissed.

2. On 22nd August 2008, TMSF issued a summons seeking the appointment of receivers by way of equitable execution over Mr Demirel's power of revocation over two trusts called the "Dolphin Trust" and the "Mana Trust", both established by separate deeds dated 8th June 1999 (the "Trusts"). Mr Demirel is both the settlor and a beneficiary of the Trusts.

3. On 26th June 2009, Smellie CJ dismissed TMSF's application to appoint receivers over Mr Demirel's power of revocation of the Trusts, but appointed Mr Stuart Sybersma and Mr Michael Penner of Deloitte & Touche as joint receivers by way of equitable execution over any income or capital that might in the future be appointed to Mr Demirel from the Trusts. The Chief Justice further declared that if the power of revocation were to be exercised by Mr Demirel, the assets of the Trusts that would revert to him would immediately become subject to the receivership. He gave TMSF leave to appeal if it needed it.

4. TMSF now appeals against the Chief Justice's refusal to appoint the receivers by way of equitable execution over Mr Demirel's power of revocation.

The issues raised by the appeal

5. This appeal raises two issues:-

   (1) First and foremost, whether, as a matter of law, the court has jurisdiction to appoint receivers, at the behest of a single judgment creditor, by way of equitable execution over a power of revocation in a trust. The Chief Justice held that it did not.

   (2) Secondly, whether, if such jurisdiction exists, the court ought in the circumstances of this case to exercise its discretion to appoint receivers, at the behest of TMSF, over the powers of

revocation in the Trusts. Having held that the court had no such jurisdiction, the Chief Justice did not go on to consider how he might have exercised his discretion, had he had one. Mr Moverley-Smith Q.C., counsel for TMSF, invites us to exercise our discretion in favour of the appointment.

The terms of the Trusts

6. The Deeds of Trust establishing the Trusts are in almost identical form.

7. The original trustee is the first Defendant, then called Merrill Lynch Bank and Trust Company (Cayman) Limited.

8. They contain the following provisions:-

(1) Clause 2 provides that: "*The Trustees shall hold the Trust Fund upon the trusts and with and subject to the powers and provisions hereinafter contained in Schedules I to X inclusive hereto which shall be construed and have effect as an integral part hereof ...*"

(2) Paragraph 1 of Schedule I headed "*Dispositive Provisions*" provides that: "*Until the Perpetuity Date the Trustees shall stand possessed of the Trust Fund and the income thereof upon the following trusts, that is to say:*

(a) *Upon trust for all or any to the exclusion of the others or others of the Beneficiaries in such shares and in such manner and subject to such limitations and provisions as the Trustees in their absolute and uncontrolled discretion ... may appoint ...*".

(3) Paragraph 3 of Schedule I provides that: "*The Settlor shall have the power exercisable by deed from time to time:*

(a) To add any person or class of persons to the class of Beneficiaries contained in Schedule X;

(b) *To exclude any person or class of persons from the class of Beneficiaries contained in Schedule X ...*";

(4) Paragraph 1 of Schedule IX under the heading "*Additional Powers of Settlor*" provides: "*The Settlor shall have the power from time to time and at any time be deed delivered to the*

Trustees to appoint additional Trustee or Trustees ... and to remove any Trustee hereof ...".

(5) Paragraph 2 of Schedule IX provides for the power of revocation primarily in issue in this appeal as follows: "*This Trust may be revoked, amended, varied or altered in any manner whatsoever from time to time and at any time by the Settlor by deed and delivered to the Trustees provided always that no such revocation, amendment, variation or alteration shall take effect until actual receipt of such instrument by the Trustees or with the written consent of the Trustees thereto if such revocation, amendment, variation or alteration would increase or extend the obligations, liabilities or responsibilities of the Trustees*".

9. The Beneficiaries are defined in Schedule X as Yahya Murat Demirel (Mr Demirel), all children and remoter issue of the Settlor now living or born hereafter, and Ayse Nur Essenler, who is now Mr Demirel's wife.

The judgment of the Chief Justice

10. In a lengthy and incisive judgment, the Chief Justice held, in broad outline as follows:-

(1) The power to appoint a receiver by way of equitable execution is contained in section 37(1) of the English Supreme Court Act 1981, as applied in the Cayman Islands by section 11(1) of the Grand Court law (2008 Revision). The overall effect is that Grand Court "*may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so*".

(2) A judgment creditor normally obtains satisfaction by execution at common law. Where, however, a creditor could not levy execution at law because of the nature of the property, normally because the property was equitable, the court had a discretionary jurisdiction to appoint a receiver, not to create a charge on the property, but to operate as an injunction to prevent the judgment debtor receiving the income from the property or dealing with it to the prejudice of the judgment creditor (see Snell's Equity 31st edition at paragraph 17-25).

(3) In Masri v. Consolidated Contractors International Company SAL [2008] 2 Lloyd's Rep. 128, the English Court of Appeal gave detailed consideration to the jurisdiction to appoint a

receiver by way of equitable execution, and decided that the jurisdiction was not ossified, but permitted of gradual and incremental improvement so that there was: "*no reason why in 2008 the court should not exercise a power to appoint a receiver by way of equitable execution over future receipts from a defined asset. There is no longer a rule, if there ever was one, that an order can only be made in relation to property which is presently amenable to legal execution*".

(4) Masri was not, therefore, authority for the proposition that a receiver could be appointed over a power of revocation in a trust so as to bring about its revocation and the re-vesting of its assets in the settlor, where he has not himself indicated an intention to do so himself, although it is authority that the jurisdiction is not limited to choses in action that are available for legal execution.

(5) The English Court of Appeal in Ex parte Gilchrist. In re Armstrong [1886] 17 Q.B.D. 521 held that a general power of appointment was not property in the context of the Married Women's Property Act 1882, so that a bankrupt married woman's separate property did not include such a power, and she could not be compelled to exercise it in favour of her trustee in bankruptcy and so as to defeat the vested interest of her son as remainderman, in default of its exercise.

(6) Nothing in subsequent authority (which the Chief Justice analysed in some detail) could be regarded as conclusive authority for the proposition that, absent specific statutory definition (for example that contained in successive English Bankruptcy Acts and section 100 of the Bankruptcy Law (1997 Revision)), general powers (whether of appointment or revocation) are tantamount to property.

(7) Under the Bankruptcy Law (1997 Revision), sections 2, 37 and 100 provide that the 'property' of a bankrupt includes "*powers in or over or in respect of property*" for the purpose of dividing his estate amongst his creditors, but not at the stage of provisional bankruptcy.

(8) Likewise, section 22 of the Wills Law (2004 Revision) does not extend the testator's property to property over which he may have a general power of appointment, and Re Brace, Welch v. Colt [1891] 2 Ch 671 established that a general devise or bequest in a will does not normally operate as an exercise of a power in the testator to revoke existing trusts and appoint other trusts.

(9) Section 3(1) of the Interpretation law (1995 Revision) meant that 'property' included choses in action, but not 'powers', because otherwise the more specialised definitions, for example, in section 87 of the Companies Law (2007 Revision) would not have been necessary.

(10) Thus, in the light of the well-established common law rule that distinguishes powers from property, where the law intends to equate them, it has been necessary to create express statutory exceptions to the common law rule, and no such express exceptional reference to 'powers' appears in the definition of 'property' in section 2 of the Trusts Law (2007 Revision).

(11) A personal power of revocation, such as Mr Demirel's power of revocation under the Trusts, cannot, on the authority of Re Triffitt's Settlement [1958] Ch 852 at page 861, be delegated, yet TMSF propose that, because of the mechanism by which equitable execution operates, the court should order Mr Demirel to delegate his power of execution to the court. Such a delegation would be impermissible also under sections 50-57 of the Trusts Law (2007 Revision).

(12) The outcome is, therefore, the same whether the proposed exercise is regarded as an assumption by the court of the power of revocation, or as a mandate of Mr Demirel to delegate the power. Whichever way one approaches the proposed jurisdiction, it is unprecedented.

(13) A court of equity must be astute to recognise the boundaries of its own jurisdiction (paragraphs 178-180 of Masri).

(14) Construing a power of revocation of a trust so as to treat it as property of the holder tantamount to ownership of the trust assets for the purpose of allowing equitable execution would not involve the kind of incremental refinement and improvement of the jurisdiction contemplated by Masri, but would involve setting aside the settled common law principles which have distinguished powers from the property they affect, for hundreds of years (see Lord Eldon's judgment in Thorpe v. Goodall (1811) 17 Ves. 388, 460; 1 Rose 40).

(15) In these circumstances, the proposed extension of the jurisdiction must be recognised for the far-reaching implications of policy that it carries. Such an extension would strike at the very heart of the trust concept, and should only be effected by legislation.

(16) Accordingly, the equitable execution jurisdiction does not permit the appointment of receivers over Mr Demirel's powers of revocation in the circumstances of this case.

TMSF's contentions and the application for an adjournment

11. In the course of Mr Moverley-Smith's submissions, it emerged that it was TMSF's contention that Mr Demirel had in fact been made bankrupt in Turkey at the behest of TMSF, and that a trustee in bankruptcy (or the equivalent provided for in Turkish law) had been appointed over his estate. Mr Nigel Meeson Q.C., for Mr Demirel, said there was no evidence of such a bankruptcy, and that he had no instructions on the point. Nonetheless, when concern was expressed in argument by the court, Mr Moverley-Smith offered, on TMSF's behalf, an undertaking that, if receivers were appointed over Mr Demirel's powers of revocation, any assets thereby recovered would be provided to Mr Demirel's trustee in bankruptcy, so that they would fall into his estate for the benefit of all his creditors, not just for the judgment creditor (the 'Undertaking').

12. The offer of the Undertaking prompted the court to ask why, if TMSF had made Mr Demirel bankrupt in Turkey, and if the powers of revocation formed part Mr Demirel's estate under Turkish law, no request for assistance had been made by Mr Demirel's trustee in bankruptcy to the Grand Court asking it to help with the collection of the assets located in Cayman forming part of that estate.

13. Mr Moverley-Smith was not able to give a complete response to this enquiry. Instead, he applied to adjourn the appeal, so that TMSF could consider whether to procure the trustee in bankruptcy to make such an application. He made clear, however, that he did not wish to abandon his appeal, but rather he wanted to preserve it in case it turned out that the trustee in bankruptcy's suggested application could not be made or was unsuccessful. Mr Moverley-Smith's application had the added attraction that it would have enabled this Court, if it allowed the jurisdiction appeal, to know more about the bankruptcy, at the time it came to decide, as a matter of discretion, whether to allow equitable execution over the powers of revocation.

14. Mr Meeson opposed the application for an adjournment of the appeal on the ground that finality was required, and that the jurisdictional question raised by this appeal had to be decided sooner or later, and there was no reason for further costs to be incurred by delaying that decision, just to give TMSF the opportunity, in effect, to add a second string to its bow. He pointed out that the need for an adjournment could be considered again if the appeal on jurisdiction was allowed.

15. In the event, this Court refused the application for an adjournment. The parties were prepared to argue the appeal, and it seemed to us that it would be a significant waste of costs to adjourn for an unspecified period to see whether the trustee in bankruptcy could, at this late stage, get his tackle in order to make an entirely separate application to the Grand Court.

16. On the substantive appeal, therefore, Mr Moverley-Smith submitted that the Chief Justice's reasoning could be faulted in the following primary respects:-

(1) A power of revocation should properly be distinguished from a general power of appointment, because the donee of a general power must exercise a discretion if he is to appoint to himself, whereas the donee of a power of revocation has no discretion to exercise; he either exercises the power resulting in the property re-vesting in himself, or he does not.

(2) A power of revocation is a chose in action, akin to a contractual option, which is capable of being enforced by legal action and assigned. In those circumstances, it must be regarded either as property or as tantamount to property, over which equitable execution should be allowed.

(3) The definition of 'property' in section 2 of the Trusts Law (2007 Revision) is sufficient to include a power of revocation. Moreover, the other extended statutory definitions of property (for example in the Bankruptcy Law) were so drafted as to show that a power of revocation was in fact already regarded as 'property'.

(4) A power of revocation can be delegated.

(5) A proper reading of Masri makes it clear that the jurisdiction to order equitable execution can and should be extended incrementally to include powers of revocation.

(6) The Chief Justice had been wrong in paragraph 88 of his judgment to say that, if equitable execution were allowed here, it would mean that such execution could be allowed where there was a settlement for an incapacitated child with a power of revocation only ever intended to be exercised if the child died, because in such a case, the court's discretion could be expected to be exercised so as to refuse execution.

17. At the outset of his submissions, Mr Moverley-Smith had submitted that any common sense analysis would result in TMSF being able to enforce against the property in the Trusts. What stands in the way, he

submitted, was the power or revocation. It is convenient to deal with this submission last.

The proper construction of the powers of revocation

18. Though the parties did not address any detailed argument to the point, it seems to us that the first question we need to decide is as to the nature of the power of revocation in this case. In particular, we need to determine whether the power of revocation is entirely unfettered as TMSF submits.

19. The first part of paragraph 2 of Schedule IX provides for the power of revocation in the following terms: "*This Trust may be revoked, amended, varied or altered in any manner whatsoever from time to time and at any time by the Settlor by deed and delivered to the Trustees*".

20. There is then a proviso as follows: "*provided always that no such revocation, amendment, variation or alteration shall take effect until actual receipt of such instrument by the Trustees*". If the provision stopped there, its meaning would be clear. But it does not. The following words are added at the end: "*or with the written consent of the Trustees thereto if such revocation, amendment, variation or alteration would increase or extend the obligations, liabilities or responsibilities of the Trustees*".

21. The first use of the word "*or*" confuses the meaning, because it is not preceded by the word "*either*" within (or even outside) the proviso, and it does not seem to bear a truly disjunctive meaning. Indeed, the two apparently separate provisos either side of the word 'or' would make far more sense if they were joined conjunctively so that "or" were read as "and". In addition, the words "*with the written consent of the trustees*" might seem more easily comprehensible if they read "*without the written consent of the trustees*" (emphasis added).

22. Doing the best we can, it seems to us that, to make sense of the proviso and the power, one needs to read it as if it said: "*provided always that no such revocation, amendment, variation or alteration shall take effect until [(i)] actual receipt of such instrument by the Trustees [and] [(ii)] with[out] the written consent of the Trustees thereto if such revocation, amendment, variation or alteration would increase or extend the obligations, liabilities or responsibilities of the Trustees*".

23. We cannot see any other sensible meaning for the proviso, except that it is imposing two separate conditions:

(1) First, a revocation will only be valid on actual receipt by the Trustees of the instrument effecting it; and

(2) Secondly, a revocation will require the consent of the Trustees, if it has the effect of increasing or extending the obligations, liabilities or responsibilities of the Trustees.

24. Mr Moverley-Smith submitted that it was obvious that a complete revocation would not increase or extend the obligations, liabilities or responsibilities of the Trustees, because they would have no further responsibility, the trust being at end. It could, perhaps, be argued that the Trustees do have one additional responsibility after a revocation, namely to re-vest the assets in Mr Demirel. Mr Moverley-Smith submitted that this responsibility did not arise under the Trusts, but under a resulting trust arising after the revocation, and we think he is right.

25. The power of revocation given to Mr Demirel seems to us, on its proper construction, to be unfettered in that he can exercise it without anyone else's consent.

Overview of the issues raised by the appeal

26. As we have said, there are two basic issues in this appeal: first, the jurisdictional question, and secondly the question of how any discretion that may exist as a matter of law should be exercised. These two issues should not, in our judgment, be confused.

27. There is also a second distinction that it is important to make. That is between on the one hand the question of whether a power of revocation should, at common law or under various statutes and for various purposes, be regarded as a chose in action and so, as 'property', and on the other hand, the question of whether, as a matter of policy, the courts should recognise for the first time in this case that equitable execution can be allowed in respect of powers of revocation of the kind in issue here. The second of these questions is the real issue in this case. The first of these questions, interesting and important though it may be in many contexts, is ultimately inconclusive. Even if, for example, we were to determine that these powers of revocation were choses in action and property under the definitions in the Interpretation Law (1995 Revision) or the Trusts Law (1997 Revision), such a decision would not determine whether it was appropriate to allow equitable execution over that species of property. In our judgment, the

question of whether equitable execution over these powers of revocation should be allowed is a policy question to be decided using the principles explained in Masri as a starting point.

28. It is for this reason that we do not think it is necessary for us to consider in detail many of the issues that are exhaustively explored in both the Chief Justice's judgment and in Mr Moverley-Smith's submissions.

29. We would, therefore, propose to explain our conclusions shortly, before dealing briefly with the submissions made by Mr Moverley-Smith.

30. As the Chief Justice records in paragraph 90 of his judgment, it is not suggested that these Trusts should be regarded as anything but valid and duly constituted trusts.

31. The question, therefore, is whether a power of revocation should be available to a single creditor by way of equitable execution, so as to enable that single creditor to procure its execution and to recover all the settled assets to satisfy his judgment debt. We have concluded, in agreement with the Chief Justice, that if such an advance in the law is to be made, it must be made by legislation.

32. To explain our reasoning, we start with Thorpe v. Goodall supra, the decision which seems to have given rise to what appears to be the first statutory provision aimed at making it clear that powers can for some purposes be encompassed within the meaning of the word 'property'.

33. In Thorpe v. Goodall, Thomas Goodall was the beneficiary under his parents' marriage settlement, which gave him a power of appointment, which could be exercised in his own favour. The parents had died and there were no other surviving children. The assignees under a commission of bankruptcy sued Thomas Goodall for an injunction to require him to exercise the power for the benefit of his creditors. It was conceded that there was no authority in which a bankrupt had been compelled to do any act which he could do by virtue of either his interest or authority.

34. Lord Eldon LC said in his judgment:-

> *"I cannot see my way to compel the execution of this power. If the estate of the bankrupt has passed under the assignment, so that the power is destroyed, then there is no occasion for this bill ...*
>
> *... but, unless bound by contract, a bankrupt has never been ordered by direct decree to do any act. Is there any instance of*

a decree, directing a bankrupt to execute a power of leasing; though by executing it a considerable fine could be obtained? The objection has not escaped the notice of the Legislature: the late acts of insolvency actually vesting in the assignees powers which he had; of making beneficial leases, for instance. Then, is so much negative authority to be considered as nothing? If the ground of relief is, that upon principles of equity the bankrupt is to exercise his power upon those principles the creditors have nothing to do with the power, unless the party chooses to execute it. They cannot compel him to do so".

35. As a footnote to the report in Thorpe v. Goodall explains, the law was altered shortly afterwards by the enactment in 1825 of the English Bankruptcy Act of 6 George IV, chapter 16. This introduced a concept which was later included in section 44 of the English Bankruptcy Act 1883 and eventually section 100 of the Bankruptcy Law (1997 Revision):-

(1) Section 57 of the 1825 Act said that: "... *all Powers vested in any Bankrupt which he might legally execute for his own Benefit (except the Right of Nomination to any vacant Ecclesiastical Benefice) may be executed by the Assignees for the Benefit of the Creditors, in such Manner as the Bankrupt might have executed the same*".

(2) Section 44 of the Bankruptcy Act 1883 said that: "*the property of the bankrupt divisible amongst his creditors and in this Act referred to as the property of the bankrupt ... shall comprise the following particulars: ... (ii) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy...*"

36. It seems to us that this piece of history demonstrates that, long before Re Armstrong, it was not thought that a power of appointment exercisable in favour of the donee of that power, was a species of property that fell into a bankrupt's estate without express legislative intervention. Thorpe v. Goodall and its legislative follow-up also seems to us to falsify another of Mr Moverley-Smith's submissions, namely that sections 2 and 100 of the Bankruptcy Law (1997 Revision) should be construed as showing that powers were always understood to be a species of property, even without the enactment in question. If that were right, one might ask rhetorically, why would a change to the law, now reflected in section 100 have been introduced to the law of bankruptcy as a consequence of the decision in Thorpe v. Goodall?

37. Having seen that, in the law of bankruptcy, a general power was not considered as property passing to the assignees or trustee in bankruptcy, the other legislative provisions, in our judgment, fall into place. They are all enacted so as to make clear that the Legislature has considered the particular context, and has decided that for that specific context, property is to include general powers exercisable by their donees in their own favour. We see nothing in Mr Moverley-Smith's supposed distinction between a general power of appointment and a power of revocation. A power of revocation is merely a narrow power of appointment. For what it is worth, at common law, we would have thought that either both, or neither, would be considered as property.

38. But the repeated enactments of the legislatures in these islands and the United Kingdom have, in our judgment, a greater significance. They show that it would be unwise and inappropriate for a court to allow equitable execution over a power of revocation by way of the kind of incremental advance envisaged by Lawrence Collins LJ's masterly judgment in Masri. This is not because it could not, in theory, be done. It is because, where the legislatures have for almost 200 years taken it upon themselves to decide when powers should be considered to be included in some defined package of 'property', the court must assume that the legislature would not wish judges to arrogate to themselves that decision, in a situation where the legislature has not yet legislated so as to include powers as a species of property for this purpose. As the Chief Justice held the incremental advance in the availability of equitable execution to include powers should, in our judgment, and as a matter of policy, await express legislative intervention. In the words of Lord Eldon, we cannot see our way (as Judges) to compel the execution of these powers.

39. We cannot agree with the Chief Justice's reasoning in paragraph 88 that inclusion of powers in the species of equitable property for which equitable execution is available would automatically "*strike at the very heart of the trust concept*". Indeed we do not see that there is much, by way of conceptual difference, between including such powers in a bankrupt's estate divisible amongst his creditors, and including them in the species of property over which equitable execution is available. Moreover, we do not agree that Chief Justice's example of a settlement in favour of an incapacitated child provides a valuable illustration. In that case, the court would, if equitable execution were available as a matter of law, decline to allow equitable execution as a matter of discretion; just as the Court would exercise the jurisdiction where a judgment debtor had executed a trust with a power of revocation in order to defeat that creditor. These examples tell us nothing about whether, as a matter of policy, powers should be available for equitable execution. The line has to be drawn somewhere. But in our judgment,

the history shows that it is for the legislature to draw the line in respect of this particular species of right.

40. It is perhaps useful, in view of the probability of further steps being taken in this dispute, for us to say something about what would have happened if we had considered that we could incrementally advance the availability of equitable execution to include these powers of revocation. In that event, we would have thought it extraordinary that TMSF should, having made Mr Demirel bankrupt, have thought it appropriate to apply to seek equitable execution over these powers of revocation so as to bring some US$27 million worth of assets to itself in satisfaction of its judgment debt, to the exclusion of whatever other creditors, known or unknown, Mr Demirel may have. We acknowledge that the Undertaking was offered so that the proceeds would be brought into Mr Demirel's bankrupt estate. But this offer seems, in our judgment, simply to emphasise that TMSF has used the wrong process and the wrong procedure to achieve the result it desires. Once Mr Demirel was made bankrupt (if he was, as TMSF says), the getting in of his assets was a matter for his trustee in bankruptcy, not for TMSF itself. It may be that there would be insuperable hurdles in the way of obtaining a secondary bankruptcy in the Cayman Islands, or even in obtaining the assistance of the Grand Court in aid of the Turkish trustee in bankruptcy. We know not because these aspects have not been fully argued. But we can say that, unless much more information were available (and TMSF has not thought fit to make it available to us), we would not have exercised our discretion to appoint receivers in aid of equitable execution over the powers of revocation. There is no appeal against the appointment of receivers in respect of the receipt of assets from Trusts, should Mr Demirel exercise his powers of revocation in the future, but we would comment that in the unlikely event of that receivership ever becoming effective, we would hope TMSF would act in the spirit of the Undertaking and to pass any recoveries to Mr Demirel's bankrupt estate for the benefit of all its creditors.

The remaining submissions on behalf of TMSF

41. For the sake of completeness, we can deal briefly with the remainder of Mr Moverley-Smith's submissions as follows:-

(1) As we have said, we regard the perceived contrast between a power of revocation and a general power of appointment for these purposes as a distinction without a difference. Both have some element of discretion in their exercise. But even if they did not, the important thing is that, until exercised, the assets remain vested in the Trustees.

(2) For the reasons we have given, we do not think it is necessary to determine whether a power of revocation is a chose in action or not. It has some similarities with an option, but again, until it is exercised, it cannot, of itself, be enforced by legal action. We do not think that, even if it were a chose in action and, therefore, 'property' by most definitions, it would make any difference to the policy decision that needs to be made in this case.

(3) We have dealt already with the legislative provisions. The definition of 'property' in section 2 of the Trusts Law (2007 Revision) is not, in our judgment sufficient to include a power of revocation. The legislature always seems expressly to mention powers when they are to be included. As we have said, the other definitions of property (for example in the Bankruptcy Law) were not drafted so as to show that a power of revocation was in fact already regarded as 'property'. The reverse is the case, as is demonstrated by the history we have set out.

(4) We do not think it is necessary to determine whether these powers of revocation can be delegated. Even if they can, it would not affect the policy decision with which the Court is faced.

(5) In our judgment, Masri does not decide whether the jurisdiction to order equitable execution should be extended incrementally to include powers of revocation. Certainly, the jurisdiction could be so extended, but we believe that the legislature must be responsible for that extension.

(6) Again, as we have said, we accept that the Chief Justice's example in paragraph 88 of his judgment was unhelpful in determining whether equitable execution should be allowed in this kind of case.

(7) Finally, we do not accept Mr Moverley-Smith's submission that any common sense analysis would result in TMSF being able to enforce against the property in the Trusts. Common sense is really not engaged here. The question is one of law, and we have determined that any extension of the law in the direction that Mr Moverley-Smith seeks must properly be left to the Legislature.

Conclusions

42. For the reasons we have given, we believe that the Chief Justice reached the correct conclusion as to the jurisdiction to order equitable execution in respect of these powers of revocation. There is presently no such jurisdiction, and TMSF's appeal will, therefore, be dismissed.

43. Since neither party argued that costs should not follow the event, TMSF must pay the costs of both Mr Demirel and the Trustees.

44. Subject to any further submissions the parties may wish to make when they have seen this judgment, we will extend time for taxation of the trustees' costs here and below to a date 3 months from the date of the order made on this appeal.

45. Having heard argument on the question of leave to appeal to the Privy Council, we are satisfied that the point is of great general or public importance within paragraph 3(2)(a) of the Cayman Islands (Appeals to Privy Council) Order 1984. Nevertheless, we would be disinclined to grant special leave to appeal in the circumstances that, given the bankruptcy of Mr Demirel, it is inconceivable that the jurisdiction (if it were to exist) would be exercised in the present case. We would, therefore, indicate that we would not think it appropriate for this Court to grant special leave for an appeal which would be of academic interest only. We do not, however, shut out TMSF from making a formal application should it wish to do so.

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Chadwick, P.

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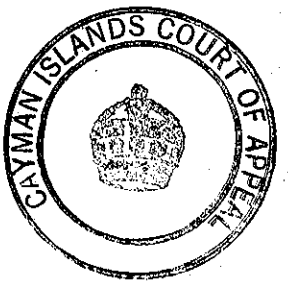
Mottley, J.A.



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Vos, J.A.