OVERSEAS CHAMBERS OF PETER HARRIS

E: oc@overseaschambers.com | Chestnut Farm
T: +44 (0)1534 625 879 | Mont du Ouaisne
F: +44 (0)1534 491 195 | St Brelade
www.**overseaschambers**.com | Jersey, JE3 8AW

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Article : A common trust or not a common law trust? That is a preliminary question.

Akers and others v Samba Financial Group [2014] EWCA Civ 1516; [2014] WLR (D) 521.

5th May, 2015.

Akers and others v Samba Financial Group [2014] EWCA Civ 1516; [2014] WLR (D) 521

CA: Longmore, Kitchin, Vos LJJ: 4 December 2014

A very interesting judgment from the English Court of appeal on an preliminary issue on jurisdiction in Bankruptcy proceedings.

This is not a pure trust law case but is an interesting decision in relation to the ability of an English Court to take and accept jurisdiction over issues that might at first sight be beyond its territorial remit.

However, the underlying legal position also needs review, as it goes to the heart of the western banking system and the use of offshore jurisdictions working to a common law and trust pattern to deal with transactions on a neutral jurisdictional basis to determine and transfer monetary value on paper.

The ICIL case note is a little sparse:

> *"Although the ownership of shares registered in Saudi Arabia was governed by the lex situs, namely the law of Saudi Arabia, where a trustee of the shares who held them on behalf of a beneficiary, an insolvent Cayman Islands company, transferred them to a company in Saudi Arabia, where the trusts were unlawful, the beneficiary's claim concerning the trusts could be brought in England by virtue of article 4 of the Hague Convention on the Law Applicable to Trusts and on their Recognition scheduled to the Recognition of Trusts Act 1987.*
>
> *The Court of Appeal so held allowing an appeal by the claimants, the Cayman company, Saad Investments Co Ltd, and its liquidators, from an order of Sir Terence Etherton C, granting a stay of a claim against the defendant Saudi company, Samba Financial Group, on the ground of forum non conveniens.*
>
> *VOS LJ, in delivering the judgment of the court, said that Sir Terence Etherton C had addressed the wrong question because of the way the argument had been addressed to him. The question before the Chancellor ought not to have been the one, at large, of whether English conflicts rules would generally require the ownership of shares to be determined by the lex situs, but the specific one of whether the alienation of the equitable interests under the declarations of trusts was excluded from the provisions of the Convention by article 4. It was not."*

The point missed by the ICIL note is that the proceedings were for an application for a stay or summary judgment.

Perhaps therefore best to read the full judgment at http://www.bailii.org/ew/cases/EWCA/Civ/2014/1516.html

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The whole gambit of the application of the Hague Convention by the English Courts was gone over, in summary.

The first point is that there was no claim available in the shari'ah law jurisdiction of Saudi Arabia, which is a neat way of cutting the Gordian Knot. The law governing the asset itself, Saudi shares, did not recognise the claim or the law upon which it woudl be based.

Vos LJ stated in his judgment that:

> *"The application that came before the Chancellor of the High Court, Sir Terence Etherton, was in substance a strike out or summary judgment application dressed up as an application for a stay on the grounds of forum non conveniens. It was notionally based on the contention that the Saudi Arabian courts were clearly and distinctly a more appropriate forum for the claim to be brought. But in fact the claim is under section 127 of the Insolvency Act 1986 (the "IA 1986") for a declaration that the relevant transaction was a void disposition. It is a claim that could not and will not be brought either in substance or in form in Saudi Arabia. England is, therefore, in reality the only available forum for the claim (apart perhaps from the Cayman Islands), and the question is and was whether the claim has any realistic prospect of success. ...*
>
> *In the broadest outline, the trusts concerned arose from what we shall refer to as the "6 transactions" which took place between 2002 and 2008. In each of the 6 transactions, Mr Maan Al-Sanea ("Mr Al-Sanea"), who is a citizen of and resident in Saudi Arabia, declared himself a trustee of certain Saudi Arabian shares for the 4th claimant company, Saad Investments Company Limited, a Cayman Islands company which is now in liquidation ("SICL"). SICL was Mr Al-Sanea's family investment vehicle, which was managed in Geneva.*
> *SICL is massively insolvent. When its winding up began, it owed US$2.815 billion plus interest to a syndicate of banks including the defendant, Samba Financial Group ("Samba").*
> *In these proceedings, the 1st, 2nd and 3rd claimants, the liquidators of SICL (the "liquidators") seek to challenge the validity of a disposition to Samba of the shares that were the subject of the 6 transactions, made just before SICL's winding up order was made. The effect of the disposition, if the liquidators are right, was to deprive SICL's creditors of shares to which it was entitled worth some US$318 million."*

The underlying issue, put shortly, is whether it was at least arguable that the shares were indeed held on trust for SICL. The issue underlying this was that the alleged trust would be invalid against Samba in Saudi Arabia and Bahrain.

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In other words, a great deal of ingenuity had gone into putting the claim or rebutting it, and cloaking it in appropriate garb in either case to place it in or outside jurisdictions willing to give effect to the alleged trusts.

Vos LJ continued thus:

> *"There must be large numbers of trusts established under the laws of common law jurisdictions, onshore or offshore, that comprise registered shares in civil law countries amongst their assets. Mr Mark Howard QC, counsel for the liquidators, opened this appeal by pointing out that it would be remarkable if all those trusts were to be held to be ineffective. Mr Mark Hapgood QC, counsel for Samba, responded by pointing out that there was nothing to stop people purporting to put shares registered in civil law jurisdictions into common law trusts; it was just that the trusts would create only personal remedies in those jurisdictions and not proprietary remedies against third parties to whom the shares were transferred or in the event of the trustee's bankruptcy."*

The distinction made by Mark Hapgood QC is the issue that is important for any trust adviser working out of a common law context into a civil law, or better, non-trust or non-equitable jurisdiction. The dividing line here between "equitable" remedial action and proprietary equitable interest is the important if not crucial issue here.

This at that stage of the proceedings was by inference. It was inferred that the laws governing the creation of the trust and the transfer of the assets were those of the Cayman Islands, not those of the domicile of the settlor, the Bankrupt, which was Saudi Arabia.

The judgment then proceeded to go through on what was effectively a very limited judicial platform are to determine how the declarations of trust were made and under what law.

> "*We should not leave this aspect of the case without making reference to the Chancellor's approach and to the cases of Macmillan supra and Glencore International A.G. & others v. Metro Trading International Inc. [2001] 1 Lloyd's Rep 284. The Chancellor's perspective was that Macmillan decided that the lex situs applied to the ownership of shares, and that that should apply as much to the purported alienation of an equitable interest as to an outright transfer. The formal requirements of the Saudi Arabian Tadawul and SDC seem to have been uppermost in his mind (see paragraph 56). He was, however, only considering article 15 (to which we shall come under issue 2 below) not article 4. For our part, we would*

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> *not question his conclusion that English law requires the court to look to the lex situs to determine the ownership of shares. Even though Macmillan concerned priority issues, support for the Chancellor's conclusion is found in the dicta at pages 399F, 405B, 411E and 424G-H of the Court of Appeal's judgments.*
>
> *In our judgment, however, the Chancellor was addressing the wrong question because of the way the argument had been addressed to him. The question ought not to have been the one, at large, of whether English conflicts rules would generally require the ownership of shares to be determined by the lex situs,* ***but the specific one of whether the alienation of the equitable interests under the declarations of trust in the later transactions (and the trusts in the earlier transactions) were excluded from the provisions of the Convention by article 4****. In our judgment, for the reasons we have given, they were not.*"

The judgment as given in the following terms:

> "*i) On the assumption that the governing law of the declarations of trust is Cayman Islands law, article 4 does not operate to exclude the application of the Convention to the declarations of trust under the 6 transactions. Whilst Saudi Arabian law as the lex situs would still govern the question of whether Mr Al-Sanea had capacity to alienate the Shares at all, Cayman Islands law would govern the capacity of Mr Al-Sanea to alienate an interest in the Shares by way of declaration of trust, and the transfer of the beneficial interest effected by the declarations of trust.*
>
> *ii) It was not appropriate in this case to determine on a stay or summary judgment application whether article 15 applied to the transfer of the equitable interests under the declarations of trust, because (i) the mandatory nature of the Saudi Arabian law rules was not explored in the expert evidence, and (ii) it would be better for the interaction between the application of the governing law of the trust to the validity, construction and effects of the trust under article 8, and the application of article 15(d) to the transfer of the beneficial interest in the Shares to SICL, to be decided after a full evidential hearing.*
>
> *iii) It is at least arguable that it is to be implied from the terms of the declarations of trust in the later transactions that they were to be governed by Cayman Islands law under article 6. In that event, article 7 would not be engaged for those later declarations of trust. It would be better for all questions under articles 5, 6 and 7 to be determined after a full evidential hearing in the light of all the circumstances of the case.*"

It is therefore clear that the issue of whether trusts over registered share rights governed by civil, as opposed to common law are valid or void was not addressed, and was in fact avoided by the judgment.

What the judgment does do is to show that it is not only the Courts of the law of the Trust or of the transfer that are necessarily the only ones "competent".

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The judgment of Vos LJ is therefore significant in that it maintained the legal basis of the paper issued in the banking system against assertions of nullity in other jurisdictions for the purposes of maintaining the procedural jurisdiction, leaving the main issues as to substantive validity to a later stage of the proceedings.

The English jurisdiction retains its influence and weight as the founding jurisdiction as to the trust and its proprietary consequences, and woe betide anyone who believe that the English courts will not decide a matter that by one manner or another comes before them under trust principles and the 1987 legislation.

Peter Harris
Barrister in overseas practice
LLB. (Hons.) Dip. ICEI (Amsterdam)
Revenue Bar Association, Mediator
E: peter.harris@overseaschambers.com