

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2010/CLE/gen/01137**

**BETWEEN**

- (1) RICHARD ANTHONY HAYWARD**
- (2) SUSAN JANE HEATH**
- (3) GILES EDWARD HAYWARD**
- (4) RUPERT CHARLES HAYWARD**
- (5) FRANCESCA ROSE CHELSOM**
- (6) EMMA LOUISE CAMERON**
- (7) ALEXANDER JAMES WROUGHTON HEATH**
- (8) NICHOLAS CHARLES EDWARDS HEATH**

**Plaintiffs**

**AND**

- (1) STRIKER TRUSTEES LIMITED**
- (2) PROMETHEUS SERVICES LIMITED**
- (3) RICHARD W DEVRIES**
- (4) KEITH GRIFFITHS**
- (5) SIR JACK ARNOLD HAYWARD (died 13 January 2015)**
- (6) LADY JEAN MARY HAYWARD (died 12 May 2015)**
- (7) FREDERICK ARTHUR LEBLANC CAMERON (a minor) by PRESTON RABL his Guardian ad Litem**
- (8) IAN BARRY**
- (9) PATRICIA RUTH BLOOM**
- (10) AMY BLOOM CLOUGH**
- (11) TREVOR BETHEL**
- (12) JONATHAN MICHAEL HAYWARD**

**Defendants**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Brian Simms QC with him Mr. Christopher Jenkins and Mr. Ra'Monne Gardiner of Lennox Paton for the Judicial Trustee

Mr. Lawrence Cohen QC with him Mr. Ferron Bethell QC and Ms. Camille Cleare of Harry B. Sands for the Plaintiffs

Mr. John Wilson QC and Mrs. Erin Hill of McKinney Bancroft & Hughes for the 1<sup>st</sup> Defendant

Mr. Luther McDonald and Ms. Keri Sherman of Alexiou Knowles for the 7<sup>th</sup> Defendant

No appearance of the other Defendants and/or their Counsel

**Also present** Ms. Meryl Ginton of Maurice O. Ginton & Co. (former Counsel) for the late 11<sup>th</sup> Defendant

**Hearing date:** 7 February 2020

**Trust – Discretionary trust – Personal Representatives - Discretionary beneficiary has no legal or equitable interest in trust – Locus Standi of Personal Representative (if and when appointed) - Judicial Trustee Rules, Rule 22(1) and RSC O. 15 rr. 7-10**

Julius Trevor Bethel (“the Deceased”) was one of the beneficiaries of the 1993 Settlement (“a discretionary trust”) of the late Sir Jack Hayward. The Deceased died tragically on 17 January 2020. At the time of his death, there were some applications pending before the Court including (i) the Deceased’ Summons to remove the Judicial Trustee; (ii) the Deceased’ Summons to set aside a Directions Order made on 18 March 2019 by another judge (“JT’s Directions Order”); (iii) the Judicial Trustee’s Summons to strike out certain paragraphs of an affidavit of the Deceased and (iv) the Judicial Trustee’s Summons seeking ratification or remaking of the Judicial Trustee’s Directions Order.

At a hearing on 7 February 2020, Counsel for the Deceased, advised the Court that the Deceased did not appear to have left a Last Will and Testament and no personal representative had yet been appointed. She was unable to confirm as to when this may occur. However, she asserted that the Deceased’ applications to challenge the Judicial Trustee’s appointment and the JT Directions Order would not fall away simply by reason of his death. The Judicial Trustee and the Plaintiffs challenged Counsel for the Deceased’ assertions.

These assertions raised an issue which makes it appropriate for me to consider whether the Estate of the Deceased could have any further interest in the trust or in its administration. A further issue arises as to whether Counsel for the Deceased is in court without a client and without instruction.

**HELD: Granting the Declaration sought by the Judicial Trustee and the Plaintiffs that the Personal Representatives of the Deceased (if and when appointed) could not have locus standi to continue to prosecute either of the Deceased’ two summonses.**

1. The Deceased' interest in the trust estate was extinguished on his death. Therefore, his estate would have no standing to advance the various applications that were pending at the time of his death.
2. The 1993 Settlement is a discretionary trust. The Deceased, being a beneficiary of the Settlement, was a mere object of that trust. The Deed of Inclusion did not make any provision for the transmission of his interest to any spouse, child or remoter issue, so there can be no issue of any interest in the Settlement surviving his death.
3. A beneficiary under a discretionary trust has a right to be considered as a potential recipient of benefit by the trustees. But that right is not a proprietary interest in the assets held by the trustees: *Y v R* [2018] 1 CILR 1 [Grand Court of the Cayman Islands relied upon.
4. In any event, the Estate of the Deceased was not "*a person interested in the Settlement*" under Rule 22(1) of the Judicial Trustee Rules. As such, it could not have *locus standi* to advance the application for removal.
5. The Deceased' summonses to remove the Judicial Trustee and to discharge the JT Directions Order do not survive him and have therefore abated: RSC. O.15 rr. 7-10.

## **RULING**

### **Charles J**

- [1] This Ruling arises from the tragic and untimely passing of the Eleventh Defendant, Julius Trevor Bethel ("the Deceased"), on 17 January 2020.
- [2] On 14 January 2020, the Court made a directions order ("the January Directions Order"), which provided directions for the hearing of three sets of applications, which were defined in three schedules to the January Directions Order.
- [3] The Summonses included in Schedule 1 to the January Directions Order ("the Schedule 1 Applications") were set for hearing initially to commence on 6 February 2020 with a time estimate of 2 days. The Schedule 1 Applications consisted of:
- (i) The Deceased' Summons filed on 18 August 2018 to remove the Judicial Trustee;
  - (ii) The Deceased' Summons filed on 3 April 2019 to set aside the Directions Order of 18 March 2019 made by Justice Winder ("the JT Directions Order");

- (iii) The Judicial Trustee's application by Summons filed on 14 January 2019 to strike out certain paragraphs of an affidavit of the Deceased; and
- (iv) The Judicial Trustee's application by Summons filed on 29 August 2019 seeking the ratification or remaking of the JT Directions Order ("the Ratification Application").

- [4] Learned Counsel Ms. Ginton, who had represented the Deceased, civilly informed the Court and the other parties of his death. By letter dated 22 January 2020, Ms. Ginton informed the Court that the parties were in agreement that only one of the two days previously fixed would be required given the change of circumstances. It was mutually agreed to proceed on 7 February 2020 with one of the Schedule 1 Application, namely the Ratification Application, but there was not complete agreement as to the course to be followed on the remaining Summonses.
- [5] On 7 February 2020, Ms. Ginton attended the hearing. She helpfully advised the Court that Mr. Bethel did not appear to have left a Last Will and Testament and that no personal representative had yet been appointed. Ms. Ginton indicated that she could also not give any confirmation as to when this may occur. Ms. Ginton stated that she was hesitant to incur any further costs or expense in the Deceased' name until such time that she had instructions to do so. Ms. Ginton indicated that she was present to submit the facts and assist the Court but that she could not take a position beyond that. That said, Ms. Ginton indicated that she did not accept that the Deceased's applications to challenge the Judicial Trustee's appointment and the JT Directions Order would fall away simply by reason of his death.
- [6] Ms. Ginton however asserted that the Court should not make any order that may prejudice the applications of the Deceased which may later be adopted by the Deceased' personal representatives, once appointed, when considering the Ratification Application and, at the invitation of the Plaintiff and the Judicial Trustee, the most serious allegations made against the Judicial Trustee in the Removal Application and elsewhere (namely the allegations of fraudulent breach of trust, conspiracy and larceny).

- [7] Learned Counsel Ms. Ginton next asserted that because the Deceased had requested a distribution prior to his death, his Estate would have a continuing interest in the matter of whether the Judicial Trustee ought to have made the distribution requested.
- [8] These assertions raised an issue that is appropriate for the Court to address namely: whether the Estate of the Deceased could have any further interest in trust, or in its administration.
- [9] Learned Queen’s Counsel, Mr. Simms who appeared for the Judicial Trustee, in response to the assertions of Ms. Ginton, posited that Ms. Ginton was in Court without a client and without instruction. Mr. Simms QC cautioned Ms. Ginton that pursuing or opposing applications without instructions could expose her personally to a costs order.
- [10] On the issue raised, Mr. Simms QC relied on two authorities to demonstrate that the Deceased’ interest in the trust estate were extinguished on his death, with the result that his Estate would have no *locus standi* to advance the various applications that were outstanding at the time of his death. Mr. Simms QC recognised that any costs awards that had already been made in favour of the Deceased would however survive his death, as would any costs orders that had been made against him prior to his death.
- [11] Mr. Simms QC relied on a passage from Williams, Mortimer & Sunnocks Executors, **Administrators and Probate** (21<sup>st</sup> Edition) paras 39-32, in which the learned editors state as follows:

**“The object of a special power of appointment or of a discretionary trust has no transmissible interest. Thus, the Executor or Administrator of the object of a special power cannot without express provision be an appointee under it.”** [Emphasis added]

[12] It is common ground that the 1993 Settlement is a discretionary trust. The question then is whether there is express provision for the interest that the Deceased had as a discretionary object to transfer to any other person on his death.

[13] Mr. Simms QC referred the Court to the Deed of Inclusion dated 8 December 2008. It was by this document that the Deceased was added as a beneficiary to the Settlement (the validity of which is challenged by the Plaintiffs). The relevant extract is as follows:

**“In the exercise of the power conferred upon it by Clause 4(1) of the Settlement and of every other power it enabling in that behalf (if any) the Trustee hereby irrevocably appoints and declares that henceforth the persons referred to in the Schedule hereto (not being present members of the class of Beneficiaries subject to the Settlement and so not capable of benefitting therefrom) shall be included in such class of Beneficiaries subject of the Settlement and be capable of benefitting therefrom.’**

[14] The Schedule simply states:

**“(i) Patricia Ruth Bloom  
(ii) Amy Bloom Shepeard  
(iii) Trevor Julius Bethel”**

[15] Mr. Simms QC submitted that there is no reference to spouses, children, remoter issue or any other person that might survive the three added beneficiaries.

[16] Mr. Simms QC next referred the Court to the case of **Y v R** [2018] 1 CILR 1 from the Grand Court of the Cayman Islands. In this case, the Plaintiff law firm was seeking to enforce a Judgement against the Defendant by appointing receivers or garnishing distributions which may be made by a trustee to the Defendant as a discretionary object of a trust. The Defendant argued that because the Defendant was merely a discretionary beneficiary of the trust, it could not be said that the Defendant had assets in the Cayman Islands.

[17] In finding for the Defendant on this point, Mangatal J. at paras. 58 -61 of the Judgment, had this to say:

**“58. In terms of assets, the only thing that the plaintiff points to is R’s status as a discretionary beneficiary of a Cayman Islands trust. It was submitted that that does not amount to a legal or equitable interest in the trust fund: the only right of the object of a discretionary trust is to require the trustees to consider from time to time whether or not to apply the whole or some part of the trust fund for his or her benefit, which does not amount to an interest in the trust fund itself. Reference was made to *Gartside v. Inland Rev. Commrs.* (2).**

**59 Mr. Dunne makes reference to *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* (4). Lewison, L.J. stated as follows ([2016] 1 W.L.R. 160, at para. 13):**

**“A beneficiary under a discretionary trust has a right to be considered as a potential recipient of benefit by the trustees. That is an interest which equity will protect. The trustees must apply some objective criterion in deciding whether or not to exercise their discretion in favour of a particular beneficiary; so that each beneficiary has more than a mere hope. But that right is not a proprietary interest in the assets held by the trustees, although it can be described as an interest of sorts: *Gartside v Inland Rev. Commrs ...*”**

[Emphasis added.]

**60 Reference was also made to para. 26 of that judgment as authority that that being the case, the assets held in a discretionary trust could only be regarded as the legal or beneficial assets of an individual where either the trusts were a sham or the trustees did whatever the beneficiary asked them to do.**

**61 There is no evidence that the trust in this case is a sham. Accordingly, it was submitted that any attempt to enforce on the premise that R has either a legal or beneficial interest in trust assets is flawed.”**

[18] Learned Queen’s Counsel Mr. Cohen appearing for the Plaintiffs endorsed the position as advanced by Mr. Simms. Mr. Cohen QC argued that the Estate of the Deceased was not “*a person interested in the Settlement*”. As such, it could have no *locus standi* to seek the removal of the Judicial Trustee under Rule 22 (1) of the Judicial Trustee Rules, which provide as follows:

**“22. (1) The court may, either without any application or on the application of any person appearing to the court to be interested in the trust, remove a judicial trustee if the court considers that it is expedient to do so in the interests of the trust.”**

[Emphasis added]

- [19] Mr. Cohen QC argued that while the Court had the jurisdiction to remove the Judicial Trustee of its own volition, the Deceased’ application was based on his claim to be a “*person ...interested in the trust*”. As his interest in the trust did not survive him, his Estate could not be a person “*interested in the trust*” as contemplated under Rule 22.
- [20] Mr. Cohen QC also referred to the provisions of RSC Order 15, Rules 7-10, which make provision for what is to occur when a claim does not abate.
- [21] For the reasons discussed above, the Deceased’ application to remove the Judicial Trustee or to discharge the directions made on 18 March 2019 do not survive him and have therefore abated. The one caveat is that, arguably at least, costs remain within the discretion of the Court so that the Order which I make must leave open the question of costs which, following the suggestions made to me by Mr Simms QC and Mr Cohen QC, will be reserved. I echo their hopes that with good sense applied by advisers, it will be unnecessary to consider this subject again.
- [22] I asked Ms. Glinton who she was instructed by. She could not confirm that she was instructed by any party.
- [23] I agree with the submissions advanced by Mr. Simms QC and Mr. Cohen QC. I therefore hold that even if the Deceased was ultimately confirmed as beneficiary of the Settlement in this litigation, he was a mere object of a discretionary trust. As the Deed of Inclusion dated 8 December 2008 made no provision for the transmission of his interest to any spouse, child or remoter issue, there can be no question of any interest in the Settlement surviving his death.



[24] I accept that the Deceased' Estate does not appear to the Court to be a person that could have any "interest in the trust" under Rule 22 of the Judicial Trustee Rules. As such, it could not have *locus standi* either to advance his application to remove the Judicial Trustee or to challenge the JT Directions Order, nor indeed any other application in relation to the administration of the trust.

[25] In the premises, I agree that the declaration sought by the Plaintiffs and the Judicial Trustee should be made, namely, that the Personal Representatives of the Deceased (if and when appointed) could not have *locus standi* to continue to prosecute either:

- (i) the Summons filed on 18 August 2018 seeking the removal of the Judicial Trustee under Rule 22 of the Judicial Trustee Rules by reason of not being capable of being persons interested in the Trust within the meaning of that Rule, and
- (ii) the Summons filed on 3 April 2019 seeking to discharge the directions given by Winder J on 18 March 2019 to the Judicial Trustee by reason of the Deceased no longer being capable of being within the class of Beneficiaries after his death.

**Dated this 10<sup>th</sup> day of March, A.D. 2020**

**Indra H. Charles  
Justice**