



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 136 OF 2023 (IKJ)

IN THE MATTER OF THE K TRUST

**AND IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION) AND
ORDER 85 OF THE GRAND COURT RULES (2023 CONSOLIDATION)**

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances:

Mr James Clifford and Mr Max Galt of Ogier (Cayman) LLP for the
Trustee

Heard: 22 September 2023

Draft Reasons circulated: 28 September 2023

Reasons Delivered 9 October 2023

HEADNOTE

Ex parte Originating Summons-uncertainty as to beneficial ownership of trust assets-beneficiaries unable to participate in proceedings-suspicious that trust assets may be proceeds of crime application for directions in relation to administration of trust assets- service on Director of Public Prosecutions-jurisdiction to grant civil recovery orders-relevance of open justice principle-Trusts Act (2021 Revision), section 48-Proceeds of Crime Act (2020 Revision), sections 4 (1), 77-79, 80, 96-Bill of Rights section 7(9), (10)(a)

REASONS FOR DECISION

Background

1. The Trustee was appointed by Order of this Court dated 6 April 2021 for the reasons set out in *Re a Trust*, FSD 181/2020 (IKJ), Judgment dated 6 April 2021 (unreported). Its initial mission was to address the twin concerns of (a) the beneficial ownership of the assets (in circumstances where it was not possible to communicate with the two main potential owners) and (b) suspicions that the trust assets were the proceeds of crime. Directions were essentially given for the new Trustee to be appointed to continue to administer the trust assets for an initial review period of no fixed duration save that further directions would be sought by the end of 2022. This deadline was extended by Orders dated 13 December 2022 and 21 April 2023 in FSD 181/2020 (IKJ).
2. I gave directions for the Attorney General to be served and to be afforded an opportunity to address public policy concerns. More substantively, the Trustee was directed to continue to administer the Trust according to its terms without making any distributions.
3. By the time the Trustee applied by an Ex Parte Originating Summons dated 24 May 2023 for further directions, the position remained that:
 - (a) it was not possible to formally notify or serve the two most likely beneficial owners (natural persons, on the one hand, and a foreign State (“Ruritania”), on the other hand) for credible personal safety reasons; and

- (b) the legality of the sources of wealth of the Settlor and the origins of the Trust assets appeared even more doubtful than before.
4. Two observations which were recorded in the 6 April 2021 Judgment are pertinent for present purposes:
- (a) “28...I am not satisfied that this Court may properly leave it entirely to a private Trustee to form the requisite judgments which have to be made about the long-term continuance or termination of the Trust...”;
- (b) “30... In my judgment, whether the Trust continues beyond a review period should also be decided by reference to a more cogent analysis of the best available evidence as [to] the likely provenance of the Trust assets themselves.”
5. The Trustee had carried out the fullest possible review of the critical beneficial ownership and source of funds issues without, understandably, arriving at a stage where it was possible to finally resolve either issue due to the notice/service issue. I accordingly granted an Order in the principal terms set out in paragraph 1, subject to the conditions set out in paragraph 2:

“1 The Court approves and/or sanctions the Trustee's in principle decision (which was made subject to the approval and/or sanction of the Court), that:

(a) The trust fund of the K Trust do continue, pending further order of the Court, to be held and administered by the Trustee for the benefit of whoever may be beneficially entitled to the assets of the K Trust.

(b) No disposition to any beneficiary of the K Trust shall be made by the Trustee pending further order of the Court.

(c) The Trustee shall return to Court for further directions to determine the source of the assets settled into the K Trust and the true owner of the assets of the K Trust upon the following events having occurred:

(i) the Trustee forming the opinion that disclosure of the existence of the K Trust to Ruritania is no longer a threat to the safety of A, B or C; or

(ii) if A, B or C are alive, that they confirm to the Trustee that they have no objection to Ruritania being notified of the existence of the K Trust.

2. *The Conditions:*

- (a) *The Trustee serves a copy of the Judgment to which this order relates and the papers filed in these proceedings (the ‘Hearing Documents’) on the Director of Public Prosecutions; and*
- (b) *The Director of Public Prosecutions does not within six months of the date of service of the Judgment and Hearing Documents commence civil recovery proceedings in respect of the K Trust under Part IV of the Proceeds of Crime Act (2020 Revision).”*

6. These are the reasons for that decision.

The source of funds issue

7. One main reason for the Trustee being directed to serve the Attorney-General was that the Court’s directions of 6 April 2021 were to a material extent based on private intelligence reports which concluded, *inter alia*, that (a) the Settlor’s conviction of financial crimes might have followed a manifestly unfair trial process, and that (b) the lives of the Settlor and beneficiaries might be at risk if notice was given to the Government of Ruritania (as a potential claimant to the trust assets) of the present proceedings. While there was no suggestion that approving the Trustee’s provisional decision not to give notice of a potential claim to a foreign state engaged any treaty obligations, I was concerned to avoid any accidental oversights where matters with potential foreign affairs implications were concerned.
8. The other main reason for serving the Attorney-General in 2021 was my concern that the Court should avoid, under the cloak of anonymity, making an exclusively private law focussed judgment about the propriety of the Trustee continuing to administer funds which might be illicit in public law terms without the benefit of a purely public law perspective. On the present application, in light the public policy concerns raised at the 2021 hearing, Mr Clifford assisted the Court to carry out its own public law scrutiny by placing the Proceeds of Crime Act (2020 Revision) (the “PCA”) before the Court. My own preliminary review of the PCA quickly suggested that the Director of Public Prosecutions (“DPP”) was the most appropriate public officer to be given notice of the present matter, rather than the Attorney General.

9. Counsel clearly demonstrated that the Trustee had discharged its own duties under the PCA by filing a suspicious activity report (“SAR”) with the Financial Reporting Authority dated 21 May 2021. There had been no response to this SAR, but there had been no response to two such filings by the original trustee in April and August 2006. Regulation 18 of the Anti-Money Laundering regulations (2023 Revision) provides:

“Obligation where unable to comply with customer due diligence

18. Where a person carrying out relevant financial business is unable to obtain information required by these Regulations to satisfy relevant customer due diligence measures —

(a) the person shall —

(i) not open the account, commence business relations or perform the transaction; or

(ii) terminate the business relationship; and

(b) the person shall consider making a suspicious activity report in relation to the customer” [Emphasis added]

10. As I observed in the course of the hearing, it is a notorious fact that public authorities are often stretched. It seems likely that a large number of SARs are filed and that the summary nature of such reports makes assessing what regulatory responses should be prioritised a less than straightforward exercise. The Trustee could nonetheless, having discharged its customary due diligence duties as far as it could, lawfully continue to administer the Trust on the very precautionary basis it proposed, having passed on its source funds concerns to the Financial Reporting Authority but I considered that the Court’s overarching duty to uphold the rule of law required a more interventionist approach in light of the current state of the evidence. The Court’s jurisdiction to supervise trusts under section 48 of the Trusts Act cannot always be exercised in a private law vacuum. In the 6 April 2021 Judgment, I calibrated my concerns as follows:

“25. ...This is evidence which the Plaintiff has very properly placed before the Court to demonstrate that it has not been wilfully blind to the relevant concerns. The material before the Court, albeit falling well below the threshold of tangible evidence, does not exclude the

possibility that the Settlor may have been subjected to unfair treatment but that, at the same time, the Settlor's wealth may still represent the proceeds of crime.

11. In other words, even if there were grounds for this Court declining to recognise the Settlor's convictions on public policy grounds, there was an alternative basis for suspecting that the Settlor did not acquire her wealth by lawful means although this alternative basis may have lacked tangible evidential support. This alternative basis of unlawfulness was, more critically considered in 2023, a fairly straightforward one. How tangible the evidence of illicit derivation of funds was depended on the lens through which one analysed the Trustee's evidence. In 2021, the Court's focus was on facilitating a change of trustee and initial review of the beneficial ownership question with a view to resolving problems of notice and service before more substantive decisions could be made. By 2023, it was far clearer that there was no immediate prospect of those notice and service issues being resolved. The public interest in ensuring the efficacy of the PCA statutory and regulatory regime appeared to me to be stronger than before in circumstances where a further review period of indefinite duration was under consideration. This called for a more critical analysis of the Trustee's evidence from a public interest perspective.

12. The present proceedings have been anonymised and heard in private despite the fact that, unlike the position in the vast majority of trust 'administration' cases, public interest considerations beyond the internal administration of the Trust and the private lives of the beneficiaries were engaged. The Trustee's application as regards the beneficial ownership issue mean that these were "*proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation*", which should *prima facie* be held in public under section 6 (9) of the Bill of Rights. However, I considered it was obvious that the Court was empowered to seal the file and sit in private because "*publicity would prejudice the interests of justice*" (section 7 (10) (a) of the Bill of Rights). Nonetheless, it seemed no less obvious that this necessary incursion on the open justice principle imposed an additional burden on this Court to ensure that any relevant public interests were addressed, so far as possible, in the same way that would likely occur had the proceedings been taking place under the gaze of public scrutiny. The rationale for the open justice principle is not transparency for transparency's sake; it is the proposition that public scrutiny, actual or potential, is likely to enhance the quality of justice in general terms. As Lord Burnett LCJ recently observed extra-judicially :

“16. That courts are open and that reasoned judgments must be made public helps ensure that judges are always on trial while trying. It thereby has a disciplinary function where judges are concerned, one that helps stop judicial abuse and misuse of power, while spurring them to act with probity, to treat parties fairly and secure justice according to law. It is for this reason that open justice was described in Scott v Scott as ‘on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.’”¹

13. Where a hearing must take place in private publication of reasons for a decision may meet the requirements of open justice to a significant extent. This will be the case most clearly where all interests have been adequately represented at the private hearing. But where a private law hearing takes place on an ex parte basis and public interest considerations are manifestly apparent, in my judgment this Court must be astute to ensure that the appropriate public authority is given an opportunity to make an informed decision about whether or not to intervene in the private proceedings. Anything less than this would have risked undermining public confidence in the administration of justice. In these exceptional circumstances, on the Court’s own motion I considered the implications of the PCA regime on the disposition of the present case with a view to deciding whether or not notification needed to be given of these proceedings to any public authority.
14. It was obvious that the available evidence lacked the solidity required to support findings that anti-money laundering offences had been committed to the criminal standard of proof. With the benefit of my provisional view that the DPP might be able to obtain a civil recovery order, Mr Clifford was able to address not just the Trustee’s statutory due diligence obligations but the wider statutory scheme as well. Part IV of the PCA (*“Civil Recovery of the Proceeds, Etc., of Unlawful Conduct”*) has the following introductory section:

“General purpose of this Part

77. (1) This Part has effect for the purposes of—

(a) enabling the Director of Public Prosecutions to recover, in civil proceedings before the court, property which is, or represents, property obtained through unlawful conduct; and

¹ ‘Open Justice Today’, Commonwealth Magistrates and Judges Conference 2023, Cardiff, 10 September 2023

(b) enabling cash which is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before a summary court.

(2) The powers conferred by this Part are exercisable in relation to any property (including cash) whether or not any proceedings have been brought for an offence in connection with the property.

15. Section 79 confers a freestanding civil recovery power on the DPP in respect of “*property obtained through unlawful conduct*”, which is explicitly not dependent on the fact that criminal proceedings have been brought in relation to the relevant property. Section 78 provides:

“Unlawful conduct

78. (1) Conduct occurring in any part of the Islands is unlawful conduct if it is unlawful under the criminal laws of the Islands.

(2) Conduct which —

(a) occurs in a country outside the Islands and is unlawful under the criminal law of that country; and

(b) if it occurred in the Islands, would be unlawful under the criminal law of the Islands, is also unlawful conduct.

(3) The court shall decide on a balance of probabilities whether it is proved —

(a) that any matters alleged to constitute unlawful conduct have occurred; or

(b) that any person intended to use any cash in unlawful conduct.”

16. Unlawful conduct committed abroad qualifies if the conduct would be unlawful here. The civil standard of proof applies to determining whether unlawful conduct has occurred in relation to any property. Section 80 provides most pertinently as follows:

“Proceedings for recovery orders in the Islands

80. (1) Proceedings for a recovery order may be taken by the Director of Public Prosecutions in the Grand Court against any person whom the Director of Public Prosecutions thinks holds recoverable property, being property defined in sections 123 to 129.

(2) The Director of Public Prosecutions shall serve the application —

(a) on the respondent; and

(b) unless the court dispenses with service, on any other person whom the Director of Public Prosecutions thinks holds any associated property which the Director of Public Prosecutions wishes to be subject to a recovery order, wherever domiciled, resident or present in the Islands...”

17. Section 80 (1) provides the jurisdictional basis for an application by the DPP for a civil recovery order being filed in this Court in relation to “*recoverable property*”, which is simply defined in section 123(1) as property “*obtained through unlawful conduct*”. The proceedings may be commenced against “*any person*” the DPP “*thinks holds recoverable property*”. Section 80(2) mandates service on the respondent and, subject to a judicial dispensation power, any other party the DPP wishes to serve. The DPP could therefore potentially file an application under 80 with the Trustee as the sole respondent and seek a dispensation from serving the beneficiaries if he forms the view that the Trust assets are recoverable property.
18. The Court’s jurisdiction to grant a civil recovery order is pivotally defined by the following provisions of the Act:

“*Recovery orders*

96. (1) Where in proceedings under this Part the court is satisfied that any property is recoverable, the court shall make a recovery order.

(2) The recovery order shall vest the recoverable property in the trustee for civil recovery.

(3) The court may not make in a recovery order any provision in respect of any recoverable property if each of the conditions in subsection (4) is met and it would not be just and equitable to do so.

(4) The conditions referred to in subsection (3) are that —

(a) the respondent obtained the recoverable property in good faith;

(b) the respondent took steps after obtaining the property which that person would not have taken if that person had not obtained it or that person took steps before obtaining the property which that person would not have taken if that person had not believed that person was going to obtain it;

(c) when that person took the steps, that person had no notice that the property was recoverable; and

(d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to that person...”

19. There is no obvious reason for construing section 96(1) as not simply imposing the usual civil standard of proof. Each of the conditions in subsection (4) must be met to constitute a bar to granting a civil recovery order. The Trustee here cannot complain that it acted to its detriment without notice in receiving the Trust property, because although it received the assets in good faith, it also was on notice of the possibility of a PCA-based claim and very properly assumed responsibility for, *inter alia*, clarifying the provenance of the Trust assets albeit focussing on the beneficial ownership issue. Accordingly, the critical factual issue, arising from the Court exercising its inherent jurisdiction to have regard to higher level public interest considerations, became whether the evidence placed before the Court disclosed a sufficiently arguable case for a civil recovery order that the DPP should be served.
20. The overall picture painted by a combination of direct evidence and anonymous informants was as follows. The Trust assets were worth over US\$ 20 million. The Settlor's partner had held political office for several years with responsibility for a lucrative natural resource in a country where public corruption was believed to be commonplace. He had no known business interests nor any inherited wealth. He earned a modest salary and it was therefore impossible (in the absence of any credible explanation) to simply accept that he had accumulated such wealth by lawful means. The Trustee's most recent investigations produced a very slender and far from convincing source of funds explanation; this was that the Settlor had at one time operated a legitimate business which generated the funds settled in the Trust. On the face of it, it was difficult to see why, if this explanation was a genuine one, it would not have been supplied when the Trust was initially formed. It is helpful to distinguish between three different categories of evidence: (a) matters clearly capable of proof, (b) hearsay statements not admissible as evidence of the truth of the relevant assertions, (c) inferential facts. In summary:

(a) it can be potentially clearly proved that:

- (1) a substantial fund of assets was settled on trust by the partner of a former Ruritanian politician with responsibility for a lucrative industrial sector who failed to provide any or any satisfactory source of funds information to the original trustee;

- (2) the trust funds, due to their significant quantum, could not have been earned legitimately; and
- (3) the Settlor's partner's public office potentially created significant opportunities to receive unlawful financial inducements;

(b) the fact that the following statements have been made can potentially be taken into account:

- (1) Ruritania is considered (both by anonymous internal sources and the publicly available reports of monitoring agencies of international integrity) to have had a high level of public corruption at the material time; and
- (2) neither the Settlor nor her family have been linked to any significant legitimate sources of private wealth (either by anonymous sources or, presumably, publicly available information); and
- (3) it may accordingly potentially be inferred that the assets held in the Trust are “*recoverable property*”.

21. I therefore concluded that there was at the very least an arguable case based on the evidence before this Court for the DPP to be granted a civil recovery order pursuant to section 80(1) of the PCA. Viewed more robustly, it might be said that a *prima facie* case is already made out. In these circumstances, it seemed incumbent on the Court to direct that the DPP be served with this Judgment and the related papers to consider whether or not an application for such an order should be made, taking into account the beneficial ownership and related notice and/or service issues considered below. The most straightforward way in which such an application might perhaps be made would be through an interlocutory summons filed in the present proceedings on an anonymised basis. The present case was clearly distinguishable as regards (a) the availability of circumstantial evidence linking the Trust funds to unlawful conduct and (b) the ability of potential beneficial owners to advance their own claims to *Re Kate Holdings Ltd*, FSD 282/2021 (ASCJ), Judgment dated 18 November 2021 (unreported). In that case, Smellie CJ concluded that the trustee could continue to administer the trust fund and that “*the onus should remain upon those seeking to claim it to establish to the satisfaction of the Successor Trustee, not only their beneficial*

entitlements(s) but also the legitimacy of the original source of funds.”² Another distinguishing factor is that in *Re Kate Holdings Ltd.* the doubts about beneficial ownership were so significant that the assets might have reverted to the Crown as *bona vacantia*.

22. This interlocutory conclusion has of course been reached without the benefit of full argument and without any comprehensive analysis of what possible statutory defences might apply. However taking a high level view, the civil recovery jurisdiction appears to be designed for cases such as this where the civil standard of proof can potentially reach recoverable assets which the criminal PCA criminal jurisdiction cannot reach. The relevant assets would not in my judgment have been accepted by the original Trustee had it been aware of the presently available facts.

The beneficial ownership issue

23. The beneficial ownership issue can be stated shortly. The Trustee is unsure whether:

(a) the Trust assets are beneficially owned by the beneficiaries; or

(b) beneficially owned by the Government of Ruritania.

24. I accepted in 2021, and see no reason to take a different view two years later, that giving notice of the present proceedings to the potential claimants would put the safety of one or more of the beneficiaries at risk. The Trustee’s proposed precautionary ‘wait and see’ approach designed to preserve the trust assets until their ownership could be safely adjudicated was an eminently sensible one. But for the source of funds considerations addressed above, I would have unconditionally granted the directions sought by the Trustee in this regard. In the event that the DPP applies for a civil recovery order, the Court would obviously have to consider the notice and service issues afresh through the lens of the statutory framework governing the relevant application.

² At paragraph 32.

Summary

25. For the above reasons, on 22 September 2023, I directed the Trustee to serve a copy of this Judgment and the papers related to the present application on the DPP.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT