COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2013/CLE/gen/01699

IN THE MATTER of Order 17 of the Rules of the Supreme Court.

AND IN THE MATTER of an application by Banque Privée Edmond de Rothschild Ltd. for interpleader relief against the claims of Dominique Queirazza Leday of the one part and Tommaso Queirazza of the other part in respect of the assets contained in certain accounts maintained at Banque Privée Edmond de Rothschild Ltd. and valued at approximately EURO 1,651,671 which is equivalent to US$2,255,852 or B$2,244,569

BETWEEN

BANQUE PRIVÉE EDMOND DE ROTHSCHILD LTD.

Plaintiff

AND

DOMINIQUE QUEIRAZZA LEDAY

First Defendant

AND

TOMASSO QUEIRAZZA

Second Defendant

BETWEEN

TOMASSO QUEIRAZZA

Plaintiff

AND

DOMINIQUE QUEIRAZZA LEDAY

Defendant

Before: Stephen G. Isaacs Snr. J.

Appearances: Stephen Turnquest for Tommaso Queirazza
Sean Moree for Dominique Queirazza Leday
Dwana Davis-Imhoff watching brief for Bank Privée Edmond De Rothschild Ltd.

Hearing Date: 13 & 26 June and 3 August 2014

JUDGMENT

This is a contest between Tommaso Queirazza (Tommaso) the son of Francesco Queirazza (Francesco) from a previous marriage, and Dominique Queirazza Leday (Dominique) the widow of the Francesco. It is centered on their competing claims to assets held in Banque Privée Edmond de Rothschild Ltd (Banque Privée) in a trust settled by Francesco.

2. By an Originating Summons filed 17 October 2013, Dominique and Tommaso were summoned to appear in Court at the instance of Banque Privée, as interpleader, to state the nature and particulars of their respective claims.

3. By a Consent Order of 26 February 2014, the parameters of the contest were set. At paragraph 1 through 5 of the Consent Order it was ordered as follows:

> (1) Banque Privée Edmond de Rothschild Ltd. ("Banque Privée") be relieved from the claims of the said Tommaso Queirazza and Dominique Queirazza Leday in respect of the assets contained in certain accounts maintained by Banque Privée (the "Accounts") and no action be brought against Banque Privée by the said Tommaso Queirazza and Dominique Queirazza Leday to recover the assets in the account or any damages for or in respect of the said claims.
>
> (2) Banque Privée do retain possession of the assets in the Accounts until further order.
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> (3) The said Tommaso Queirazza and Dominique Queirazza Leday do proceed to the trial of the following issues:
>
> (i) Whether the Declaration of Trust dated the 12th July 2011 (and attached to the said Affidavit of Nikolai Sawyer at Tab 1) ("the Declaration of Trust") is valid;
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> (ii) In the event the Declaration of Trust is held not be be valid, who are the rightful beneficiaries of the assets in the Accounts;
>
> (4) Pursuant to Order 17 rule 5(1)(b) of the Rules of the Supreme Court Tommaso Queirazza be the Plaintiff

in the issue and Dominique Queirazza Leday be the Defendant in the issue.

(5) Banque Privée shall only be required to attend fixtures at the request of the Court.

4. At the heart of this dispute is a Declaration of Trust dated 12 July 2011, which Dominique maintains is valid. Tommaso, on the other hand, disputes the validity of the trust instrument, and has submitted that Italian Laws of Inheritance governs the relevant assets.

5. The background facts are not in dispute and are laid out at paragraphs 4 through 8 of the Affidavit of Nikolai Sawyer filed 17 October 2013 (the Sawyer Affidavit). The claim by Tommaso is succiently put at paragraph 9 of the Sawyer Affidavit. Those paragraphs state:

"(4) The Plaintiff is a duly licensed bank carrying on business from within The Bahamas. It is part of the Edmond de Rothchild Group, which has a presence in Europe, the Middle East, Asia, Latin America and The Bahamas.

(5) The Plaintiff maintains an account ("Account M") that was opened by Francesco Queirazza on 27 April 2007.

(6) Francesco Queirazza executed a Declaration of Trust ("Settlement") in respect of Account M on 12th July 2011, the terms of which provided that the assets contained in Account M were to be held by Francesco Queirazza upon trust for the benefit of his wife, the First Defendant. The Settlement also provided that upon the death of Francesco Queirazza, the Plaintiff would be the Successor Trustee and the assets remaining in Account M should be paid by the Plaintiff to the First Defendant absolutely.

(7) Francesco Queirazza died on 3rd November 211 and on this date the assets contained in Account M comprised both cash and securities.

(8) In accordance with the terms of the Settlement, the Plaintiff made arrangements for the transfer of the assets contained in Account M to the First Defendant, who had instructed that such assets be transferred to an account ("Account F") which she had opened with the Plaintiff for this purpose.

Dispute

(9) Before all of the assets contained in Account M were transferred, the Plaintiff received a letter from Lennox Paton, as attorney for the Second Defendant. The Second Defendant is the son of Francesco Queirazza by a previous marriage. According to the letter: (i) the Second Defendant is the executor of the estate ("Estate") of Francesco Queirazza, (ii) Francesco Queirazza, by his Italian Will dated 9th March 2006, devised his assets within "Rothschild Bank" to his first wife and their son the Second Defendant, in equal parts and (iii) a forced heirship regime exists under Italian law whereby the heirs of Francesco Queirazza have a predetermined right to the Estate, regardless of any testamentary dispositions."

6. On 16 February 2012, Lennox Paton wrote to Banque Privée on behalf of Tommaso, as executor of the Will of the Settlor, in respect of account M in the following terms.

> "If the account was a privately managed account in the name of Mr. Queirazza then, as executor of the Will, our client is entitled to all information in respect of the account. If the account was a joint account, then the account was established as such purely for the sake of nominating the joinee as a signatory solely as a matter of convenience if, for what ever purpose, Mr. Queirazza could not personally sign on his behalf. It is our client's contention that even as a joint account, his father's intention was never that the survivor would then become the beneficiary of the funds in the said account. Such a presumption is not applicable with regards to the facts surrounding the establishment of the account. Further, if a trust was established, either expressly, or by virtue of the circumstances surrounding the account, there was never any intention of Mr. Queirazza to do so. The account is, as we understand, a privately managed account and operated as such. Therefore any such trust could amount to nothing more than a 'sham trust' in any event, and the monies would thus still vest in Mr. Queirazza's estate."

7. On 2 March 2012, Higgs and Johnson wrote to Lennox Paton on behalf of Banque Privée advising that particulars of the identity of the executors, and the authority under which they acted, was required before the bank could consider the request.

8. Other letters of 3 October, 8 November and 21 December 2012 from Tommaso personally followed, with certain demands made of Banque Privée and of Dominique. There was, however, no

formal action taken by Tommaso to establish a claim.

9. On 16 August 2013, the bank was instructed by Dominique to transfer all assets held to her account to another institution. Account F had a balance of EURO 1.63 million and account M had a balance of EURO 21,671. In the circumstances the Bank has approached the Court for a decision in order to avoid liability for breach of contract or breach of trust if it declines to follow Dominque's instructions.

The Declaration of Trust (Settlement)

10. Turning to the live legal issues relative to the Settlement, as seen above the Settlement provided that the assets in account M were to be held for the benefit of Francesco and Dominique and upon the death of Francesco, Bank Privée as successor trustee would transfer the assets in account M to Dominique (see paragraph 2 of the Settlement.)

11. Tommaso, through Counsel and personally, caused the transfer to be arrested by challenging the ownership of account M on the basis firstly that Francesco executed an Italian Will (the Will) whereby he devised his assets in the Bank to his first wife and Tommaso in equal parts. Secondly, a forced heirship regime in Italy creates a predetermined right in the heirs of Francesco to his Estate.

The issue of the effect of the Italian Will fell away as no such Will was ever produced in Court. What remained was the status of the Settlement itself, for if it is valid then the assets in account M are removed from the Estate of Francesco and the forced heirship regime in Italy becomes moot.

12. In The Bahamas Section 3 of the Trustee Act (the Act) provides:

> "S.3(1)**3.** (1) The retention, possession or acquisition by the settlor of any one or more of the matters referred to in subsection (2) shall not invalidate a trust or the trust instrument or cause a trust created *inter vivos* to be a testamentary trust or disposition or the trust instrument creating it to be a testamentary document.
>
> (2) The matters referred to in subsection (1) are-
>
> (a) any powers to revoke the trust or the trust instrument or any trusts or powers granted thereby, or to withdraw property from the trust;

(b) any powers of appointment or disposition over any of the trust property;

(c) any powers to amend the trust or the trust instrument;

(d) any powers to appoint, add or remove any trustees, protectors or beneficiaries;

(e) any powers to give directions to trustees in connection with the exercise of any of their powers or discretions;

(f) any provisions requiring the consent of the settlor to any act or abstention of trustees;

(g) any such other powers as are referred to in subsection (2)(a) to (h) of section 81;

(h) the appointment of the settlor as a protector of the trust;

(i) any beneficial interests of the settlor (including absolute beneficial interests) in the capital or income of the trust property or in both such capital and income; and

(j) any interests of the settlor in any companies or assets underlying the trust property and any control of the settlor over such companies or assets.

(3) Subject to any contrary intention expressed in the trust instrument and subject to its other terms, a power in a trust instrument to amend, alter or vary a trust shall include (without limitation) a power to add as beneficiaries any persons whatever (including the settlor and any private or charitable trusts or foundations) and to remove any beneficiaries."

13. As Mr. Moree indicated Francesco retained the right as Settlor to revoke the trust, transfer or dispose trust property, increase the assets in the trust and invest income and capital of the trust. These powers may be lawfully retained by the Settlor under Section 3 of the Act and do not invalidate the trust.

14. Mr. Turnquest has submitted that Section 3 of the Act does not apply where the Settlor is the sole trustee. He relies on the proposition expressed in **Lewin On Trusts 13th Ed (2008) pp 11 – 12** where the author says:

"In some jurisdictions there are express statutory

> *provisions to the effect that various kinds of powers or interests reserved by the settlor neither invalidate a lifetime trust [nor] delay or prevent it taking effect as a lifetime trust rather than a testamentary disposition*[68] *[footnote 68 says 'Examples are – The Bahamas: Trustee Act 1998; Cayman Islands: Trusts Law (2001 Revision), Sections. 13 and 14; Jersey: Trusts (Jersey) Law 1984...Art. 9A')].* Such provisions may go no further than give effect to what is the position without statutory intervention in England and Wales but have the advantage of eliminating doubt as to the scope of the common law rules and are no doubt a comfort to settlors who wish to establish lifetime trusts in those jurisdictions reserving wide powers to themselves"

15. The proposition is seen at work in **Re: the AQ Revocable Trust [2010] 13 AI.T.E.L.R. 260** where Ground J. said:

> "the concatenation of rights and powers in the settlor, when coupled with the fact that he was sole trustee at the same time of the constitution of the trusts, rendered this trust illusory during his lifetime...the cumulative effect of the trust documents, when taken with the *de facto* situation, means that the settlor as trustee could not effectively be called to account during his lifetime. Crucial to this conclusion is art VIII H, which allows the settlor to absolve himself as trustee from any and all breaches of trust. While it may be that I would not have come to the conclusion had art VII H been coupled with a distinct and independent trustee, in this case it is the combination which pushes it over the top. Given that the trust agreements are constituted on their face with the settlor as sole trustee, and that no further appointment was made at the time, I consider that arts I and II were void on the face of the documents at the inception of the trust agreements, and that the remaining trusts created by the agreements were therefore testamentary in nature"

16. The union of Settlor and Trustee in one person does not of itself make the trust a sham but it is an aggravating factor when considering whether a trust is a sham. Again referring to **Lewin on Trusts,** the author states:

> "Where a settlor has declared himself trustee, as in Midland Bank, plc v Wyatt, it will be a great deal easier to regard

> what has been done as of no effect than where he has instead transferred the trust property to a trustee and both of them have executed a deed declaring the trusts on which the trustee is to hold"

Lewin goes on to state:

> "It should also be borne in mind that the mere retention of wide beneficial powers and interests by the settlor does not of itself make the trust a sham, so long as the trustee genuinely has control of the assets and exercised his own independent discretions in respect of those matters where the terms of the trust require him to do so."

17. Mr. Turnquest submits that given the structure of the trust in the instant case, Section 3 of the Act can only validate the trust where the Settlor and Trustee are separate. He refers to Sections 3(2)(e) (f) and (h) of the Act in support of his submission. In essence he argues that Section 3 of the Act codified the common law regarding a Settlor's reservation of powers/interest, and that the legislative changes do not protect a trust from pre-existing law relative to the adverse effect of the unity of Settlor and Trustee in one.

18. The submissions of Mr. Turnquest attempt to analyse a trust where the Settlor is the sole beneficiary, as in **Re the AQ Revocable Trust (supra).**

19. A trust is required to incorporate three certainties in order to be effective, those are certainty of words, subject and object. The case of **Knight v Knight (1840) 49 E.R. 58** and a line of cases that followed demonstrate this. In the case of **Kayford Ltd [1975] 1 W.L.R.** Megarry J. pointed out that as for certainty of words, the word 'trust' or 'confidence' or the like need not be used so long as sufficient intention to create a trust is manifested.

20. In the instant case Francesco as Trustee, held account M in trust for himself and Dominique manifesting certainty of words to create a trust. The account is described as an "In Trust For" account and its purpose is expressed in the following words:

> "WHEREAS the Account Holder is the owner of and entitled to all monies standing to the credit of the Account and is desirous of holding the Account UPON TRUST for the purpose of Providing for the benefit of the Account

> Holder, the Beneficiary and the Contingent Beneficiaries on the terms hereof and subject to the powers and provisions hereinafter declared and contained."

21. As to certainly of subject, Francesco segregated the trust property from his estate. Account M was created for the benefit of Dominique and contains trust property. The trust property is to be transferred to Dominique upon his death. In **West v Watson [1998] N.S.W.S.C. 419** it is seen that a trust must make it clear who the beneficiary/object is as in the instant case. The three certainties are manifested in the instant case.

22. Returning to the arguments of Mr. Turnquest that where the Trustee and beneficiary are in one person the trust is a sham, the case of **T. Choithram SA v Pagarani (PC) [2001] 1WLR** shows that a Settlor may either convey property to trustees, or declare himself to be a trustee of it.

23. The parties are on common ground on the point that a sole Trustee cannot hold the trust for himself as a sole beneficiary. Mr. Moree referred to the statement of Lord Denning in **Rye v Rye [1962] 1 AER 146** where he said:

> "This makes it necessary to determine the point of law: Is it possible for a person to grant a tenancy to himself? Or for two persons to grant a tenancy to themselves? At common law it was clearly impossible. *Nemo potest esse tenens et dominus.* A person cannot be, at the same time, both landlord and tenant of the same premises: for as soon as the tenancy and the reversion are in the same hands, the tenancy is merged, that is, sunk or drowned, in the reversion."

24. On the other hand, as far back as the case of **Forster v Abraham (1874) LR 17 Eq. 351**, the Courts have held that a beneficiary can be a Trustee. In the instant case Francesa is the Settlor, a Trustee and one of the beneficiaries, therefore the legal title vested in Francesco as Trustee while the equitable title is vested in himself and Dominique, thus removing the trust from that category where the sole Trustee is also the sole beneficiary.

25. Mr. Turnquest has brought into question the intention of Francesco but there is no admissible

parole evidence on which to ground such a submission. The only document that expresses Francesco's intention is the Settlement itself. There is nothing in the settlement that can reduce it to a testamentary disposition.

26. In Halbury's Laws of England 4th Ed. Paragraph 1478, the author writes :

> "where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements, either to show that intention to contradict, vary, or add to the terms of the document [...]
>
> Extrinsic evidence cannot be received in order to prove the object with which a document was executed; or that the intention of the parties was other than that appearing on the face of the instrument."

This principle is applied in **Gordon v Burke (1970) 16 WIR 204.**

27. As to the retention of wide powers in the Settlor, that is authorised by Section 3 of the Act, and does not affect the basic requirement that the trustee holds the trust assets for the sole benefit of the beneficiaries. Section 3 provides that retaining wide powers in the Settlor "shall not invalidate a trust or the trust instrument or cause a trust created *inter vives* to be a testamentary trust or disposition or the trust instrument creating it to be a testamentary document."

28. Mt. Turnquest argued that the power to revoke the trust and the indemnity clause in the trust are factors that invalidate the trust. Even the power to revoke a trust is retained in the Settlor at Section 3(2)(a) of the Act without invalidating the trust or cause it to be testamentary. Further the indemnity clause in the Settlement is common place and does not invalidate the trust.

29. The suggestion that account M is not the account referred to in the Settlement is rebutted by the Affidavit of Nikolai Sawyer filed 17 October 2013 which exhibits a letter from Tommaso's former Counsel identifying Account #36101 as the sole trust asset to which the Settlement relates.

30. In all of the circumstances I accept, as submitted by Mr. Moree, the following:

i. The three certainties exist.

ii. There is no provision contained in the Settlement which is inconsistent with the Act or Bahamian common law principle

iii. The Settlement divests the Accounts Legal interest (with the Settlor) and the beneficial interest (the Settlor and Dominique); and

iv. The Settlement imposes fiduciary duties upon the Settlor, as trustee, to manage and operate the account for the benefit of the beneficiaries.

32. In the result I declare that the Settlement is valid and enforceable.

33. Costs are awarded to Dominique to be taxed if not agreed.

Dated the 16th day of April 2015.

Stephen Isaacs Sr. J.