



GANY HOLDINGS (PTC) SA V KHAN AND OTHERS

FEBRUARY 2019

The Privy Council has handed down its decision in *Gany Holdings (PTC) SA v Khan and others*, which was appealed from the Court of Appeal of the British Virgin Islands.

The case concerned a discretionary trust established in 1982 by Mr Mohamed Ragoonwala, with the principal beneficiaries being Mr Ragoonwala himself, his second wife, his children and their spouses (the "**Trust**").

Following Mr Ragoonwala's death in 1998, his daughter, son-in-law and granddaughter made requests to the Gany (the trustee company) for information about the Trust, resulting in proceedings being issued by those beneficiaries in the BVI in 2012. It is those proceedings that were appealed to the Eastern Caribbean Court of Appeal, and ultimately the Privy Council.

The main issues in the proceedings centred on what assets had actually been transferred to the Trust before the settlor's death, and whether the trustee's decision to distribute the entirety of the Trust fund to one beneficiary very soon after the settlor's death could be set aside (on the basis that the trustee misunderstood what assets the Trust actually had).

Whilst decisions of the Privy Council relating to other jurisdictions (e.g. the BVI) are not binding on the Royal Court of Guernsey, they are persuasive authority. It is likely, therefore, that the Guernsey Courts would follow the principles laid out in this case, and prudent Guernsey practitioners will take note of the Privy Council's decision.

A background to the matter is set out below, followed by a summary of the decision and some pointers on the implications of it.

Background

Mr Ragoonwala was a highly successful businessman. Shortly after setting up the Trust, Mr Ragoonwala appointed Gany Holdings as trustee.

Around the time of the settlement of the Trust, Mr Ragoonwala began to delegate management of many of his commercial interests to one of his sons, Asif. Asif took on an important role in the running of Gany as trustee, and became sole director and shareholder of that company.

Following Mr Ragoonwala's death, Asif (who succeeded to his father's power to appoint/remove trustees of the Trust) appointed his mother and two others as directors of Gany. Thereafter Asif "*went out of his way to make it appear to his siblings...that there was substantial property held by Gany on the terms of the Trust amounting in value to many millions of dollars*". Asif told his siblings that

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they would receive \$2 million dollars each from the Trust if they signed waiver letters waiving claims against the Trust or the settlor's estate (the waivers were given and distributions made).

6 months after Mr Rangoonwala's death, the trustee company resolved to wind up the Trust by distributing the entirety of the Trust fund to Asif.

Questions / Proceedings

Some years later, certain beneficiaries began to raise questions about the distribution of assets from and ultimate winding up of the Trust. This process turned into a series of negotiations in which Asif and his brother, Khalid, made a proposal to their siblings that the Trust be reconstituted by the establishment of sub-trusts for each sibling. In the course of those negotiations, Asif implied that the Trust was possessed of property worth over €90m (including interests in various companies).

Those negotiations broke down and in 2012 the trustee – Gany – informed the siblings the whole of the Trust property had been distributed by 2000 following the payments made to them in 1998. It also explained that to the best of its knowledge, the Trust had never held any companies.

It was at that stage that certain beneficiaries issued proceedings in the BVI, seeking a proper accounting of the assets of the Trust.

First Instance

In response to the beneficiaries' claim, the trustee's response was to confirm that the Trust had never comprised any assets other than a nominal sum of \$100 used to settle it. The trustee later conceded that the Trust owned some assets in the form of an interest in a Hong Kong company (which it said owned little or no assets).

At first instance, the Court refused the beneficiaries' claim, explaining that they had not adduced any evidence to falsify the trustee's account, with no evidence of any assets of value having been transferred to the Trust.

Court of Appeal

The Court of Appeal overturned this decision, finding that:

1. As well as the shares in the Hong Kong company, the shares in three further BVI companies had been transferred into the Trust, and were Trust assets;
2. The 1998 appointment of Trust assets to Asif should be set aside; and
3. Asif was to account for the assets received by him pursuant to the 1998 appointment.

The Court of Appeal noted a nineteenth century English Court of Appeal – *In Re Curteis' Trusts* – explaining that this English case established that where a settlor of an existing trust makes a gratuitous transfer of assets to the trustee of that trust, it will be presumed that those assets will be held on the terms of the existing trust.

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As Mr Rangoonwala had purportedly transferred assets to Gany after Trust had been established, the presumption worked to validate the transfer of assets in to the Trust.

This decision was appealed by Gany and Asif, resulting in a hearing before the Privy Council.

Privy Council

The Privy Council dismissed the appeals of Gany and Asif in their entirety.

It also held that both the Judge and the Court of Appeal "*went wrong in their analysis*". Specifically, it was said that the Court of Appeal was wrong to decide that the issue could be resolved by reference to any legal presumption (*In Re Curteis' Trusts*, or otherwise).

Instead, the Privy Council held that the correct approach was to look at whether there is any written or oral declaration that indicated the intentions of the parties. Failing that, the Court must look to the evidence available and come to a common sense decision, taking into account "*the parties' conduct and the factual context in which the transfer takes place*". If there is no evidence available, the Court can have regard to the legal presumptions that can arise in these situations, but only as a last resort.

The Privy Council therefore proceeded to determine whether assets were in the Trust or not using the methodology set out above.

It decided that the evidence before it was sufficient to establish that Mr Rangoonwala, in divesting himself of personal ownership of various companies between 1989 to 1995 – after the Trust was established – did so on the basis that those assets would become assets of the Trust.

As a consequence, the further issue of whether the 1998 distribution (whereby Gany distributed the entirety of the Trust fund to Asif) fell to be considered – namely whether it was a flawed decision, and whether it should be allowed to stand.

The Privy Council found that the failure of Gany's directors to appreciate, or to investigate, the extent of the Trust's assets at the time of the distribution was a serious breach of fiduciary duty. The Privy Council therefore exercised its discretionary power to set aside the appointment.

The Privy Council also order that Asif must provide an account of the full extent of the assets which were subject to the 1998 distribution.

Key Points and Take Aways

You presume too much - Despite the decision in this case, the Privy Council confirmed that a legal presumption that a settlor who gratuitously transfers property to a trustee of an established trust transfers it subject to the terms of that trust, is not the first port of call. A common sense view will be taken, with all relevant facts taken into account.

Importance of documenting decisions - The importance for all parties (not just trustees) to record the transfer of assets into a trust was starkly demonstrated. Three separate courts were called upon to decide whether certain assets were transferred to the Trust because of a lack of records and documentation which, if they had been prepared, would have negated a large part of this case.

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Avoid distribution if there is asset confusion - This case is a reminder to trustees to get clarity on precisely what they hold as trust property, and not just what those assets are, but how much they are worth (which may include arranging updated valuations), particularly before distributions are made to beneficiaries, which could be subject to challenge later down the line if the trustees – as in this case – are in breach of their fiduciary duties by not checking the position thoroughly beforehand.

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