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

Cause No.: FSD [REDACTED] (IMJ)

**IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW
(1997 REVISION)**

**AND IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF AN
ARBITRAL AWARD DATED 5 JULY 2016 [REDACTED]**

BETWEEN

Y

Plaintiff

AND

R

Defendant

IN CHAMBERS

Appearances: Mr. Colin McKie QC and Mr. Luke Stockdale of Maples and Calder for the Plaintiff
Mr. Nicholas Dunne and Mr. Andrew Gibson of Walkers for the Defendant

Before: The Hon. Justice Ingrid Mangatal

Heard: 27 July 2017

Draft Judgment

Circulated: 13 December 2017

Judgment Delivered: 9 January 2018



HEADNOTE

Application by Judgment creditor for Appointment of Receivers by way of equitable execution in relation to judgment to enforce foreign arbitral award - Whether application should have been made under section 4 of the Confidential Information Disclosure Law before use of information - Whether beneficiary in discretionary trust has any interest which can be considered an asset, in equity or otherwise in relation to the trust fund.

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JUDGMENT

Introduction

1. The Plaintiff Y ("Y" or the "**Judgment Creditor**") is a professional law corporation, incorporated in the State of [REDACTED]. It specialises in entertainment law, intellectual property law and related disciplines.
2. The Defendant R ("**R**" or the "**Judgment Debtor**") is a former client of the Plaintiff. He is the son of the late M, [REDACTED] [REDACTED] [REDACTED]. M died [REDACTED] [REDACTED] when R was two years old. Prior to his death, M had transferred certain of his assets to a Bahamian law governed trust [REDACTED]. In [REDACTED], the managing trustees of that settlement settled its assets upon a new Cayman Islands law governed discretionary trust, [REDACTED] (the "**Trust**"). R is a beneficiary of the Trust.
3. R engaged the Plaintiff to act for him in relation to certain matters in connection with his late father's estate in order to secure additional income from the estate, including from the Trust.
4. A dispute subsequently arose between the Plaintiff and the Defendant in connection with the payment of legal fees.

The Judgment Debt

5. On 4 August 2015, the Plaintiff commenced arbitration against the Defendant in the State of [REDACTED] pursuant to the terms of an arbitration agreement between them (the "**Arbitration**") to deal with the dispute between them.

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6. On 5 July 2016, the arbitral tribunal (the “**Tribunal**”) issued an award against the Defendant and in favour of the Plaintiff in the total amount of US\$ 1,987,219.51 (the “**Award**”).
7. In August 2016, the Plaintiff issued these proceedings to enforce the Award pursuant to s. 5 of the *Foreign Arbitral Awards Enforcement Law*.
8. On 4 October 2016, the Court entered the Judgment ex parte on the same terms as the Award. Pursuant to *Grand Court Rules* (“*GCR*”) O. 73, r. 31(8), the Plaintiff was not permitted to enforce the Judgment until the final determination of any application that the Defendant might make to set it aside.
9. On 3 November 2016, the Defendant issued a summons seeking to set aside the Judgment. That application was later listed to be heard on 7 April 2017.
10. On 29 March 2017, an order was entered by consent which dismissed the Defendant’s summons to set aside the Judgment and ordered him to pay the Plaintiff’s costs of the application. Consequently, the Award now falls to be enforced, and the Defendant is a Judgment Debtor indebted to the Judgment Creditor in the amount of the judgment debt, together with accrued interest and costs. The Plaintiff has indicated that it has recovered US\$91,720.63 from the Judgment Debtor in the [REDACTED] proceedings.

11. In its summons dated 2 May 2017 the Plaintiff seeks orders against the Defendant, as follows:-

“(1) *The appointment of receivers by way of equitable execution to receive all distributions to or for the benefit of the Judgment Debtor from [the Trust] in or towards satisfaction of the monies, interest and costs due to the Judgment Creditor under the Judgment in this action dated 4 October 2016 (the “Judgment”);*



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(2) Alternatively, garnishment of such distributions out of the Trust which are payable to the Judgment Debtor.”

12. The application is supported by a number of affidavits, including that of HY, an attorney admitted to practice in [REDACTED], and the founder and principal of Y, of EM, an attorney and partner in the law firm [REDACTED], which firm acts for the Plaintiff in the [REDACTED] proceedings, and of RK, lawyer and practicing member of the State Bar in [REDACTED] who was asked to give evidence in relation to certain aspects of [REDACTED] law on behalf of the Plaintiff. The Defendant has filed affidavits of DE, who acts for the Defendant in the [REDACTED] proceedings.
13. At the start of the hearing, I was informed that the parties were agreed that only the issue of appointment of receivers should be dealt with at this time.
14. However, in addition a preliminary point was taken by Mr. Dunne, on behalf of the Defendant, which in my view has to be considered first. It is because both Counsel felt that I could go on to deal with the substantive argument regarding appointment of receivers, *de bene esse*, that I have spent time looking at the substantive argument in addition to the preliminary one.

The Defendant's Skeleton Arguments

Preliminary issue - Confidentiality

15. The Defendant maintains that the evidence relied upon by the Plaintiff contains a great deal of highly confidential information relating not only to the affairs of R, but also those of the other potential beneficiaries and Trustee of the Trust.
16. At paragraph 5 of HY 2, the use of information held by Y in relation to R is said to be permitted by virtue of the [REDACTED] Evidence Code. However, Mr. Dunne on behalf of the Defendant says that this ignores entirely the fact that the present proceedings have been brought here in the Cayman Islands.



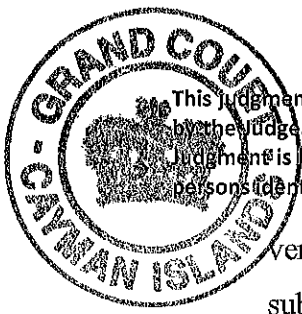


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17. Mr. Dunne points out that, in his affidavit at paragraph 8.3, RK acknowledges on behalf of the Plaintiff that if the statutes of another jurisdiction would prohibit a lawyer's evidence in that jurisdiction, the [REDACTED] lawyer is governed by that more stringent standard. He continues that [REDACTED] Law cannot permit the courts of another jurisdiction to accept evidence that would not be admissible under the standards that apply in that other jurisdiction. Counsel submits that having elected to bring proceedings in the Cayman Islands, the Plaintiff is subject to the confidentiality regime applicable here.
18. It was submitted that the existence of a private fee dispute between R and Y [REDACTED] cannot possibly have the effect of collaterally waiving the right to confidentiality of those other parties.
19. The Defendant's position is that the need to seek the Court's directions under section 4 of the *Confidential Information Disclosure Law ("CIDL")* is plain. It was submitted that the Plaintiff has instead ignored its obligations and has proceeded to disclose the confidential information, as if it had been permitted to do so, in circumstances where, the Trustee has not been served with the application.
20. It was submitted that that conduct would be inappropriate in any case, a fortiori where the Plaintiff is a firm of professionals. It was submitted that, not only is the Plaintiff in breach of its duty of confidence, but also brings an action which relies upon inadmissible material. It was argued that it would clearly undermine the foundations of Cayman Islands law on confidentiality if the Court permits a party to ignore its duties in this way and carry on regardless.

The Plaintiff's response to the preliminary point

21. Mr. McKie Q.C. made a number of points in response to the confidential information issue. He submitted that the enforcement of the Award itself involves consideration of the



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very facts and information in relation to the Trust exchanged by R with Y. He further submitted that even if the information was confidential information, it cannot be confidential as between the Plaintiff and the Defendant.

22. It was also argued that, in any event, a substantial amount of relevant information is already in the public domain. Reference was made to the decision of [REDACTED] in the Equity Division of the High Court in the Bahamas in [REDACTED]
23. It was also submitted, that even if the information was provided in breach of a duty of confidentiality, this would not render the information or material inadmissible. It was pointed out that the previous Law, the *Confidential Relationships (Preservation) Law*, which provided for criminal offences, has been repealed. Learned Counsel posited, that in civil proceedings, the Court should admit evidence if relevant and admissible. Reference was made to a number of English authorities which pre-dated the civil evidence reforms and which indicate that there is no general discretion in civil cases to exclude evidence on the ground that it was unlawfully obtained.
24. Learned Queen's Counsel also referred to paragraphs 5 and 6 of RK's affidavit, which in essence says that an attorney is, under [REDACTED] Law, released from obligations of confidentiality when it comes to the attorney's rights and interests in a fee dispute.

Resolution of Preliminary Point

25. In my judgment, Mr. Dunne's submissions must succeed. To the extent that the issues are said by the Plaintiff to be governed by [REDACTED] Law, the [REDACTED] Rules do not apply here. The existence of those Rules does not mean that the Plaintiff can use them in Cayman where there is a different confidentiality law regime.

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26. In any event, even if it were right that by virtue of entering into the Agreement with Y, R waived confidentiality, I accept that he could not by that act have waived confidentiality on the part of the Trustee or on the part of the other beneficiaries. I have noted that in some of the papers filed on behalf of the Defendant in the [REDACTED] proceedings, he has expressed an interest in the Judgment Debt being paid from the Cayman Trust Fund. It may be that such an indication, taken with other factors, may arguably mean that the Defendant has expressly or impliedly consented to the use of confidential information. At any rate, it may well be said that it does not sit well for the Defendant to take that position in the [REDACTED] enforcement proceedings, yet rely upon the duty of confidentiality here in this jurisdiction. However, it would seem to me that on core principles, that cannot affect the rights of the Trustee and other beneficiaries, to have the Court perform its role as gatekeeper for the use of confidential information in these proceedings.

27. In the circumstances, an application should have been made by the Plaintiff under section 4 of the *CIDL* and the Trustee served with the application. This is particularly so where the Plaintiff relies upon what it says the Trustee has done in the past, in order to attempt to predict or proffer opinions as to what the Trustee will do in the future.

28. Additionally, the regime regarding confidentiality here in the Cayman Islands is very different to what exists in England. Section 4 of the *CIDL* provides for a gateway permission to be obtained from the Court before the information can be used. It does seem to me that if it were the case that the Court cannot say that the use of such information without the Court's permission is inadmissible, section 4 of the *CIDL* would have very little teeth to it. It is also the case that confidential information is not necessarily the same thing as information unlawfully obtained.

29. Thus, I find that the information in HY's affidavit regarding the funds that have been disbursed, the details of the beneficiaries and such other matters about the Trust, all fall within the realms of confidential information under the *CIDL* and application ought to



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have been made by the Plaintiff under section 4. Thus, the major part of the contents of HY's affidavit is inadmissible, and the application does not really get off the ground.

30. Whilst I accept that the Bahamian decision in [REDACTED] dealt with the Bahamian Law governed Settlement, it did not deal with the later Cayman Islands Law governed Trust.

31. However, in the event that I am wrong on this issue, and in light of the fact that both sides made full submissions on the substantive application for appointment of receivers, I have gone on to deal with that aspect of the matter.

The Trust

32. The Judgment Debtor is a beneficiary of an irrevocable discretionary trust, the Trust. The Trust is governed by Cayman Islands law.

33. The Trust was established in [REDACTED]. Since that time the Judgment Debtor has received distributions of (at least) [REDACTED] from the Trust. No other beneficiary has ever received any distribution from the Trust.

34. Distributions from the Trust represent the overwhelming majority of the Judgment Debtor's income.

Appointment of Receivers

Jurisdiction

35. Section 11(1) of the *Grand Court Law* states:

"The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the court or conferred by this or any other law for the time being in force in the islands, shall possess and

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exercise, subject to this and any other law, the like jurisdiction within the islands which is vested in or capable of being exercised in England by -

(a) Her Majesty's High Court of Justice; and

(b) the Divisional Courts of that Court,

as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amended or replacing that Act."

36. Section 37(1) of the Senior Courts Act, 1981 (England) states:

"the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

37. The Grand Court therefore has the same jurisdiction as the English High Court with respect to the appointment of receivers.

The Plaintiff's Arguments

38. Learned Queen's Counsel Mr. McKie submits that there is no doubt that where a judgment debtor owns the beneficial interest in a bare trust that the court may appoint receivers by way of equitable execution in respect of that beneficial interest. Although he has not been able to come across any reported judgment considering the situation where a judgment debtor does not yet own, but may reasonably be expected in the future to own, the beneficial interest in a bare trust, learned Counsel submits that the Court has jurisdiction to appoint receivers by way of equitable execution in respect of that beneficial interest.

39. Reference was made to *Masri v Consolidated Contractors International (UK) Ltd (No.2)* [2009] Q.B. 450, where the English Court of Appeal reviewed the English High Court's jurisdiction to appoint receivers (both generally and, specifically on the facts of that case, receivers by way of equitable execution). It held that:

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- (1) The court's jurisdiction to appoint receivers is comprised in section 37(1) of the Senior Courts Act, 1981.
- (2) The court is not bound by the strictures of the former equitable jurisdiction to appoint receivers as developed by the Court of Chancery pre-1873.
- (3) The modern jurisdiction may be developed incrementally, applying established principles to new situations.

40. After a detailed analysis of the authorities, it was held that it had jurisdiction to appoint a receiver by way of equitable execution in respect of future receipts due to a judgment debtor from a defined asset. Further support, the Plaintiff submits, is found in *Webb v Stenton* (1883) 11 Q.B. 518, where the English Court of Appeal stated obiter that the High Court had jurisdiction to appoint a receiver by way of equitable execution in respect of future distributions payable to a judgment debtor pursuant to his life interest in a trust.
41. Since *Masri (No.2)* the courts have further developed the jurisdiction incrementally to facilitate the enforcement of judgment debts over judgment debtors' assets.
42. In *TMSF v Merrill Lynch Bank and Trust Company (Cayman) Ltd* [2011] (1) CILR 467, the Privy Council (on appeal from the Cayman Islands) applied *Masri (No.2)*. It held that the Grand Court had jurisdiction to appoint a receiver by way of equitable execution in respect of a power to revoke a revocable discretionary trust which power was vested in the settlor/judgment debtor.

Application

43. The Plaintiff relies upon the following facts as being undisputed:
 - a. The Trust is governed by Cayman Islands law.
 - b. The Trustee is a Cayman Islands company whose headquarters are located in the Cayman Islands.
 - c. The Trust assets comprise of cash and liquid securities of at least [REDACTED], being an amount far greater than the Judgment.



- d. The Judgment Debtor is a beneficiary of the Trust.
- e. Since 2003 the Trustee has from time to time exercised its discretion to distribute trust assets in the form of substantial amounts of cash totaling at least [REDACTED] to the Judgment Debtor.
- f. Since the Trust was settled in [REDACTED], the Trustee has never exercised its discretion to distribute trust assets to any beneficiary other than the Judgment Debtor.
- g. Payments by the Trustee out of the trust assets and to the Judgment Debtor represent the overwhelming majority of his income.
- h. There is no spendthrift clause in the Trust Deed which would disqualify the Judgment Debtor from receiving the distributions.

44. Therefore, the Plaintiff submits that:

- a. the Trustee is under a duty to consider from time to time whether or not to exercise its dispositive discretionary powers in favour of the Judgment Debtor (and if he makes no request for a distribution to make inquiries of him as to his financial status and needs);
- b. if and when it decides to exercise such powers in his favour, and it has determined the amount to be distributed to him, the Trustee will ensure that it has sufficient cash available to make the distribution on the date that it proposes to make that distribution;
- c. no later than the time at which the distribution is made, the Trustee must segregate the cash from the remaining corpus of the trust fund; and
- d. then the Trustee will pay the amount to the Judgment Debtor.
- e. Given that the Judgment Debtor has very limited other means of financial support and a substantial liability in the form of the Judgment Debt, it is fanciful to suggest that the Trustee would not at some point in the proximate and foreseeable future exercise its discretion in favour of the Judgment Debtor.



- f. At the point in time when the Trustee is about to pay an amount to the Judgment Debtor he will own the entire beneficial interest sum; that is, the Trustee will hold that sum, either as bare trustee or as agent for the Judgment Debtor. (To the extent that the Trustee holds the sum as agent, the Judgment Debtor would also be the legal owner of the money. In that case, the money would be amenable to garnishment).
- g. Once the Judgment Debtor has the entire equitable interest in the sum to be paid then that is an asset which may be applied to the discharge of the Judgment Debt, and is therefore amenable to execution.
- h. Following *Masri (No.2)* and *Webb v Stanton* the Grand Court has jurisdiction to appoint receivers over future distributions from the Trust.

The Court's Discretion

45. The appointment of receivers is a discretionary remedy. Mr. McKie refers to *Cruz City 1 Mauritius Holdings v Unitech Ltd (No. 2)* [2015] 1 All ER (Comm) 336, where the English High Court recently considered the discretionary factors, described by learned Counsel, incorporating the language of other cases, as follows:

- a. In considering "*the demands of justice*" in this context, (See *TMSF v Merrill Lynch*), those demands include the policy of the law that judgments of the courts should be complied with and, if necessary, enforced;
- b. The jurisdiction is "*unconstrained by rigid expressions of principle and responsive to the demands of justice in the contemporary context*" (See *Masri (No. 2)*).
- c. The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal process of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal and it is necessary to take into account all the circumstances. It will be sufficient if it would be difficult to enforce the judgment by other means and the appointment of a receiver is the only realistic prospect available to the judgment creditor to enforce its judgment in the short term.



- d. Convenience is a relevant consideration, and
- e. A receiver will not be appointed if the Court is satisfied that the appointment would be fruitless. However all that is required is that there is a real prospect that the appointment will serve some useful purpose.

46. Applying the above principles to this case, it was put forward that:

- (1) The Judgment Debtor alone of all the beneficiaries of the Trust, has received very substantial distributions from the Trust over the last several years.
- (2) It is highly improbable that the Trustee will cease to make payments to the Judgment Debtor.
- (3) The only conceivable form of normal execution process which might be available to the Judgment Creditor is garnishment, but the Court's jurisdiction to do so is doubtful.
- (4) Whatever the position may be with respect to the enforcement of the [REDACTED] Judgment against assets of the Judgment Debtor in [REDACTED], this application concerns the enforcement of a judgment of this Court with respect to distributions from a trust that could only be reached by action taken in this jurisdiction.
- (5) In any event, there are a number of difficulties in enforcing the [REDACTED] Judgment against the Judgment Debtor's known assets in [REDACTED] and, even if wholly successful, enforcement steps against assets will not realize sufficient funds to discharge the judgment debt. Thus:
 - a. Although the Judgment Debtor owns two apartments in [REDACTED], which DE states have a value of [REDACTED], the Judgment Debtor has filed no independent valuation evidence to support that value, nor any evidence as to whether the properties are encumbered. The Judgment Creditor has obtained its own valuations, however those are highly qualified because they are based on the valuers' external observations of the apartments because the Judgment Debtor has declined to permit inspection of



the interior of the apartments. Further, DE makes no allowance for closing and sale costs which would reduce the net realisable value from the properties to approximately [REDACTED] at best. Furthermore, any sale of the apartments is likely to take up to 1½ years to complete.

- b. Similarly ER provides no supporting documentation or other verifiable evidence to support the apparent valuation of approximately [REDACTED] which he places on the Judgment Debtor's royalty stream.
- c. The cash amounts which DE refers to at paragraphs 13(c) and 13(d) of his Third Affidavit represent a small fraction of the Judgment Debt. The Judgment Creditor has no knowledge of the recovery referred to by DE at paragraph 18 of his affidavit.

(6) There is no question of double-recovery. Once the Judgment Debt, interest, costs and receivers' fees and expenses have all been discharged then enforcement action will be discontinued and the receivers discharged. Any surplus remaining in the hands of the receivers will be paid to the Judgment Debtor. The proposed receivers are independent professionals who must account to the Court for all monies that they receive and distribute, and the Judgment Debtor will be entitled to receive copies of their accounts. Any amount received by the receivers which exceeds the judgment debt/amount owing to the Judgment Creditor, will be paid to the Judgment Debtor.

(7) It is overwhelmingly in the interests of justice that the Court appoints receivers by way of equitable execution as sought.

47. For those reasons, it was submitted on behalf of the Plaintiff that the Court should make the receivership orders sought by the Judgment Creditor.



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48. The proposed receivers [REDACTED], have both sworn affidavits confirming that they are independent of the parties and are willing to accept appointment.

49. It was also sought, that as the proposed receivers have appropriate insurance coverage, the receivers not be required to give security for their appointment.

The Defendant's Arguments in relation to the appointment of Receivers

50. It was Mr. Dunne's submission, that even leaving aside the confidentiality difficulties, there are other problems with the relief sought, the appointment of receivers being a discretionary remedy. Reference was made to *Gee on Commercial Injunctions* 6th Edition, 2016, page 573.

51. Order 51, r. 1 of the *GCR* provides as follows:

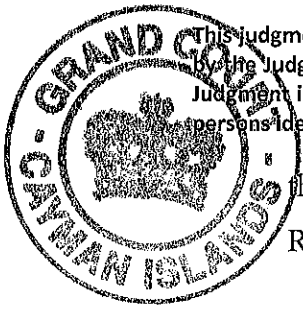
"Appointment of receiver by way of equitable execution

1. Where an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is just or convenient that the appointment should be made shall have regard to the amount claimed by the judgment creditor, to the amount likely to be obtained by the receiver and to the probable cause of his appointment and may direct an enquiry on any of these matters or any other matter before making the appointment."

52. It was submitted that when those factors are properly assessed, the case for appointment is not made out.

Just and Convenient

53. It was submitted that the judgment debt is not particularly large, and that, in any event, the existence of the debt of just under US\$ 2 million is contingent upon the outcome of proceedings before the foreign appeal court. Counsel therefore suggests that it is not clear



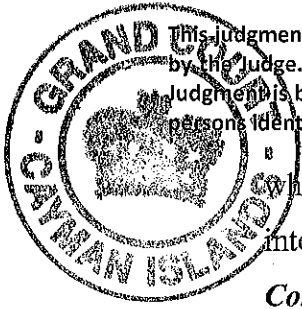
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that the debt's collection justifies the significant expenses that would be incurred by Receivers were they to be appointed.

54. Mr. Dunne indicates that this is to be contrasted with the fact that the Plaintiff has significant available assets against which to enforce in the United States. Reference was made to HY 3. Though Counsel does not accept the values there stated, he indicates that when taken together, it is clear that the Plaintiff is able to directly enforce in respect of all (or virtually all) of the sums owed to it against assets in the United States, the jurisdiction in which the debt arises, and where both the Plaintiff and the Defendant reside.
55. Reference was also made to the decision in *Hutton v Watling* [1948] Ch 26, as an example of the principle that the Court will not grant equitable relief such as the appointment of a receiver where another adequate remedy exists.
56. It was also argued that it cannot be just and convenient to appoint a receiver in circumstances where there are no assets which are legally or beneficially owned by R within the jurisdiction. Further, that it would be wrong for the court to make a speculative appointment just in case such assets were to exist at some point in the future.
57. Further, Mr. Dunne opines that it is worth noting that HY does not assert that the assets in [REDACTED] are not available for enforcement, rather her complaint appears to be that there may be some delays in doing so. He submits that there is nothing to suggest that those delays would be undue, or that enforcement in the Cayman Islands could be completed more speedily.

Whether assets in the Cayman Islands

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



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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 Revenue Commissioners* [1968] AC 553.

59. Mr. Dunne makes reference to *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139. At paragraph 13 Lewison LJ stated as follows:

“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 Revenue....”

(My emphasis)

60. Reference was also made to paragraph 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.

62. Reference was made to *JSC VTB Bank v Skurikhin* [2015] EWHC 2131(Comm). In that case, Christopher Butcher QC, sitting as a Deputy High Court Judge in the Commercial Division, accepted the proposition that a receiver by way of equitable execution could be appointed over whatever may be considered in equity as the assets of the judgment debtor.

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63. Reference was also made to “*The Law Relating to Receivers and Managers*”, Picarda, 4th Ed., where at page 431, the learned author opines as follows:



“It is a pre-condition ...of an application for a receiver by way of equitable execution that the subject matter sought to be subjected to the order is in existence and within the reach of the order.....

It is the function of a receiver or manager appointed by the court to carry out the duties assigned to him by the court and by statute in relation to the assets subjected to the court's order. If there are no available assets there is nothing against which the order can bite.

What then are 'available' assets? Certainly the interest affected must be a genuine right of property. And so a receiver will not be appointed of a purely voluntary allowance such as the income of property held on discretionary trusts...”

64. In *R v Lincolnshire County Court Judge* [1887] QBD 167, the Divisional Court overturned an order requiring trustees to make payment to receivers. Pollock P there stated, at page 170:

“...we find that there is no case in which a receiver has been directed to receive a sum the payment of which is to the debtor is wholly contingent and dependent on the will of another person.”

65. At page 171, Hawkins J, agreeing observed:

“No doubt the county court judge had jurisdiction to make an order appointing a receiver of funds of which the defendant himself had the right to the control, or which he had the right to receive; but that is not the order which has been made in the present case, for this order authorizes the receiver to take that which the trustees alone have the power to receive and deal with in their discretion. There is no jurisdiction to do this.”

Discussion and Analysis

Whether any assets in the Cayman Islands

66. It seems to me that there is good reason why learned Counsel for the Plaintiff has not been able to discover a reported judgment where receivers were appointed, where the judgment debtor owns neither the legal or beneficial interest in a bare trust. This is



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because there is nothing in the circumstances of an ordinary discretionary trust that could lead to the conclusion that a beneficiary has a legal or beneficial interest in the Trust Fund. It is clear that where there are no available assets to be viewed as the Judgment Debtor's assets in equity, then there can be no question of appointing a receiver over them.

67. The Judgment Debtor's only right is to require the Trustee to consider from time to time whether or not to apply the whole or some part of the trust fund for his benefit.
68. To grant the relief sought by the Plaintiff in this case would amount to a radical, impermissible extension of the law.
69. Whilst in *Masri (No.2)*, the English Court of Appeal made the point that the Court can appoint a receiver by way of equitable execution over future receipts from defined assets, the facts were very different from those involved in the instant case. The Court indicated that the jurisdiction may be developed by incremental change, however, the Court was not saying that the jurisdiction is limitless or is an unfettered power.
70. Further, in *TMSF v. Merrill Lynch* the Privy Council did not disagree that there had to be a proprietary interest. What the Court there said was that the power of revocation which the settlor had retained/reserved was a completely general power, and could be regarded as tantamount to ownership. There is no evidence of such a power or any similar right being vested in the Judgment Debtor in the instant case.
71. There is no evidence that this Trust is a sham, and no evidence that the Defendant has the right to call for any part of the Trust Fund to be transferred to him. He does not on the evidence have any effective or de facto control over the trust assets in this plain discretionary trust.

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72. This is not a case in which there is evidence that there is no genuine discretion exercised by the Trustee over the assets. In any event, in that regard, I accept the submissions advanced on behalf of the Defendant, that, the Plaintiff having not served the Trustee with this application, nor made one under section 4 of the *CIDL*, the Court is not in a position to speculate, or to assume the facts alleged by the Plaintiff as to the manner of operation of the Trust.

Whether Just and Convenient

73. The remedy sought is of course a discretionary remedy. In my judgment, clearly other adequate remedies exist for the Plaintiff. There are plainly assets amenable to execution at law available to the Plaintiff in [REDACTED]. There does not appear to be any need for recourse to Cayman Islands receivers in these circumstances. It is not clear that the process in the Cayman Islands can proceed more quickly than that in [REDACTED]. In any event, both the Plaintiff and the Defendant are all inextricably linked in the United States, where the Defendant has assets, some of which have already been executed upon. However, as I have held, in my judgment there are, on the evidence, no assets which can be regarded as the assets of the Defendant, in equity or otherwise. There is also nothing that, in any event, can be identified as a future debt from a defined asset, as discussed in *Masri (No.2)*.

Disposition

74. In all of the circumstances, the application is refused, with costs to the Defendant to be taxed if not agreed.


THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

