Private Client eBriefing

A Tale of Two Forums – the decision in *Grosskopf v Grosskopf* [2024] EWHC 291 (Ch)

Article by Ernest Leung, 26th April 2024

1. The decision by Master Clark on 16 February 2024 in *Grosskopf v Grosskopf* (two members of Wilberforce Chambers: Fenner Moeran KC and Simon Atkinson acted for the C in this case) is a judgment on an increasingly important point – to what extent can parties contractually agree to submit their trust dispute to arbitration? Does section 9 of the Arbitration Act 1996 bite in circumstances where the claimant seeks a replacement of the trustee with a judicial trustee? The answer it would seem is that you can, but the arbitrators will have their hands relatively tied as to what relief they can order.

2. The basic facts of the case are as follows: C is the beneficiary of a trust established in 1974 by the Grosskopfs and Ds the trustees. C sought the appointment of a judicial trustee on the basis that Ds have been in breach of their duties as trustees and may be dishonest such that their conduct should be investigated independently.

3. On 14 June 2017, however, the parties agreed into an arbitration agreement in favour of the Beth Din of the Federation of Synagogues. Four interim awards were issued by the Beth Din; these contained extensive orders on disclosure, and for an account of the trust. It was further found that in January 2019, C submitted to the Beth Din a Details of Claim and sought relief materially identical to those before the court. Against this background, C issued the present claim as the arbitration in the Beth Din rumbled on.

4. The Master considered the application of s. 9 of the Arbitration Act 1996 which provides for an automatic stay of legal proceedings in respect of a matter which under the agreement is referred to arbitration. The Master considered that the claim fell within the scope of the arbitration clause and, in any event since the question of jurisdiction was addressed explicitly by the Beth Din and C participated in those proceedings, an issue estoppel applied to bar C from taking a second bite at the cherry (at [55]).

5. The more interesting points in this case are the submissions advanced by C in support of the proposition that the claim was incapable of arbitration as the appointment of a judicial trustee lay in the exclusive jurisdiction of the court. The High Court has a supervisory jurisdiction over trusts and to ensure that trusts are properly administered. Furthermore, it was submitted that since not all the beneficiaries (including minors and unborns) were made parties to the proceedings, the arbitral proceedings were not properly constituted.

6. Master Clark rejected these submissions and these are the key-takeaways from the judgment:

    6.1. While the court does have a supervisory jurisdiction over trusts, *'[u]nless and until it is invoked, private trusts are left to operate outside court*' (at [62]).

    6.2. It is irrelevant whether all beneficiaries have participated in the Beth Din as beneficiaries '*have no general right to control the exercise of a power of appointment of new trustees*' anyways (at [64]). However, in some circumstances, if the beneficiaries have not been properly informed or consulted, this may provide a basis for setting aside the appointment.

    6.3. The fact that the Beth Din has no jurisdiction to make an order to appoint a judicial trustee does not render the matter non-arbitrable. It merely restricts the kinds of relief the arbitral tribunal can give, for instance the arbitral tribunal could exercise its in personam jurisdiction to direct Ds to step down but it could not appoint a judicial trustee; the latter is a matter within the exclusive jurisdiction of the court under s. 41(1) of the Trustee Act 1925 (at [65]).

7. The Master further endorsed the reasoning in *Rhinehart v Welker* [2012] NSWCA 95, a New South Wales Court of Appeal decision which expressed the view that submitting disputes involving the removal of a trustee to an arbitration was not contrary to public policy. An analogy was also drawn with *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33, a Privy Council decision which laid down the principle that a winding up petition on just and equitable grounds is arbitrable. While the arbitral tribunal cannot make a winding up order, it can decide whether one party has breached its obligations under a shareholders' agreement or equitable rights arising from the parties' relationship have been flouted.

8. Similar principles can be distilled from decisions in relation to unfair prejudice petitions brought in the agreed forum outside of the company's place of incorporation. In *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, Patten LJ considered that while a winding-up order lies within the exclusive jurisdiction of the court, the question of whether or not there has been unfairly prejudicial conduct can be arbitrated. It is said that the '*only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted*'.

9. In the BVI, in *Artemis Trustees Ltd & Ors v KBC Partners & Ors* Claim No BVIHC (COM) 2012/0137, Bannister J endorsed the reasoning in Fulham and stated that the solution, where the appropriate remedy is for the winding up of the company, may well be for the petitioner to apply to the court in the place of incorporation for the order on the basis of the award (at [17]).

10. Indeed the judgment in *Grosskopf* comes hardly as a surprise in light of the English court's general pro-arbitration policy. Consider a case where a creditor tries to wind up a company in the place of incorporation but the underlying agreement contains an agreed forum clause. Should the winding up petition be stayed in favour of the agreed forum? The answer it would seem depends on whether the clause is an arbitration clause or an exclusive jurisdiction clause:

    10.1. In relation to arbitration clauses, the English Court of Appeal has held that even though a winding-up petition does not fall strictly within the scope of s. 9, the pro-arbitration policy embodied by the Arbitration Act means that s. 9 should apply by analogy under common law such that the winding up petition should be stayed in favour of arbitration unless if the creditor could show exceptional circumstances: *Salford Estates (No. 2) Limited v Altomart Limited* [2014] EWCA 575 Civ. The same position has been adopted by the Singapore Court of Appeal in *AnAn Group (Singapore) PTE Ltd v VTB Bank* [2020] SGCA 33.

    10.2. The BVI Courts have, however, taken a different approach in the well-known decision of *Jinpeng Group Limited v Peak Hotels and Resorts Limited* BVIHCMAP 2014/0017. To avoid a stay in favour of arbitration, the creditor need not show exceptional circumstances, but need only show that the debt is not disputed on genuine and substantial grounds; in other words, the existence of an arbitration agreement does not alter the court's usual jurisdictional test for appointing a liquidator.

    10.3. As for EJCs, the prevailing position under English law seems to be that the winding up petition should still proceed in the place of incorporation, ignoring the *EJC: City Gardens v Dok 82 Ltd* [2023] EWHC 1149 (Ch) (another member of Wilberforce Chambers Bobby Friedman acted for the successful party in this case). The decision is based on two extremely thinly reasoned English decisions and in light of the seminal judgment by the Hong Kong Court of Final Appeal (in *Guy Kwok-Hung Lam* [2023] HKCFA 9) ruling to the contrary, one might expect the position to change.

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