

HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, BELL AND GAGELER JJ

MONTEVENTO HOLDINGS PTY LTD & ANOR APPELLANTS

AND

GIUSEPPE DIEGO SCAFFIDI & ANOR RESPONDENTS

Montevento Holdings Pty Ltd v Scaffidi
[2012] HCA 48
7 November 2012
P22/2012

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 27 July 2011 and, in their place, order that:*
 - (a) *the appeal to that Court be dismissed; and*
 - (b) *Giuseppe Scaffidi pay the costs of Eugenio Scaffidi, Maria Scaffidi and Montevento Holdings Pty Ltd, including reserved costs, to be taxed if not agreed.*
3. *The first respondent pay the appellants' costs of the appeal to this Court.*

On appeal from the Supreme Court of Western Australia

Representation

K A Vernon with A S Meysner for the appellants (instructed by Butcher Paull & Calder)

P E Cahill SC with C J Garde for the first respondent (instructed by Oldfield Legal)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Montevento Holdings Pty Ltd v Scaffidi

Equity – Trusts and trustees – Trust deed for discretionary family trust provided that "[i]f, and so long as any individual Appointor is a Beneficiary that individual shall not be eligible to be appointed as a Trustee" – Individual who was appointor of trust was also beneficiary of trust – Whether corporation of which appointor was sole director and shareholder eligible to be appointed trustee of trust.

1 FRENCH CJ, HAYNE, CRENNAN, BELL AND GAGELER JJ. Part of the background to this appeal is a long-running dispute between members of the Scaffidi family over the control of a trust called The Scaffidi Family Trust ("the trust"). The appeal concerns the proper construction of a clause in the trust deed governing the appointment of trustees.

2 The second appellant, Eugenio Scaffidi, and the first respondent, Giuseppe Scaffidi, are brothers. They are the only children of Antonio Scaffidi, who died on 29 August 2004, and the second respondent, his widow Maria Scaffidi, who is party to these proceedings by her guardian ad litem, the Public Trustee. The second respondent has filed an appearance submitting to any orders made by the Court. The first appellant, Montevento Holdings Pty Ltd ("Montevento"), was incorporated on 27 March 2007. Since that date, Eugenio Scaffidi has been its sole director and shareholder.

3 The trust was created by a deed of settlement dated 2 May 1977 ("the trust deed"). It is a discretionary trust designed to regulate the acquisition, management and disposal of assets of the Scaffidi family. Giuseppe, Eugenio and Maria Scaffidi are all within the class of beneficiaries of the trust, and Eugenio Scaffidi is the appointor of the trust.

4 This appeal concerns the proper construction of cl 11.03 of the trust deed, which provides that "[i]f, and so long as any individual Appointor is a Beneficiary that individual shall not be eligible to be appointed as a Trustee." By a deed poll dated 18 February 2009, in his capacity as appointor, Eugenio Scaffidi appointed Montevento as the sole trustee of the trust. On 19 April 2010, Giuseppe Scaffidi commenced proceedings in the Supreme Court of Western Australia against Eugenio and Maria Scaffidi and Montevento, seeking a declaration that the appointment of Montevento as the sole trustee of the trust was invalid because it breached cl 11.03 of the trust deed, or, alternatively, an order for Montevento's removal as trustee pursuant to s 77 of the *Trustees Act* 1962 (WA) ("the Trustees Act").

5 The primary judge (EM Heenan J) dismissed Giuseppe Scaffidi's proceedings¹. However, a majority of the Court of Appeal (Murphy JA and Hall J; Buss JA dissenting) upheld Giuseppe Scaffidi's appeal². The Court of

1 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180.

2 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146.

French CJ
Hayne J
Crennan J
Bell J
Gageler J

2.

Appeal made orders which included a declaration that the appointment of Montevento as the sole trustee of the trust was invalid because it breached cl 11.03 of the trust deed, and required the appointment of a new trustee pursuant to the Trustees Act. By special leave, Eugenio Scaffidi and Montevento appeal to this Court.

Facts

6 The trust deed provides for the offices of trustee (cll 11 and 12), appointor (cl 13), and guardian (cll 14 and 15), described below. The class of beneficiaries of the trust is broad, and is defined in cl 1.04 by reference to the "Specified Members", Giuseppe and Eugenio Scaffidi.

7 Clause 9 of the trust deed deals with the distribution of the trust fund to beneficiaries. The trust deed does not confer on any of the beneficiaries a vested interest in the capital or income of the trust fund. Instead, the trust deed grants the trustee a discretionary power, within some prescribed limits (including a requirement of consent of the guardian), to distribute capital or income in favour of one or more of the beneficiaries.

8 Clause 10 of the trust deed sets out the trustee's powers in relation to the trust fund. The trustee has broad powers under the trust deed to deal with the investment and realisation of the trust fund.

9 Clause 11 of the trust deed provides for the appointment and removal of the trustee. Clause 11.01 relevantly provides that "[a] trustee may be a corporation." Many of the provisions of the trust deed³ distinguish between an "individual", meaning a natural person, and a "corporation" or "company"⁴. Clauses 11.02 and 11.03 provide:

"11.02 Subject to the provisions of this Deed the Appointor may by instrument in writing at any time and from time to time:

11.02.01 remove any Trustee hereof;

3 See, for example, cll 10.03.04, 11.01, 11.05, 11.06, 12.04, 12.09.03, 12.11, 12.12, 13.05 and 14.03.

4 See *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 at [85]-[91] per Buss JA.

3.

11.02.02 appoint any additional Trustee or Trustees;

11.02.03 appoint a new Trustee or Trustees in the place of any Trustee who resigns his Trusteeship or ceases to be a Trustee by operation of law.

11.03 If, and so long as any individual Appointor is a Beneficiary that individual shall not be eligible to be appointed as a Trustee."

10 Between 2 May 1977 and 16 August 1995, Scaffidi Nominees Pty Ltd ("Scaffidi Nominees") was the sole trustee of the trust. Scaffidi Nominees was incorporated on 27 April 1977. Giuseppe and Eugenio Scaffidi were its original directors, and Antonio and Maria Scaffidi were appointed directors on 3 May 1977. Antonio, Maria, Giuseppe and Eugenio Scaffidi all continued as directors until 10 May 2000, and there were no other directors during this time. Antonio, Maria, Giuseppe and Eugenio Scaffidi all held shares in Scaffidi Nominees.

11 Between 16 August 1995 and 18 February 2009, Scaffidi Holdings Pty Ltd ("Scaffidi Holdings") was the sole trustee of the trust. Scaffidi Holdings was incorporated on 29 June 1995. Antonio, Maria, Giuseppe and Eugenio Scaffidi were its original directors. Antonio Scaffidi was a director until his death on 29 August 2004, and Maria Scaffidi was a director until 30 June 2006. There have been no other directors. Antonio, Maria, Giuseppe and Eugenio Scaffidi all held shares in Scaffidi Holdings.

12 Since 18 February 2009, Montevento has been the sole trustee of the trust.

13 Clause 13 of the trust deed provides for the appointment and removal of the appointor. The first appointor of the trust was Antonio Scaffidi. On Antonio Scaffidi's death, Maria Scaffidi became the appointor. By a deed dated 30 June 2006 made between Maria and Eugenio Scaffidi, Maria Scaffidi, in her capacity as appointor, appointed Eugenio Scaffidi to be the appointor of the trust.

14 Clause 14 of the trust deed provides for the appointment and removal of the guardian. Some of the powers of the trustee are circumscribed by a requirement that the trustee not exercise those powers without the express written consent of the guardian of the trust⁵. The first guardian of the trust was Antonio Scaffidi. On Antonio Scaffidi's death, Maria Scaffidi became the guardian. By a

5 See, for example, cll 9.01, 9.02, 9.03 and 15.01.

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Bell J
Gageler J

4.

deed poll dated 30 June 2006, Maria Scaffidi, in her capacity as guardian, declared pursuant to cl 15.04 of the trust deed that any or all of the powers or rights referred to in cl 15.01 may be exercised by the trustee without reference to the guardian.

- 15 Whilst the phrase "discretionary trust" has no "constant, fixed normative meaning"⁶, it is apt to describe this trust and, in particular, the relative positions of the trustee and the beneficiaries.

Relevant legislation

- 16 As at 2 May 1977, provisions of the *Estate Duty Assessment Act* 1914 (Cth), the *Stamp Duties Act* 1920 (NSW), and the *Death Duty Assessment Act* 1973 (WA) imposed death duties on the property of a deceased person, and relevantly provided that the estate of a deceased person would be deemed to include any property over which the deceased person had a "general power of appointment" at the time of his or her death⁷.

- 17 Prior to the commencement of the *First Corporate Law Simplification Act* 1995 (Cth) on 9 December 1995, proprietary companies were required to have at least two directors and at least two shareholders. The *First Corporate Law Simplification Act* 1995 (Cth) allowed for the creation of proprietary companies with one director and one shareholder, something which continues to be possible under the *Corporations Act* 2001 (Cth)⁸.

Proceedings

- 18 In dismissing Giuseppe Scaffidi's proceedings seeking a declaration that the appointment of Montevento as the sole trustee of the trust was invalid, the primary judge found that Eugenio Scaffidi was the sole director and shareholder

6 *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98 at 109-110 [15]; [2005] HCA 53, citing *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 234 [8]; [1998] HCA 4.

7 See *Estate Duty Assessment Act* 1914 (Cth), ss 8(1) and 8(3); *Stamp Duties Act* 1920 (NSW), ss 100, 101 and 102(2)(j); *Death Duty Assessment Act* 1973 (WA), ss 10(1) and 10(2)(i).

8 See *Corporations Act* 2001 (Cth), ss 114, 201A(1).

5.

of Montevento and, hence, the sole controller of Montevento⁹. His Honour also acknowledged that Montevento had no apparent commercial purpose or history other than acting in the role of trustee of the trust¹⁰. However, the primary judge considered this latter point as being of "little significance"¹¹, and found that there was no evidence that Eugenio Scaffidi had appointed Montevento as trustee for an improper purpose¹².

19 The primary judge went on to reject, in the following terms, Giuseppe Scaffidi's argument that the appointment of Montevento as the sole trustee of the trust was in breach of cl 11.03 of the trust deed¹³:

"I am satisfied that in this case the deed of settlement draws a clear distinction between individuals and corporations, recognises that a corporation may be a trustee or co-trustee of this trust, and contains no actual or implicit prohibition upon a corporation, even if controlled by a beneficiary, from being such a trustee. Because the corporation is distinctly and legally separate from the individual, I do not consider that the prohibition in the deed of settlement against an individual beneficiary being a trustee prohibits the appointment of Montevento and, accordingly, I dismiss the application by Mr Giuseppe Scaffidi seeking declarations or other relief on the basis that Montevento was invalidly appointed."

9 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180 at [31].

10 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180 at [31].

11 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180 at [31].

12 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180 at [33]-[34].

13 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180 at [38].

French CJ
Hayne J
Crennan J
Bell J
Gageler J

6.

20 The primary judge found that there was no evidentiary basis for concluding that Montevento would jeopardise the welfare of the trust fund or the interests of the beneficiaries¹⁴ and observed¹⁵:

"As trustee, Montevento is subject to the duties and obligations resting upon any trustee at law and in this case as also set out in the deed of settlement. There are ample avenues of redress available to any aggrieved beneficiary to challenge or review the actions of the trustee. More significantly, there is no allegation that Montevento has admitted, or is threatening or likely to commit, any breach of trust."

21 The primary judge went on to say that he was satisfied that, as trustee, Montevento had advanced the welfare of the trust and the interests of the beneficiaries by making efforts to identify, collect and preserve the assets of the trust, including by demanding payment of a large debt owing to the trust by a company associated with Giuseppe Scaffidi¹⁶.

22 In dissent in the Court of Appeal, Buss JA supported the reasoning of the primary judge. His Honour noted that the trust deed consistently distinguishes between individuals and corporations¹⁷. This is the critical point which is sufficient to determine this appeal. His Honour also observed that the drafters of the trust deed would have been concerned to avoid the revenue consequences of conferring a "general power of appointment" upon the trustee¹⁸. Relying on these considerations, and on the natural and ordinary meaning of the words of cl 11.03¹⁹, Buss JA held that the language of cl 11.03 does not extend to prohibit

14 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180 at [41].

15 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180 at [35].

16 *Montevento Holdings Pty Ltd v Scaffidi Holdings Pty Ltd (No 2)* [2010] WASC 180 at [41].

17 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 at [85]-[91].

18 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 at [96].

19 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 at [92]-[93].

7.

the appointment of a trustee which is a corporation²⁰. The construction of cl 11.03 adopted by Buss JA is plainly correct.

23 The majority in the Court of Appeal, Murphy JA and Hall J, upheld Giuseppe Scaffidi's appeal from the decision of the primary judge, on the basis that the appointment of Montevento as the sole trustee of the trust was in breach of cl 11.03 of the trust deed²¹. In a joint judgment, their Honours emphasised the importance of the words "appointed as a Trustee" in cl 11.03²² and said²³:

"The words in cl 11.03, in their ordinary usage, are capable of meaning that a beneficiary/appointor is ineligible to be appointed to a position involving the performance or the functions of a trustee under the trust deed, or involving the performance of activities proper to the institution of a trustee under the trust deed ...

The contention that [a person who is both an appointor and a beneficiary] may appoint himself to the position of exercising the powers and rights of the trustee by appointing as trustee a company of which he is the sole director and shareholder involves, in our view, assigning a meaning to the word 'Trustee' which it cannot reasonably bear when cl 11.03 is read as a whole, in that it treats the office of trustee as entirely separate from the powers and rights exercisable by the officeholder."

24 In this Court, the first respondent sought to amplify the reasoning of the majority in the Court of Appeal by pointing to the use in cl 11.03 of the phrase "appointed *as a* Trustee" (emphasis added). The first respondent submitted that the words "as a" were used in the clause to distinguish between control over the exercise of the trustee's powers, and appointment to the office of trustee. It followed, so the argument continued, that the class of persons excluded from appointment to the office of trustee extended to any corporate person whose powers, directions or duties as trustee would be exclusively exercised by the individual appointor.

20 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 at [93].

21 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 at [169].

22 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 at [161]-[164].

23 *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 at [163], [165].

French CJ
Hayne J
Crennan J
Bell J
Gageler J

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25 It is enough to say that cl 11.03 does not bear the meaning which the first respondent attributed to it. The ordinary and natural meaning of the clause is that any natural person who holds the office of appointor may not be appointed as trustee. The words "as a" will not bear the weight which the first respondent sought to place upon them. Rather, when cl 11.03 is read in the context of the whole document, which repeatedly distinguishes between an "individual" (in the sense of a natural person) and a corporation, the clause must be read in the manner indicated by Buss JA. The matters of context to which Buss JA referred point in the same direction.

Orders

26 The following orders should be made:

1. Appeal allowed.
2. Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 27 July 2011 and, in their place, order that:
 - (a) the appeal to that Court be dismissed; and
 - (b) Giuseppe Scaffidi pay the costs of Eugenio and Maria Scaffidi and Montevento, including reserved costs, to be taxed if not agreed.
3. The first respondent pay the appellants' costs of the appeal to this Court.

