Abdul Jalil bin Ahmad bin Talib and Others v A Formation Construction Pte Ltd [2007] SGCA 29

Case Number : CA 117/2006

Decision Date : 28 May 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Tay Yong Kwang J

Counsel Name(s) : Andre Yeap SC and Kelvin Poon (Rajah & Tann) and Aloysius Leng Siew Wei (Abraham Low LLC) for the appellants; Anthony Netto (Teo Keng Siang & Partners) for the respondent

Parties : Abdul Jalil bin Ahmad bin Talib; Hussen Bin Ahmad Bin Salamah Bin Awad Bin Talib; Waleed Abdul Jalil Talib — A Formation Construction Pte Ltd

Contract – Consideration – Forbearance – Tenant giving up any right to make claim against previous trustees for damages for breach of terms in lease agreement by accepting compromise offered – Whether such forbearance amounting to consideration for compromise agreement

Equity – Estoppel – Tenant giving up any right to make claim against previous trustees for damages for breach of terms in lease agreement by accepting compromise offered – Tenant discharging obligations under compromise agreement – Whether inequitable for present trustees to refuse to honour compromise agreement on ground that such agreement not lawfully entered into

28 May 2007 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

1 This appeal is concerned with the power of a sole trustee under cl 19 of the will of Shaik Roubayak bin Khalid bin Talib ("the testator") to waive arrears of rent payable by a tenant of three properties, *viz*, Nos 29 and 30 Purvis Street, and No 21 Amoy Street (collectively called "the trust properties").

2 The appellants are the present trustees of the trust ("the trust") established under the will of the testator. They have appealed against the decision of Judith Prakash J ("the Judge") in dismissing their claim for arrears of rent (and interest thereon) which the previous sole trustee had waived prior to their appointment as trustees.

Background

3 On 9 December 1996, the then trustees, Awad bin Omar Harharah ("Awad") and Shaik Mohamad bin Omar Harharah ("Shaik") (who became the "sole trustee" after the death of Awad), entered into lease agreements for 25 years (Purvis Street properties) and 20 years (Amoy Street property) with the respondent, A Formation Construction Pte Ltd, subject to the approval of the court (as cl 12 of the will restricted the power of the trustees to grant leases not exceeding five years). The rent for the Purvis Street properties was $10,000 per month and the rent for the Amoy Street property was $3,000 per month. The relevant provisions of the leases were as follows:

(a) Clause 1(1) provided that the lease of the trust properties was to commence either on 9 December 1998 (which was two years from the date of the agreement) or from the time the respondent commenced business at the trust properties, whichever was earlier.

(b) Clause 1(3) provided, *inter alia*, that the trustees would use their best endeavours to negotiate and obtain vacant possession of the trust properties.

(c) Clause 1(4) stipulated that if the trustees fail to obtain vacant possession through negotiation, they would apply (at the cost and expense of the respondent) to the Tenants' Compensation Board ("TCB") for an order giving them vacant possession.

(d) Clause 1(5) stated that the trustees would sign such applications and plans as were necessary to secure the requisite approvals for the restorations works and would render such reasonable assistance as may be necessary to assist the respondent in getting permission to undertake the works.

4 In 1996, the tenants of the trust properties were statutory tenants whose tenancies were protected by the Control of Rent Act (Cap 58, 1985 Rev Ed). One of the statutorily prescribed ways to recover vacant possession of rent-controlled properties then was to obtain planning permission to re-develop them and then apply to the TCB for an order for vacant possession subject to the landlord paying compensation as determined by the TCB. Hence, the lease agreements with respect to the trust properties provided first for the trustees to try to obtain vacant possession through negotiations, failing which they would apply to the TCB for the requisite order. It would appear that the trustees considered that a period of two years (in cl 1(1)) would be sufficient for them to obtain vacant possession of the premises by negotiating with the tenants or, alternatively, by obtaining an order from the TCB.

5 However, by 9 December 1998, when the rent became payable by the respondent, the then trustees were not able to get vacant possession of the trust properties for the respondent to begin redevelopment. In January 1999, Awad died and a new trustee was appointed on 13 April 1999. However, the new trustee retired in November 2000 leaving Shaik once more as the sole trustee until March 2002. In August 1999, the solicitors for the trustees ("M&N") sent a notice to the respondent's solicitors ("CH&A") demanding payment of arrears of rent due and payable from 9 December 1998 to August 1999. CH&A replied in June 2000 that the respondent wished to seek the trustee's indulgence to waive the rent payable until the temporary occupation permit ("TOP") for the trust properties were issued. M&N replied that the trustees would only consider the respondent's request for waiver of the outstanding rent or part of it when the restoration works relating to the trust properties commenced, and provided that the respondent paid M&N's outstanding legal fees.

6 Vacant possession of the trust properties was given to the respondent in October 2000 (for the Amoy Street property) and February 2001 (for the Purvis Street properties). In May 2001, the respondent's new solicitors ("TKS") wrote to M&N proposing that the commencement date of the rent payments be changed on the ground that the trust had contributed to the delay in obtaining the requisite permits for them to begin redevelopment works on the trust properties.

7 There was then a lull in the exchange of correspondence until 17 January 2002, when M&N, acting on behalf of the sole trustee, sent a letter to TKS demanding payment by the respondent of all arrears of rent due from 9 December 1998 to 31 December 1999. TKS replied on 22 January 2002 that the commencement date of the rent should be the date when vacant possession of the trust properties was given as the trust had contributed to the delay in obtaining the requisite planning approvals to redevelop the trust properties. On 28 January 2002, M&N rejected the request and denied that the trust had caused the alleged delay. However, three days later, on 31 January 2002, M&N sent a "without prejudice" letter to TKS making an offer to waive part of the arrears of rent for the period up to 31 December 1999, provided that all rents payable from 1 January 2000 onwards were paid within seven days from the date of the letter. In their "without prejudice" letter dated

6 February 2002, TKS agreed to the offer in relation to the Amoy Street property as the TOP had been obtained. In relation to the Purvis Street properties, TKS requested that the rent should start from December 2002 or the obtaining of the TOP, whichever came later. M&N rejected the request and on 8 February 2002, sent notices to quit to the respondent with respect to all the trust properties. In the same letter, after the computation of sums outstanding, M&N made another offer to TKS (which was open for acceptance up till 15 February). On 15 February 2002, two of the respondent's directors went to M&N's office and confirmed acceptance of this second offer on the terms it was made.

8 On 5 March 2002, the sole trustee appointed another trustee to the trust. They ceased to be trustees in March 2004 upon being replaced by the appellants who were appointed as trustees by a court order. Upon discovery of the waiver of rent by the sole trustee, the appellants commenced the present action in October 2004 to recover the rent that had been waived by the sole trustee in February 2002, together with interest at the rate of 12% per annum, amounting to $303,464.41.

The Judge's decision

9 The issues which the Judge was asked to consider were as follows:

(a) whether the sole trustee had the power under cl 19 of the will to enter into the compromise agreement to waive the arrears of rent;

(b) if the sole trustee did not have such power, whether nevertheless, M&N had ostensible authority to effect the compromise so as to bind the trust; and

(c) whether there was any consideration to support the waiver and/or, in any event, whether the appellants were estopped from denying the efficacy of the waiver.

10 The Judge dismissed the appellants' claim for recovery of the waived rent on the following grounds:

(a) The waiver of rent was within the power of the sole trustee under cl 19 of the will to carry on the "necessary" business of the trust.

(b) Even if the sole trustee did not have the power under cl 19, M&N had ostensible authority to do so on behalf of the trust. The respondent did not have actual knowledge that the sole trustee did not have such power, and constructive knowledge was insufficient to prevent the operation of the principle of ostensible authority.

(c) There was sufficient consideration for the waiver as in accepting the compromise offered by the sole trustee, the respondent gave up any right it had to make a claim for damages for breach on the part of the trustees. In this regard, the fact that this claim may have been weak and may not have succeeded was not material. Alternatively, the appellants were estopped from denying the validity of the waiver as the respondent had (i) paid up all the moneys required by the sole trustee in accordance with the waiver arrangement; and (ii) incurred expenses in completing work on one of the trust properties.

Issues in the appeal

11 The appellants, being dissatisfied with the judgment, appealed. The issues raised on appeal were substantially the same as those raised before the Judge.

12 Before addressing these issues, it is convenient at this stage that we reproduce the relevant clauses in the will on the powers of the trustees. They are cll 12 and 19 and they provide as follows:

> ***Clause 12*****:** My trustees shall manage or superintend the management of my settled property with power to erect, pull down, rebuild, add to and repair houses and other buildings and to drain and make roads and fences and otherwise to improve all or part of my settled property and to insure houses and buildings or rents against loss or damage by fire or other risks *and to make allowances to or arrangements with tenants and to accept surrenders of leases and tenancies and to grant leases or agreements for leases on such terms* as my Trustees shall think fit for any period not exceeding five years from the date thereof and generally to deal with my settled property as if they were absolute owners thereof without being responsible for any loss but so that nothing in this clause contained shall be deemed to empower my Trustees except as hereinafter provided to sell or mortgage or create any charge on my settled property and so that my Trustee shall be under no obligation to insure buildings or rents against fire or other risks and shall not be responsible for non-insurance.
>
> ***Clause 19*****:** There shall always be at least two trustees and any vacancy in the trusteeship shall be filled up as soon as conveniently may be and a single trustee if there shall be only one trustee and the executors or administrators of the last surviving trustee shall only have the power to appoint new trustees and to *carry on all necessary business of the trust until new trustees or trustee are appointed.*
>
> [emphasis added]

It can be seen from a comparison between cl 12 and cl 19 that the intention of the testator was that there should always be two trustees to manage the trust but that if there was only one trustee, his duty was to appoint another trustee as soon as convenient and that in the meantime he had the power to carry on the necessary business of the trust. The meaning of the expression "necessary business of the trust" forms the main dispute in this case.

Was compromise agreement by sole trustee a breach of cl 19?

13 Counsel for the appellants contended before the Judge that the sole trustee's agreement to enter into the compromise agreement to waive the accrued rent was in breach of cl 19 as it was not a necessary business of the trust. Counsel argued that when cl 19 is read with cl 12, the word "necessary" in cl 19 must limit the ambit of the words "business of the trust", otherwise the sole trustee would have the same powers as the joint trustees have under cl 12. The testator could not have intended this since cl 12 does not use the word "necessary". Under cl 12 the joint trustees have the power to make "arrangements" with tenants, which would include making compromises with tenants: see *Huddersfield Banking Company, Limited v Henry Lister & Son, Limited* [1895] 2 Ch 273. Counsel contended that cl 19 should be construed to have a narrower scope than cl 12, and the word "necessary" in the context connotes urgency, or a pressing need or a degree of compulsion. Counsel referred to *Pabari v Secretary of State for Work and Pensions* [2005] 1 All ER 287, and *Regina (Nilsen) v Governor of Full Sutton Prison* The Times, 2 January 2004 where the English courts have so construed the word "necessary". In the present case, there were no urgent circumstances that required the sole trustee to agree to the compromise. There was no evidence of any exigency, urgency, pressing need or compulsion for the sole trustee to waive the arrears of rent in the circumstances. Counsel also pointed out that the sole trustee appointed a co-trustee on 5 March 2002 just a few weeks after the compromise. There was no reason why he could not have waited until the new trustee was appointed so that the joint trustees could make the decision under cl 12.

14 The Judge rejected these arguments for the following reasons:

(a) that the term "necessary business of the trust" must be read in the context of the kind of business that the trust was engaged, which was to manage the trust properties for rent income for distribution to the income beneficiaries;

(b) in this context, the term "necessary" would imply the need to collect rent and how to deal with tenants who were in arrears, including the extent to which indulgence should be shown to a tenant in default;

(c) that since it has been conceded by the appellants (by failing to argue otherwise) that the sole trustee had authority to terminate the lease agreements and recover the trust properties, he would have authority to take action to recover all or only part of the rent; and

(d) that the meaning of the term "necessary" was not limited to matters of urgency or pressing need, as otherwise the power would only be exercisable in very limited situations such as where the property was threatened with physical destruction.

Meaning of "necessary business of the trust" in clause 19

15 In this appeal, counsel for the appellants has repeated the same arguments made before the Judge. He further contended that the Judge's reliance on the omission of counsel for the appellants to argue that the sole trustee had no authority to terminate any tenancies as a reason to support her interpretation of cl 19 was wrong as it was based on pure surmise as the appellants had not been asked that question, and if asked would have stated that cl 19 did not authorise the sole trustee to terminate tenancies, except in cases of urgency or pressing need. Counsel also contended that in any event even if the sole trustee had power to recover arrears of rent or to terminate tenancies or to recover rent, it did not follow that he had power to enter into compromises to waive accrued rent.

16 In our view, the proper approach to determining the intention of the testator in using the words "all necessary" to qualify the words "business of the trust" in relation to the power given to the sole trustee in cl 19 is to consider what the testator's purpose was in setting up the trust. It is clear from the terms of the will that he wanted to provide maintenance for his widow, children and grandchildren. To do this, he made his last will in 1934 in which he devised all his immovable properties situated in the Straits Settlements ("the settled property") on trustees to apply the net income from the rents and profits accruing to the settled property during "the period of the settlement" (defined as the expiry of 20 years after the death of the last survivor of all his children and 22 named persons, many of whom were infants) for the maintenance of his widow, children and grandchildren. On the expiration of the settlement period, the settled property would be divided among the surviving income beneficiaries. To achieve this purpose, the testator directed his trustees to manage or superintend the management of the settled property with extensive powers to maintain and improve the settled property and to deal with them as if they were absolute owners thereof without being responsible for any loss but without power to grant any lease exceeding five years or to sell, mortgage or create any charge on the settled property.

17 Clause 19 of the will also provided that there shall always be not less than two trustees but any vacancy in the trusteeship shall be filled up *as soon as conveniently may be* and a single trustee *if there be only one trustee* "and" (which can only mean "or" contextually) the executors or administrators of the last surviving trustee shall only have power to appoint new trustees and to carry on *all necessary business of the trust* until new trustees are appointed. It is apparent from the terms of cl 19 that the sole trustee, if there be one, is not under an immediate duty to appoint new

trustees as soon as there is a vacancy in the trusteeship. He is under a duty to do so as soon as conveniently may be, and this period of time may extend to allowing his personal representative to make the appointment. It therefore follows that a sole trustee may remain as such for a very long time. Under the general law, a trustee has certain duties in relation to the trust. In this case, the trustees' duties are to manage the settled property and apply the net income for the maintenance of the income beneficiaries during the settlement period. For this purpose, the trustees have been given wide powers under cl 12. In our view, the sole trustee in the present case must have the same powers of management if he is to carry out his duty to apply the income from the settled property for the maintenance of the income beneficiaries. Such powers cannot be less extensive than those expressly given in cl 12 to two trustees as the principal duty of a sole trustee is the same as that of two trustees. Such powers, as the Judge has pointed out, would include collecting and recovering accrued rent, terminating and granting tenancies, and doing all such acts as would ensure that there is a steady stream of income from the settled property for distribution to the income beneficiaries.

18 One of the powers given to the trustees in cl 12 is "to make allowances to or arrangements with tenants", a power which the appellants have acknowledged, includes making compromises with tenants. This is the power that the sole trustee in the present case had taken upon himself to exercise by waiving accrued rent amounting to $120,000 (for the Purvis Street properties from 9 December 1998 to 31 December 1999, excluding interest of about $99,663). The appellants' argument was that this could not be a necessary business of the trust as there was no urgency or pressing need to do so. The evidence showed that shortly after the compromise the sole trustee appointed another trustee. Accordingly, it was argued, there was no reason why the sole trustee could not have waited until the second trustee was appointed so that both of them could then decide whether or not to waive the rent pursuant to their powers under cl 12 of the will.

19 The Judge rejected this argument on the ground that the term "necessary" was not limited to situations of urgency or pressing need or compulsion, having regard to the business of the trust. We agree with this interpretation. It does not seem sensible to us that in a trust of this nature that the power of the sole trustee (who may be in office for a very long time) under cl 19 is limited to managing the settled property in times of urgency or pressing need. To discharge his duties diligently as a trustee in the present case, he has to do all things that are necessary to ensure that the trust is able to secure rental income from the settled property. The question of whether it is urgent or whether there is a pressing need to do so is secondary. In such situations, the sole trustee must exercise his management powers, but the power is not limited to such situations. Rather, the extent of the power is determined by what is in the interest of or for the benefit of the trust. In other words, the term "necessary" in cl 19 connotes the fulfilment of the object or purpose of the trust rather than the temporal conditions in which the power to carry on the business of the trust may be exercised. It may be noted that the words "all necessary" qualify the business of the trust and not the exercise of the power to carry on the business of the trust. Clause 19 empowers the sole trustee to do what is needed to be done to meet the object of providing maintenance for the income beneficiaries. In our view, the power to carry on all the necessary business of the trust includes doing what is *expedient* to meet the object or purpose of the trust.

20 In our view, the meaning of the term "all necessary business of the trust" in cl 19 must be understood, as the Judge has found (and which the appellants have not challenged), in the context of the kind of business that the trust was engaged, which was to manage the trust properties for rent income for distribution to the income beneficiaries. This means that cl 19 was intended to allow the sole trustee to exercise his powers to do everything that would produce income for the benefit of the income beneficiaries from the letting out of the trust properties, as that is the business of the trust.

21 On this interpretation, the relevant issue before the Judge and in this appeal is whether what the respondent did in this case was expedient for the purpose of carrying out the purpose of the trust. The appellants' case is that giving away trust money was detrimental to the trust and therefore could not be for the purpose of securing income to realise the object of the trust. We acknowledge that it appears counter-intuitive or contrary to common sense, or even irrational to suggest that waiving accrued rent can be a necessary business of the trust, when the object of the trust is to acquire revenue in the form of rentals from the settled property. This is not an unreasonable approach in considering the scope of the sole trustee's power under cl 19. But it is not necessarily the best approach to carry on the necessary business of the trust which must, in our view, mean the realisation of the testator's intention in setting up the trust. We have earlier noted that this trust was intended to endure for a settlement period which may last a century to provide maintenance for beneficiaries who are still living during this period. To realise this object, the trust must be assured of a long, steady and stable stream of income from the settled property.

22 Clause 12 uses the word "business" to describe the purpose of the trust. On this basis, if a business-like approach is adopted, the aim of the trustees must be to determine which course of action would be in the best interest of the trust. In February 2002, the sole trustee was faced with the dilemma as to whether to forgo immediately a part of the accrued rent in order to ensure that the trust properties were redeveloped at no cost to the trust and to enable it to collect a substantial rent of $13,000 per month for up to about 17 years, or to take court action to recover the accrued rent, but at the risk of losing the redevelopment and the rent if the respondent abandoned the redevelopment. He decided to adopt the former course in the honest belief that it was in the interest of the trust so as not to risk substantial loss of revenue to the trust which would have resulted in the cessation of maintenance to the income beneficiaries and being saddled with three uncompleted buildings for which he did not have the capital reserves to complete.

23 The present case concerns three rent-controlled properties belonging to the trust which the trustees have earlier agreed to lease to the respondent for a term of 20 years subject to two important conditions for the trust. The first was that the properties would be redeveloped by the respondent at their cost. The second was that the respondent would then pay a monthly rent of $13,000 for the properties for 20 years (which far exceeded the rentals payable by the existing protected tenants). Although there was no evidence before us as to the state of repair of the three properties, the redevelopment costs were estimated to be several million dollars which the trust could not have afforded. It should be recalled that under cl 12, the trustees were prohibited from selling or mortgaging the settled property. Hence, from the point of view of the trust, this transaction was of great benefit to the long term interest of the trust and the income beneficiaries in the way of improving the value of the properties and increasing the rentals from them.

24 When cross-examined by the appellants' counsel on why he entered into the compromise agreement, the sole trustee explained that he was concerned about the respondent deciding to abandon the redevelopment of the trust properties if they were not given a waiver of part of the accrued rent to compensate them for the trustees' delay in giving vacant possession of the properties to the respondent to commence redevelopment works, and also his own delay in his inability to sign the necessary plans to obtain planning approval for the redevelopment. The sole trustee took the position that if he did not agree he would not be able to recover the accrued rent from the respondent (which had a paid up capital of $2) and that the trust would suffer considerable loss if the project were abandoned. In reply to the first point, the appellants have argued that the payment of the rent was guaranteed by the directors of the respondent and therefore the reason given by the sole trustee for waiving the rent was groundless. However, the appellants' response to the second reason was only that the waiver of the accrued rent was not in the interest of the trust and of the income beneficiaries.

25 In our view, the appellants' approach in considering only the immediate consequences of the compromise agreement is an overly narrow view of what the necessary business of the trust requires. It must be consonant with the object of this trust and more beneficial to it if the trustee were able to secure a stream of stable revenue from the settled property for as long as possible. The continuation of the arrangements under the lease agreements would secure this stream of revenue at a higher rate of return. Consider the consequences if the respondent had abandoned the project. The three properties were in an unfinished state. The trust did not have any capital funds (there was no evidence that it had) to complete the redevelopment. It would have had to borrow the funds to do so or to bring in another tenant who was prepared to complete the redevelopment. In the meantime, there would be no rental for some period of time, and even if or when rental becomes available, all of it would have to be utilised to repay the borrowings and the interest thereon. All in all, it is our view that entering into the compromise agreement was within the power of the sole trustee to carry on the necessary business of the trust as contemplated by cl 19.

26 It should also be noted that the appellants have not alleged that the sole trustee did not act in good faith in wanting to secure this stream of income for the trust at the lowest possible cost (except in relation to his explanation for not being able to recover the accrued rent from the respondent). In our view, he acted in good faith as he had received advice from his solicitors, M&N, that he had the power to enter into the compromise agreement under cl 19 of the will. He was faced with a situation where he had to make a decision to waive or not to waive part of the accrued rent and what the consequences could be if he decided not to do so. It might well be that his decision to waive was unwise, or was an error of judgment but it cannot be gainsaid that what he did achieved his aim of securing a long term stream of stable revenue from the redeveloped properties to the benefit of the trust and the income beneficiaries. In our view, the fact that that decision was or might have been questioned does not mean that he had no power to make that decision under cl 19.

27 For the reasons given above, we agree with the decision of the Judge that it was within the power of the sole trustee to carry on the necessary business of the trust pursuant to cl 19 of the will to enter into the compromise agreement. Whether or not he exercised the power rightly or wrongly does not detract from the existence of the power. In light of this conclusion, there is strictly no need to consider the appellants' alternative argument that M&N, the solicitors for the sole trustee who had made the offer to compromise with the respondent, did not have any ostensible authority to do so, and that therefore the appellants are not estopped from denying the validity of the compromise. However, since the appellants have made a submission on a point of law (based on the analogy of a company with a trust) which has not been argued before a Singapore court, we will, for the sake of completeness, give our reasons for rejecting it in the context of this case. But before doing so, we need to address the appellants' argument that the respondent had actual or constructive notice that the sole trustee acted in breach of trust and, therefore, they are not entitled to plead the compromise by way of estoppel against the appellants.

Did the respondent have actual or constructive notice of the breach of trust by the sole trustee?

28 The appellants' argument on this issue is that the sole trustee acted in breach of trust *because* he had no power to enter into the compromise agreement under cl 19 and *not because* he had exercised it wrongly or negligently. Nevertheless, assuming that the sole trustee's decision was in breach of trust, did the respondent have actual or constructive notice of such breach? The Judge found, after a detailed analysis of the evidence, that the respondent did not have actual notice of the breach. There was no evidence that cl 19 was drawn to the attention of the respondent's solicitors at the time of the signing of the lease agreements or that the respondent had ever been

advised that the sole trustee had no power under cl 19 to waive the accrued rent or that a possible construction of that clause might lead to the same result. We see no reason to disagree with the Judge on this finding, and in any case counsel for the appellants did not press the contrary before us.

29 On the question of constructive notice, the Judge made no finding on this issue but observed that the appellants had cited no authority that constructive notice could nullify the respondent's reliance on M&N's ostensible authority. She ruled that constructive knowledge could not be sufficient for this purpose as the only way of nullifying an apparent position was, logically, actual knowledge.

30 Counsel argued that the respondent had constructive notice that the compromise was a breach of trust because a copy of the will had been registered in the land-register: see the decision of this court in *HSBC Trustee (Singapore) Ltd v Lycee Francais De Singapour* [1996] 2 SLR 24, ("*HSBC Trustee*"). Counsel also referred to *Fairtitle v Gilbert* (1787) 2 TR 169; (1787) 29 ER 91; *HSBC Trustee* (*supra*); *Dance v Goldingham* [1873] LR 8 Ch App 902 and Ford on *Principles of the Law of Trusts* (Thomson Lawbook Co, Looseleaf Ed, 1996) at para 17410 (March 2007 update) as authority for his submission that actual or constructive notice was sufficient to enable the appellants to set aside the compromise. It was further argued that the respondent's solicitors had constructive knowledge of cl 19 because they had actual knowledge of cl 12 of the will (since they had required the trustees to obtain court sanction to give the respondent a 20-year lease).

31 In the present case, the parties dealt with each other through their solicitors. There was no reason why the respondent's solicitors should not assume that the sole trustee had the power to offer or accept the compromise and that, being advised by solicitors, he would not act in breach of trust or outside the terms of the Will. In fact, the evidence is that M&N had advised the sole trustee that he had such power. In our view, even if the respondent's solicitors had constructive notice of cl 19, it did not necessarily follow that they could be imputed with knowledge of the legal effect of cl 19 which, as we have seen, is a provision of considerable ambiguity. Until this court has decided what its scope is, the parties cannot be expected to know what its legal effect is. We have not been cited any judicial decision or statement that has gone so far as to equate constructive notice of a clause in a will with the legal effect of that clause in a situation where the clause is vague or ambiguous and which requires a judicial decision to state its meaning and effect conclusively against a party relying on it. Counsel has cited no authority to show that the principle of constructive knowledge reaches that far.

Power and authority

32 This brings us to the argument on the scope of ostensible authority as a defence by way of estoppel. Counsel for the appellants submitted that the principle of law in agency relationships is that if A does not have any capacity or power to do X, A cannot give any authority to B to do X, and C who deals with B cannot plead that B has any ostensible authority on X. As authority for this principle, counsel referred to the decision of the English Court of Appeal in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 ("*Freeman & Lockyer*"). In that case, it was held that an agent can only have apparent or ostensible authority to do an act that is within the capacity or power of the principal. In that case, the principal was a company and in the law of companies, if a company lacked capacity to perform an act (the *ultra vires* doctrine), it could not be estopped from denying the validity of that act. Counsel argued this principle was applicable to a trust as a trust is analogous to a company in terms of its corporate structure with respect to its object and powers. So, in this case, if the sole trustee did not have the power under cl 19 to waive the accrued rent, he could not hold out M&N as having apparent or ostensible authority to enter into the compromise agreement with the respondent's solicitors. M&N could not do what the sole trustee himself could not do.

33 It is necessary to examine the facts in *Freeman & Lockyer.* There, the articles of association of the defendant company, BPP, contained a power empowering the board of directors to appoint a managing director. None was appointed, but K, a director, appointed a firm of architects, F&L, to apply for planning permission to develop an estate and do certain other work. F&L executed the work and claimed their fees from BPP. The Court of Appeal found that K had no actual authority to employ F&L but had ostensible authority as he acted throughout as managing director to the knowledge of the board, and held, applying *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93, and *British Thomson-Houston Company, Limited v Federated European Bank, Limited* [1932] 2 KB 176, that (a) K's acts as managing director were within the ambit of the authority of a managing director and F&L did not have to inquire whether he was properly appointed; and (b) it was sufficient for F&L that under the articles of association there was in fact power to appoint him as such and accordingly BPP was liable for F&L's fees.

34 Diplock LJ delivered an elaborate judgment in which he sought to clarify the confusing state of the law as to the ostensible authority of officers and servants to enter into contracts on behalf of corporations. Diplock LJ said at 504:

> Under the doctrine of ultra vires the limitation of the capacity of a corporation by its constitution to do any acts is absolute. This affects the rules as to the "apparent" authority of an agent of a corporation in two ways. First, no representation can operate to estop the corporation from denying the authority of the agent to do so on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself. Secondly, since the conferring of actual authority upon an agent is itself an act of the corporation, the capacity to do which is regulated by its constitution, the corporation cannot be estopped from denying that it has conferred upon a particular agent authority to do acts which by its constitution, it is incapable of delegating to that particular agent.
>
> To recognise that these are the direct consequences of the doctrine of ultra vires is, I think, preferable to saying that a contractor who enters into a contract with a corporation has constructive notice of its constitution, for the expression "constructive notice" tends to disguise that constructive notice is not a positive but a negative doctrine, like that of estoppel of which it forms a part. It operates to prevent the contractor from saying that he did not know that the constitution of the corporation rendered a particular act or a particular delegation of authority ultra vires the corporation. It does not entitle him to say that he relied on some unusual provision in the constitution of the corporation if he did not in fact so rely.
>
> The second characteristic of a corporation, namely, that unlike a natural person it can only make a representation through an agent, has the consequence that in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his "apparent" authority must be made by some person or persons who have "actual" authority from the corporation to make the representation. Such "actual" authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, upon the board of directors, or it may be conferred by those who under its constitution have the powers of management upon some other person to whom the constitution permits them to delegate authority to make representations of this kind. It follows that where the agent upon whose "apparent" authority the contractor relies has no "actual" authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.

35 It may be noted that in *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2005), the editor is of the view (see para 3.87) that Diplock LJ's statement may have little or no importance in the Singapore context since s 25(1) of the Companies Act (Cap 50, 2006 Rev Ed) has virtually abrogated the *ultra vires* principle. However, the question raised by the argument of counsel for the appellants is whether what is really a company law principle affecting *ultra vires* acts should be extended to a trust constituted by a trust instrument setting out the objects of the trust, the duties of trustees and the powers given to trustees to carry out the objects of the trust. Counsel's argument assumes that the principle established in *Freeman & Lockyer* is applicable to trustees for the reason that, just as the powers of directors of a company are determined by the articles of association, the powers of trustees are determined by the terms of the trust. Therefore, applying the principle in *Freeman & Lockyer,* by analogy, if the sole trustee did not have the power to waive the accrued rent, he could not authorise or hold out M&N to do what he himself could not do. Accordingly, the appellants were not estopped from denying the validity of the compromise made by M&N on behalf of the sole trustee.

36 Attractive as counsel's argument may appear in terms of its structure and logic, we do not think that it helps the appellants in this case. Let us assume for the purposes of this argument that a trust is equivalent to a corporation in terms of its corporate structure, powers and authority, *ie*, (a) the trust instrument is akin to the constitution of the corporation; (b) the business of the trust is akin to the objects (business) of a corporation (which in turn would determine its capacity); (c) the powers of the trustees are like the powers of the board of directors; and (d) any agent to whom the trustees may delegate their duties is akin to the managing director and other officers of the corporation. In the present case, the business of the trust is the maintenance of the testator's widow, children and grandchildren for the settlement period of the trust which could last up to a hundred years, during which the trustees must manage the settled property to generate the revenue to carry out the business (or purpose) of the trust. The trustees have been given the power to manage the trust, just as the board of directors are given powers to manage the company. Again, just like the board of directors, when the number is less than the prescribed number, the trustees must fill the vacancies and, until it is done, they must carry on the business of the trust, just as a depleted board of directors has to carry on the business of the company.

37 So far the analogy between the legal structure of a company and that of a trust holds good. The legal structure of a trust is akin to that of a corporation in terms of objects and power and how the power is exercised. Just as, in practice, it is necessary for the board of directors to appoint a managing director, it is also sometimes necessary for the trustees to appoint an agent to look after certain functions of the trust. In the present case, the trustees (including a sole trustee) have such a power. Both the board and the trustees may be regarded as the primary organs of their respective bodies. However, whilst a depleted board has the power to carry on the business of the company and to exercise all the express or implied powers and authorities for this purpose, the sole trustee in the present case is given the power only to carry on the *necessary business of the trust*. Does this make a difference for the purposes of the principle in *Freeman & Lockyer*? We would say no. Even a limited power is still a power and there is no legal or policy reason why it should not operate in the same way or have the same effect for applying the principle of ostensible authority.

38 We can carry the analogy further. Suppose in *Freeman & Lockyer,* the directors had passed a board resolution to appoint K as the managing director but lacked the requisite quorum to do so or the requisite period of notice had not been given. In such a situation, the managing director would still have ostensible authority to act as such as the board had actual authority to represent to third parties that the managing director had the power to act as such. Similarly, as the sole trustee in the present case is akin to the board in a company, his power to carry on the necessary business of the trust under cl 19 may be relied upon by the respondent as having represented that his solicitors,

M&N, had the power to offer the compromise to them.

39 We could take the argument further. If the appellants are entitled to rely on the principle based on the *ultra vires* doctrine in *Freeman & Lockyer,* then the respondent in the present case should be allowed to rely on the indoor management rule (the rule in *Turquand*'s case) to argue that what the sole trustee did was regular, *ie*, within his trust powers, unless they had actual notice of the irregularity. *Walter Woon on Company Law* (*supra*) has suggested, at para 3.40, that the rule in *Turquand*'s case should be applied together with the rules on apparent authority. The passage continues:

> Although the doctrines developed separately, it is suggested that there is no reason why they should not be merged. The rule in *Turquand*'s case should, in a modern context, be seen as a sub-set of the rules of apparent authority. In real life, people who deal with companies invariably assume that agents who appear to be authorized are in fact authorized. In the absence of anything to put a third party on notice, he is entitled to rely on the presumption of regularity. Any other rule would have a severely restrictive effect on real-life commercial transactions. A party dealing with a company does not know what the actual authority of its agent is. The actual authority of a company's agent is an internal matter. An outsider cannot easily find out what an agent's actual authority is. It is sufficient if the agent has apparent authority to do the acts in question. Persons dealing with the company in good faith are entitled to assume that acts within the apparent authority of its agent have been properly performed and need not inquire as to whether the agent's powers have been exercised or conferred regularly in compliance with all the prescribed formalities. As long as the agent has apparent authority, the fact that there is some internal irregularity that vitiates his actual authority does not matter.

40 Applying the indoor management rule, by way of analogy, it could be said that whether or not the waiver of the accrued rent was a necessary business of the trust was an internal decision for the sole trustee to make. It was a matter between him and the beneficiaries, and it was not for the respondent to enquire or concern himself with whether the waiver was a necessary business of the trust. The sole trustee had the power to so decide, even though it might have resulted in a breach. If he had the power to decide, he had the power to authorise M&N to carry out his decisions. On the facts of this case, since the sole trustee did authorise M&N to offer the compromise to the respondent, M&N would have had actual authority to negotiate with the respondent.

Ostensible authority of M&N

41 This brings us to the issue of ostensible authority of M&N as solicitors for the sole trustee. The question here is the apparent or ostensible authority of M&N as seen by a third party dealing with them. Here, the third party was the respondent's solicitors. The law is well established on this issue. The Judge applied the principle in *Waugh v H B Clifford & Sons Ltd* [1982] Ch 374 (and accepted as long established in *Harford v Birmingham City Council* (1993) 66 P & CR 468) that in contentious matters a solicitor or counsel had ostensible or apparent authority to bind his client to a compromise of the action. She held that in the present case, the dispute had turned contentious as the appellants' solicitors had asserted a claim for the waived rent and the respondent's solicitors had rejected it. We agree with the Judge. It would be most inconvenient or impractical for the daily conduct of legal business if solicitors could not rely on the apparent authority of solicitors they have to deal with and every act or decision has to be supported by evidence of actual authority before an agreement between them could be reached on behalf of their clients. Indeed, in *Abacus Realty Pte Ltd v Indian Overseas Bank* [1999] 1 SLR 1, this court held that the ostensible authority of solicitors extended to non-contentious matters. At [22], the court said:

> What Brightman LJ [in *Waugh*'s case] said of compromise negotiated and agreed to in litigation is equally apt and applicable to conveyancing or other non-contentious matters, where, daily, solicitors on behalf of their clients are engaged to settle the terms and conditions of agreements and other instruments in the absence of their clients [which was the case on our facts]. The solicitors acting for a party on one side usually rely on and accept the terms and conditions or changes to the terms and conditions agreed to or communicated by the solicitors acting for the party on the other side and normally without any question of the existence of the requisite authority of the clients. It would be highly impracticable, if on each occasion when a solicitor agrees on behalf of his client to a new term or condition or any changes thereof, he has to produce authority from his client for such agreement.

42 For the above reasons, if it were necessary to decide the issue of ostensible authority, we would hold that the respondent would be entitled to rely on the ostensible authority of M&N to offer or accept the terms of the compromise agreement on behalf of the sole trustee, and the appellants cannot now deny its validity.

Validity of compromise and consideration

43 The next issue we have to address is whether the respondent had given consideration for the compromise, and if not, whether it was in any event, binding on the appellants.

44 On the question of consideration, the Judge found on the evidence that the respondent believed that they had a claim against the trustees for breach of their obligations under the lease agreements, particularly the delay in obtaining vacant possession of the trust properties, and that the respondent gave up any right they had to claim damages in accepting the compromise offered by the sole trustee. The Judge (at [42] of the judgment) distilled the principles in *Chitty on Contracts* (H G Beale gen ed)(Sweet & Maxwell, 29th Ed, 2004) at paras 3-051 and 3-052 in the following terms:

> [T]he compromise of a claim which is doubtful in law is binding as a contract and that this rule applies even if the claim is clearly invalid in law, so long as it was a reasonable claim which was in good faith believed by the party forbearing to have at any rate a fair chance of success.

45 The appellants' case on the issue of compromise in this appeal is that (a) the appellants were not a party to the compromise and therefore they were not bound by the compromise; and (b) the compromise involved the sole trustee's breach of trust and therefore was not binding on the successor trustees, the appellants. In our view, these arguments have no merit. If the compromise was binding on the sole trustee, it was also binding on the successor trustees. On the question of the sole trustee's alleged breach of trust, we have found that the trustee believed that when he authorised M&N to enter into the compromise on the accrued rent he was not acting in breach of trust as M&N had advised him that it was within his power to do so. In this regard, we note that there is no evidence that the respondent was actually aware that the compromise was a breach of cl 19 of the will.

Waiver and estoppel

46 The final issue is whether the appellants were estopped from claiming the waived rent. The Judge referred to the line of cases starting from the well-known decisions of *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439 and *Central London Property Trust Limited v High Trees House Limited* [1947] KB 130 that had held that in equity, a promise by a contracting party not to enforce his strict legal rights has a limited effect provided that certain conditions are met. In so far as such promise relates to an agreement by a creditor to accept a lesser sum in settlement of a debt

due to him, these are as follows: (a) there must be a representation by the creditor that he will not enforce his strict legal right to full payment; (b) there must be a reliance by the debtor on the representation; and (c) there must be circumstances which make it inequitable for the creditor to go back on his promise. On the evidence, the Judge found that all the three conditions were fulfilled in the present case.

47 In her grounds of decision, the Judge also considered the ongoing debate in academic circles on the scope of the third condition, *viz*, whether detriment is necessary in all cases of promissory estoppel (the "narrow view") or if it would suffice to show "circumstances that make it inequitable for the creditor to go back on his promise ("broad view"). The Judge preferred the broad view, which is also advocated by *Chitty on Contracts* (below) and *Halsbury's Laws of England* vol 16(2) (LexisNexis UK, 4th Ed, 2003 Re-issue) at para 1086). The Judge's observations at [44] of the judgment merit reproduction.

> As for the third element, there has been *some discussion* as to whether there must be "detriment" suffered by the debtor before the creditor is estopped from going back on his promise. In this respect, *Chitty on Contracts* at para 3-135, asserts that the better view is that detriment of the kind required for the purpose of estoppel by representation is not an essential requirement and all that is necessary is that the promisee should have *acted in reliance on the promise in such a way as to make it inequitable to allow the promisor to act inconsistently with it*. [emphasis added]

48 In this appeal, counsel for the appellants has not challenged the correctness of the Judge's ruling on the third condition. It is therefore not necessary for us to enter into this controversy without the benefit of arguments to the contrary.

49 However, the appellants did raise two issues in connection with the application of the law in relation to the facts. First, it was argued that the representations were made by M&N who were the solicitors for the sole trustee and not for the appellants as pleaded by the respondent. Since the appellants did not make the representations, they could not be bound by any estoppel that the representation might have given rise to. Second, the appellants argued that promissory estoppel, unlike proprietary estoppel, does not bind third parties, such as the appellants.

50 In our view, these arguments have no merit. If the waiver was binding on the sole trustee and the trust, it was binding on the appellants who are the successor trustees of the trust.

Conclusion

51 For the reasons given above, this appeal is dismissed with costs.