[TRANSLATION FROM THE ORIGINAL ITALIAN TEXT]

The Court for Trusts and Fiduciary Relations

- President Maurizio Lupoi, Judges Antonio Gambaro and Paul Matthews -

issued the following

ORDER

Case no. 4 of year 2017

Upon a petition filed by P. S.A., a company organised and existing under the Laws of Luxembourg (lawyers Antonella Bonelli, Enrico Mancini of Velletri (Italy) and Pasqualino Silvestre of Rome (Italy)).

PART ONE – THE PETITION AND OUR DECISION

§1. MAIN FACTS

1.1. The petitioner has been the trustee of "A. trust" since its creation on 24th September 2010 by way of an instrument in Italian language. The signatures of the two settlors F. and L., as well as that of the trustee were legalised by notary Martine Schaeffer from Luxembourg. The instrument is expressed (art. 16) to be regulated by the Trust Law in force in the Republic of San Marino, and evidences the payment of €10,000 made by the two transferors in equal shares.

1.2. The definition of "Beneficiary" in the trust instrument includes non-separated spouses and the settlors' respective descendants born by the end of the trust period (art. 10.A).

1.3. By deed dated 20th October 2010, settlor L. transferred 320 shares in Luxembourgian company "A." to the trustee. The other transferor did not transfer anything, then or later, and did not play any role in the life of the trust. From this point on in this order, any reference to "settlor" will include only L.

1.4. In the spring of year 2012, an Italian shipping company suffered an economic crisis. The Court of Torre Annunziata received an application to approve an arrangement with creditors. The request was rejected and the Court declared the bankruptcy of the shipping company (judgement dated 9th May 2012).

1.5. Exactly one year later, the same Court ascertained the existence of a *de facto* company whose shareholders, directors and managers, including the settlor,

were involved in the shipping company. The Court declared the bankruptcy of this company and notified it to all the aforementioned persons, since they all had unlimited liability for the company's debts (Bankruptcy case no. 24/2013).

1.6. As a consequence of the bankruptcy of the shipping company, a criminal case began against several people, including the settlor. He was [convicted and] sentenced to four years and six months of imprisonment by the Court of Rome (in accordance with his own pleading[?]).That judgment is now final. Two more criminal proceedings are still going on: no judgment has yet been given.

1.7. In February 2015, the *de facto* company's receiver started a complex legal action before the Court of Torre Annunziata including claims to avoid the transfers of assets to the trustee, claims for damages (also against the trustee), claims that the trust was invalid, and claims concerning fictitious transactions. These proceedings are still pending at first instance (RGAC 691/2015).

1.8. Some seizure orders had been previously issued and the shares of company A. included in the trust fund were transferred into the custody of the Court.

§2. APPLICATIONS AND PROCEEDINGS

2.1. By way of a petition filed on 12th October 2017, the trustee primarily asked to be authorised to reach a settlement of the case in which it is involved as a defendant before the Court of Torre Annunziata. It also described the conditions of such settlement in summary form. These include the use of 90% or more of the trust fund for the benefit of the receiver.

2.2. The trustee's petition was presented pursuant to art. 53 of Law no. 42 of 1st March 2010 – the Trust Act. Paragraph 4 of that law reads: "*A trustee may apply to the judge to be authorised to carry out some useful action which is not included among his powers*".

2.3. In 2010, when Law no. 42 had not been promulgated yet, this Court did not exist and art. 53 generically referred to the "Court". When this Court was created, proceedings falling under art. 53 of Law were regulated, together with the other functions of the Court, by way of Delegated Decree no. 128 dated 30th September 2013. Such proceedings were included among the functions of the President of the Court under the heading "non-contentious proceedings" (art. 12): "*The measures provided for by articles 53, 54 and 55, first paragraph, of Law no. 42 of 1st March 2010 [...] shall be submitted to the President by way of petition. He shall issue his judgement about such cases after taking general information and, should he deem it to be suitable, after hearing the person against whom the measure is requested or other people involved*".

2.4. The text of art. 12 further provides that (paragraph 2): "*The President will issue immediately executable decrees*".

2.5. That same Delegated Decree establishes that in ordinary contentious proceedings the President shall issue a decree to organize the management of the case. The management may range from judge(s) designation, to the calculation of the legal expenses to be charged to the petitioner, to the choice of the language of the proceedings and more.

2.6. The President, as has already occurred in previous non-contentious proceedings, decided not to adjudicate on the petition by himself. Therefore, by issuing an organizational decree dated 13th October 2017, he established that a board of three judges should decide on the petition. Given the petitioner's urgency, he reserved to himself only the acquisition of general information on 23rd October 2017.

2.7. In the aforementioned decree, the President observed that:

2.7.1. "the proceedings started as a consequence of the above mentioned petition, although formally considered to be non-contentious proceedings, affect the interests of third parties and, even more, they specifically aim to dispose of such interests, since the use of 90% or more of a trust fund obviously reduces the value of beneficiaries' interests";

2.7.2. "therefore, the matter of this proceeding is more akin to that of contentious proceeding".

2.8. In the aforementioned organizational decree, the President ordered the service of a copy of the decree and of the petition to adult beneficiaries and to the trust protector. Such notifications were duly made but none of the addressees appeared before this Court.

§3. CONTINUED FROM THE PREVIOUS POINT: THE SITUATION OF THE TRUST BENEFICIARIES

3.1. The settlor is married and of the marriage three children have been born. Two of them are presently minors, a girl aged 16 and a boy aged 12. The girl was formally diagnosed with "persistent difficulties in carrying out duties and functions typical of her age", resulting in civil invalidity.

3.2. The trust instrument establishes that the trust fund shall be divided not between the "Beneficiaries", but between the settlor's children living at the date of expiry of the trust and the descendants of any deceased child (art. 13)[1]. Therefore, although the settlor's wife is one of the beneficiaries of the trust for other

[1] See point 1.2 above for the definition of "Beneficiary".

purposes, she is not a beneficiary as far the division of the trust fund is concerned. We will not here consider certain features of the trust, such as the existence of sub-funds, since they will have no effect on the petition.

3.3. Should the trustee, as it requested, use 90% or more of the fund to settle the litigation with the receiver of the de facto company, the interests of all trust beneficiaries will be jeopardised, not only the settlor's wife and children, but also any children who may be born later, in accordance with the definition of "Beneficiary" given in the trust instrument. In the aforementioned organizational decree dated 13th October 2017, the President appointed a special Protector, lawyer Debora Cenni, to protect the interests of the two minors and those of any child who may be born before the expiration of the trust period (the period set in the trust instrument is thirty years. The trustee is entitled to bring it to an end sooner with the Protector's approval - art. 9).

3.4. The special Protector participated in the proceedings and handed in her written conclusions during the hearing held on 8th November 2017.

§4. OUR DECISION

4.1. This Court resolved to issue its judgement by way of an order rather than by decree, as provided for by the Law for non-contentious proceedings. The reasons for this choice lie in the thorough explanation that the Court decided to give of the conclusions reached in the light of third party interests, which the granting of the petition is bound to jeopardise. The order was agreed in chambers immediately after the hearing on 8th November 2017, and immediately made known to the petitioner.

4.2. The order reads: "*Granting the petition, as originally submitted and further explained during the oral discussion, the Court authorises the Trustee of "[...]" trust, that is "P. S.A.", to settle the litigation with the receiver of the de facto company resulting from judgment no. 24/2013 issued by the Court of Torre Annunziata on such conditions as it deems most suitable but taking into account the Court's recommendation of the transfer of a sum to a sub-trust to safeguard the interests of [...],, a child affected by serious and permanent disability.*

The Court hereby orders that the claimant pays the special Protector's fees as per invoice submitted.

The reasons for this order will be notified to the parties within thirty days".

PART TWO – THE REASONS

§5. THE APPLICATION AND THE LEGAL BASIS OF THE COURT'S JURISDICTION

5.1. The petitioner is aware that it has no power to use the trust fund for purposes different from those established in the trust instrument, that is, in favour of the beneficiaries. Therefore, it cannot complete the negotiations with the *de facto* company's receiver, of which it gave the basic elements in its petition and that the receiver communicated to the creditors. Should the trustee enter into an agreement with the creditors, it would take on obligations it could not lawfully fulfil since it has no authority to transfer the trust property to the receiver. In any event, should it manage to fulfil such obligations, the beneficiaries could sue it for damages.

5.2. The petitioner's main thesis is that the use of almost the entire trust property for the settlement with the receiver would be an advantage for the beneficiaries.

5.3. The apparent antinomy between the two positions cannot be resolved in general terms because any express trust, as is trust "A.", needs first an assessment of the specific rules contained in its instrument. Indeed, in the San Marino legislation, the rules governing trusts are largely dispositive, as is generally the case in *common law* legislation which contain only few mandatory norms. The latest example of this trend is Hong Kong's amended Law, which established that the powers granted to trustees by the Law are subject to any contrary provision contained in the trust instrument.[2] Therefore, it is perfectly normal that any analysis takes into consideration first the trust instrument and then statutory provisions.[3]

5.4. This trust is not a "discretionary trust", which, in different forms, is the most preferred kind of trust internationally. Contrary to what most people think, a "discretionary trust" is not a technical expression, since any trust gives some discretion to the trustee and therefore, every trust should be treated as a discretionary trust. The kind of discretion we refer to when we talk about discretionary trusts concerns the choice made among beneficiaries within a class, that is a discretion concerning the composition of such class, adding or removing some elements, and finally, a discretion on benefits granted to selected beneficiaries within the class.

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[2] Trustee Ordinance (as amended, 2013), sect. 3.2(A).

[3] This is the order appearing in a *dictum* by Lord Browne-Wilkinson in *Target Holdings* v *Redferns* [1996] AC 421, page 434: "The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law."

5.5. Typical Italian settlors rarely agree to grant trustees the authority to make very important decisions, such as those concerning to asset distribution among the beneficiaries. Therefore, true discretionary trusts are rare regardless of what foreign law governs them. The "A. trust" is not an exception.

5.6. Indeed, the trustee has no discretion over who is going to receive assets nor over the distribution of assets to them, which are strictly regulated. On the other hand, there is some limited discretion in the use of trust income favour of the settlor's non-separated spouse and the settlor's descendants (art. 36 of the trust instrument).

5.7. One of the consequences of the aforementioned trend of Italian settlors is that the trustee may be without any power in case of unexpected situations, which is what has happened to the petitioner.

5.8. Art. 53 of the Trust Act enables the Court to authorise the trustee "*to carry out some useful action which is not included among his powers*". That is in touch with modern legislation such as art. 47 (3) of the Jersey trust law, which contains an analogous provision with reference to the case when the trustee's powers are not wide enough to carry out an "expedient" act relating to "management or administration". Guernsey has a similar provision in section 58 of its trust law in order to carry out an "expedient" action of trust "management or administration." Those provisions, which limit the judge's intervention to acts of trust "management or administration", stem from English law, and specifically in section 57 of the Trustee Act 1925 which also refers to "expedient" acts.

5.9. The fundamental difference between San Marino and English law is that the latter does not extend to trustee acts which aim to modify the beneficiaries' interests set in the trust instrument[4]. For that purpose one may turn to the 1958 Variation of Trusts Act. On the contrary, San Marino's legislation does not set any limit to the powers of the court. This is more significant since:

5.9.1. San Marino's law employs the term "useful", which is certainly equivalent to the term "expedient" used in the English statute and in the other aforementioned statutes;

5.9.2. however, San Marino has not adopted the limitation to "management or administration".

§6. THE ROLE OF THE SETTLOR AND OF THE BENEFICIARIES AND THE TRUSTEE'S ACTIONS

[4] *In re Downshire Settled Estates* [1953] Ch 218 (Court of Petition).

6.1. From the dossier of the proceedings, it appears that on the first difficulties suffered by the shipping company, the settlor specifically applied to the trustee to have company "A."'s assets transferred to the company in trouble. Such assets were mainly formed by equity participations (equal to one third of the capital) in companies which controlled significant assets. The trustee promptly fulfilled the settlor's request in the context of the proposal of arrangement with creditors which was rejected by the Court, and which brought the shipping company into bankruptcy[5].

6.2. This Court does not understand why the trustee decided to promptly fulfil the settlor's request. The Court cannot deem sufficient the reasons given by the trustee in Italian civil proceedings, namely that he made a final informed decision after thoroughly assessing all relevant circumstances and exercising his authority for the benefit of the beneficiaries. Actually, the point is whether such authority existed, not how it was to be exercised.

6.3. Trustees of San Marino trusts are able to apply to a specialised judge by following simple procedures and at a low cost. Moreover, any decision is made in an extremely short time, as this case shows. That is not always true elsewhere. Over one century ago, cheapness was a source of pride for the English judiciary and a trustee could obtain orders from the judge with a "comparatively small expense"[6]. Contemporary judges have had sadly to admit that this vision is "simply wrong in modern times".[7]

6.4. Therefore, trustees must always consider that

6.4.1. This Court is here to support them to carry out their difficult tasks and to keep their actions within the limits of the law;

6.4.2. A trustee can always apply to this Court using little time and money.

6.5. In its order on precautionary measures, the Court of Torre Annunziata concluded that "A." was a "sham" trust, simply on the basis of the trustee's impulsive behaviour in fulfilling the settlor's request. The judge interpreted such act as ongoing control by the settlor over the trust. Perhaps he would have issued a different judgement if the trustee had previously applied to this Court.

6.6. From the dossier of the proceedings it appears that, after the declaration of bankruptcy of the *de facto* company and the criminal convictions, both the settlor and the beneficiaries urged the trustee in writing (December 2016) to make the trust fund available to the receiver.

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[5] See 1.4. above
[6] *Re Beddoe. Downes* v *Cottam* [1893] 1 Ch 547 (C.A.), *per* Lindley LJ on page 558.
[7] See Briggs J in *Breakspear* v *Ackland* [2009] Ch. 32, page 38.

6.6.1. In contrast to the opinion expressed by the Italian Agenzia delle Entrate (tax authority) and in some Italian judgments, it is not true that the settlor should refrain from having any contact with the trustee after the creation of the trust.

6.6.2. This was the thesis supported by the writers who, for the first time, opened the way to trusts in the Italian legal system over twenty years ago. However, it was evident that such a thesis was instrumental in avoiding any misunderstanding between trusts and fiduciary relations.

6.6.3. Nowadays, in a completely different scenario, we can state that, in line with English law, trustees must take into consideration the settlor's will as established in the trust instrument or deducible from the provisions therein or expressed later and taken not as binding instructions, but as the expression of the settlor's desire, whose fulfilment is subject to the trustee's prudent evaluation.

6.7. The beneficiaries' request to the trustee raises some problems.

6.7.1. It is embodied in a letter sent to the trustee on 5th December 2016 signed by the four beneficiaries: the settlor's wife and three children, for two of whom the mother signed since they were minors.

6.7.2. In such letter, the beneficiaries asked for their "entitlement to the assets held in the aforementioned trust to be made available to bankruptcy case no. 24/2013, except only for such percentage of such assets, as we shall tell you in a subsequent communication by which we will inform you about the hopefully positive results of the negotiations presently being held with the receiver".

6.7.3. On the following day, also the settlor's lawyer wrote to the trustee, with the approval of the settlor himself, who signed the letter, and expressed the "need for making the assets of *de facto* company [...] held in trust available to the receiver according to the agreement set in the letter you received from the beneficiaries".

6.8. The four beneficiaries asked the trustee to do something (namely, to settle the case with the receiver) which would imply a use of the trust fund to the prejudice of the interests of the beneficiaries themselves. The settlor supported them.

6.9. It is not easy to legally define the effects of that letter.

6.9.1. It is not a renunciation made by the beneficiaries of their rights, which, however, for two of them would have required the prior authorization of the judge responsible for supervising guardianship and the compliance with the "requirements established in the trust instrument" (art. 50 of Law no. 42 dated 1st March 2010).

6.9.2. It is not even a dispositive order, since the rights of the settlor's children on the assets will vest only if they are alive at the end of the trust period[8] (not to mention the authorization to be given by the judge supervising the guardianship for the two minors).

6.9.3. The most probable construction of the content of the letter is a prior waiver of the right to complain of the trustee's action, should it comply with the beneficiary's request. This Court cannot evaluate whether the agreement with the receiver would need any authorization by the judge responsible for supervising the guardianship, but we cannot exclude the possibility.

6.10. However, not much turns on this matter, since the positions taken by the settlor and the beneficiaries do not bind the Court's decision in any way: a petition submitted according to art. 53 of the Trust Act to authorise a trustee to carry out some action which is not included among his powers may be granted even against the will of the settlor and the beneficiaries[9].

6.11. The Court's decision will mainly depend on prognostic assessment of the litigation that the trustee has asked to be authorised to settle.

§7. ACTION FOR ANNULMENT AND "SHAM"

7.1. The word "sham" entered trust law quite recently coming from a colloquial term, which had no legal meaning. This word can be a verb, a noun or an adjective[10]. In the world of trusts, the adjective took hold quite rapidly in the expression "sham trust"; that codified an error of perspective since the adjective "sham" can only refer to the trust instrument or to another document, not to a legal relationship. That was evident in the first modern occurrence of "sham", when judges asked themselves whether the combination of a contract for the sale of an MG car with a subsequent lease to the seller by way of a purchase agreement was actually the cover for a loan secured on the car itself.[11]

7.2. This error of perspective is not perceived by lawyers of civil law systems, who instinctively associate the word "sham" with "simulation". Therefore, the first

[8] See 3.2 above.
[9] In English and Jersey law, these are precedents relating to trustees who decided to pay a debt made by the trust's beneficiary despite the objection of the latter. The difference with our case is that those were discretionary trusts and their trustees enjoyed a wide range of powers. However, there is a common point in the fact that the trustee used the trust fund, totally or partially, to pay creditors of the settlor.
[10] Examples from the Oxford Dictionary: noun "George abhorred sham and affectation"; adjective "a sham marriage", verb "was he shamming?". In legal matters the noun "shammer" identifies somebody who commits something "sham".
[11] *Snook* v *London and West Riding Investments Ltd.* [1967] 2 QB 786 (C.A.).

term is placed into the same conceptual area to which the second belongs without considering, just confining ourselves to this, that there has never been a legal theory based on simulation in the common law (you only have to open any manual on Contracts to find that such a matter is not even dealt with). Moreover, generally speaking, the investigation of parties' intentions, when one has to decide on the validity of a document or on its construction, is scarcely significant, according to the classical theory, or even excluded in order not to go beyond what is written in the text (the so-called "four corners" theory).

7.3. We can summarise the following from foreign case-law on "sham" (there are no statutes on this matter).

7.3.1. A self-declared trust between two people can be a "sham" if one of them did not intend to create the trust and the other did not even know what he was signing.[12]

7.3.2. A "sham" trust may be one where, short of a previous agreement between settlor and trustee, during the trust period the trustee passively accepts any request from the settlor; but not when each time the trustee considers all significant factors.[13]

7.3.3. A "sham" trust may be one where the parties have different actual intentions, provided that they both accept that the agreement they have entered does not correspond to their manifest will and therefore, it is just "pretence".[14]

7.3.4. A previous understanding – which is the only condition that would turn *sham* matters into simulation in civil law – is imputed when the settlor created the trust to carry out a project that did not appear in the trust instrument and the trustee – although not bound to do so– exercised his powers to implement that project. [15]

7.3.5. The settlor's control over trust assets by excluding the trustee from its management does not necessarily lead to a "sham". Actually, it may be due

[12] *Midland Bank* v *Wyatt* [1997] 1 BCLC 241.
[13] *Shalson* v *Russo* [2005] Ch 281, (2006) 8 ITELR 435*; A.* v *A. and St George Trustees Limited* [2007] EWHC 99 (Fam); the same conclusion may be drawn by considering settlor's "control", which would be significant in case of spouse separation, in *Charman* v *Charman* [2006] 2 FLR 422.
[14] *MacKinnon* v *Regent Trust* [2005] JLR 198.
[15] *Antle* v *R* (2009) 12 ITELR 314 (Tax Court of Canada): the decision to declare the trust null and void was affected also by the fact that the trust instrument, the transfer deed to the trustee and the following action taken by the trustee himself had been predated while actually all facts had occurred at the same time. The judgement was confirmed by the Court of Appeal: *Antle* v *R* (2010) 13 ITELR 591 (Federal Court of Appeal).

to a breach by the trustee[16] or it may be a trust where the trustee lacks the usual powers given to it (in this case the trust is called a "bare" trust).[17]

7.3.6. It has been considered whether a "sham" trust may evolve into an ordinary trust if, a new trustee is appointed who honestly acts to the benefit of the beneficiaries.[18]

7.3.7. Finally, according to some recent judgements, a trust cannot be a "sham" if it does not fulfil a further requirement, that is a common intention to give a false impression to third parties .[19] Actually, some recent opinions link "sham" trusts to fraud.

7.4. This variety of operational rules shows that there is not a commonly accepted legal theory about "sham" trusts.

7.5. The theory of "sham", if such a theory exists, would not be admitted in San Marino since our law, just like any other civil law system, is perfectly equipped to regulate specific cases of lack of correspondence between the content of a document and the will of its author(s), or of understandings that differ from those established in writing or even orally.

7.6. Simulation has a long history in continental culture, literature and law, which often focuses on the contrast between simulation and dissimulation, as well as, with regard to simulation, between honest and fraudulent simulation. Honest simulation cases included legal fictions, which were extremely common in Roman Law and later in Medieval and Renaissance Law on both sides of the Channel. England was probably the place with the highest number of simulations: both in legal proceedings, in order to compensate for the rigidity of the forms of action, and in everyday trading life, in order to ensure the validity of real estate transfers (*fines of land* and *common recoveries* coming from the *in iure cessio*).

7.7. Simulation occurred in numerous circumstances, as in the judgement issued by the Apostolic Chamber in the mid-17th century. The case was about an

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[16] *A.* v *A. and St George Trustees Limited* [2007] EWHC 99 (Fam).
[17] *Promyshlenniy Bank* v *Pugachev and Others* [2017] EWHC 2426 (Ch), paragraph 150.
[18] See *A.* v *A. and St George Trustees Limited* [2007] EWHC 99 (Fam).
[19] "a common intention to give a false impression to third parties is a necessary element in this head of claim": *MacKinnon* v *Regent Trust* [2005] JLR 198; similarly did the High Court of Australia in *Raftland Pty Ltd* v *Commissioner of Taxation* (2008) 82 ALJR 134 on pages 146-148 *per* Kirby J and the Court of Appeal of New Zealand: "To establish a sham, the intention to mislead must be shown to have existed from the inception of the trust (or from the time when particular property was disposed to the trust). Evidence of effective control of the trust post settlement may be used to infer the requisite intention": *Official Assignee in Bankruptcy in the property of Reynolds* v *Wilson* [2008] NZCA 122, paragraph 71. The Federal Court of Australia speaks about "deliberate deception" in *Coshott* v *Prentice* (2015) 17 ITELR 555, no. 64

acknowledgement of debt made by the debtor to a person different from the real creditor following a request by the latter in order to make collection easier at the due date. In this case, the court identified a particular case of simulation related to the person of the creditor but referred to an existing and uncontested debt.[20]

7.8. Again simulation is at the root of the regulations of some French customary legal systems, such as the Norman one: "donner et retenir ne vaut", where the lacking "traditio" of a good makes it possible to presume unwillingness to donate and, therefore, simulation of the donation.[21]

7.9. Actually, simulated contracts did not transfer any ownership, as already noted by Baldo in a sentence which strangely corresponds to those used today for "sham trusts": "Quero: numquid in contractu simulato transeat possessio?" Reply: "Tunc non transfert, cum simulans remanet dominus, ut prius, res suae".[22]

7.10. Civil law doctrine became interested in simulation during the 15th century, not for its theoretical implications, but because several cases of simulated contracts which occurred, for instance to hide loans at usurious rates. Among others, Paolo Castrense, Alessandro Tartagna, Bartolomeo Socino and Giason del Maino dealt with this matter, up to the monograph written by Bartolomeo Cepolla "De simulatione contractuum" published in 1481. In England, "contracts" had not yet appeared in the King's Courts and, therefore, the studies carried out by civil law specialists were of no interest.

7.11. Civil law doctrine then focused mainly on two aspects: the effects of simulation vis-à-vis third parties and proof. The latter was often based on a counterstatement having a specific name in French Law - "contre-lettre" – and dealt with by some specific rules of the French Civil Code (art. 1321, abrogated by 2016 reform, and new arts. 1201 and 1202[23]). It would be impossible to translate the French word "contre-lettre" into English, thus illustrating the differences which have arisen from the evolution of the legal system.

7.12. Moreover, the fundamental civil law doctrine, which distinguishes between the cases where the parties do not want any legal relation to develop from those

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[20] *Romana Simulationis Mutui*, De Luca, *Theatrum veritatis et Justitiae*, l. VII, *De Credito & Debito*, Disp. LXXVII.
[21] A. DEJARDINS, *Recherche sur l'origine de la règle "Donner et retenir ne vaut"*, *Rev. crit.*, vol. XXXIII (1868), page 207 and page 311
[22] Baldo a C. 4, 22, 3 (underlining added).
[23] Art. 1201: "Lorsque les parties ont conclu un contrat apparent qui dissimule un contrat occulte, ce dernier, appelé aussi contre-lettre, produit effet entre les parties".

where the parties want to engage in a different relation from that appearing in the documents is scarcely taken into consideration in England.

7.13. Finally, the civil law doctors, from the 17th century on, linked simulation to the formation of the parties' consent. This is proved by legislative norms about simulation. For example, the Swiss Code of Obligations establishes that "the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement" (art. 18).[24]

7.14. We felt it was appropriate to provide this short historical-comparative explanation to discourage the assimilation of "sham" to "simulation".

7.15. Italian case-law has included the word "sham" in seven judgements issued by the criminal section of the Corte di Cassazione . It was given a meaning similar to that of the English "pretence", that is "mere appearance", which regularly led to the nullity of the trust. The same word has been used several times in civil cases to mean "simulation", although no analysis has been made with reference to the concept of simulation in unilateral instruments according to the Italian Civil Code (art. 1414, paragraph 3).

7.16. The Court of Torre Annunziata, ruling on the precautionary measures, considered the "A. trust" as a "sham trust". The judge was probably misled by the arguments by the lawyers', even by those put forward by the trustee's lawyers, since the latter, in the petition to this Court, referred to "sham" by quoting English and Jersey cases, as if San Marino were a Crown dependency.

7.17. Italian Courts, just like in any other state which has adopted the Hague Convention on the Law Applicable to Trusts and their Recognition, have to apply the foreign law by which a trust is governed. The claim for nullity submitted for the "A. trust", to the extent to which it is based on references to San Marino's laws, has necessarily to follow the norms of San Marino. The interpretation of a foreign law by Italian Courts is subject to the supervision of the Corte di Cassazione.[25]

7.18. Therefore, it may help the Italian Court to know that the mere fact that the trustee promptly agreed to fulfil the request to make trust assets available for an arrangement with the creditors of the shipping company does not lead by itself to the conclusion of trust simulation. It could more easily be interpreted as a breach of trust by the trustee[26] or as evidence of lack of peace of mind in assessing the various possibilities he had.

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[24] Italics added.
[25] Cass., 15th June 2016, no. 12364.
[26] This consideration was made starting from English case-law: *A.* vs *A. and St George Trustees Limited* [2007] EWHC 99 (Fam).

7.19. According to the evidence submitted, this Court considers it unlikely that the claims of nullity, simulation and interposition based on the allegation of "sham" trust would be accepted.

§8. ACTION TO SET ASIDE

8.1. This Court has drawn different conclusions about the prospects of the action to set aside the transfer ("the set-aside action").

8.2. The trustee's lawyer correctly illustrated the strong points of the receiver and detailed the weak points of his own defence. In fact, he focused on a procedural detail which does not seem to be strong enough, considering also the social impact locally of the shipping company case.

8.3. The set-aside action refers to the transfer of 320 shares of company "A." to the trustee. These shares gave control of high-value assets. The transfer occurred about 18 months before the disclosure of the crisis which affected the shipping company[27] but at the end of a plurennial period during which, as stated in the judgement that found the *de facto* company, the representatives of the shipping company had transferred the fleet and a number of assets to companies that the Court of Torre Annunziata defined as "front companies". It must be said that the facts set out in the judgment of that Court suggest agreed activity between the representatives of the three families controlling the shipping company with the aim of transferring the assets out of the reach of potential creditors. Therefore, we hold that the thesis according to which when the settlor created the trust instrument he was aware of the fact that he was doing something to the detriment of the reasons of company creditors is not without merits. On the other hand, the lack of such awareness by the trustees is not relevant since it was not a synallagmatic contract.

8.4. While putting forward the issues in the set-aside action, the trustee's lawyer was noticeably weak on the merits of the case; [to counterbalance that] this Court does not want to take into consideration elements such as the difficulties that the receiver may have to face in order to actually reach the assets of "A." company. Indeed, the mere continuation of the proceedings, not to mention subsequent appeals, will imply expenses that will reduce the trust fund, so damaging the prospects of a settlement with the creditors and of the beneficiaries.

8.5. This Court must conclude that the set-aside action commenced by the receiver of the *de facto* company will probably be successful.

[27] See points 1.3-1.4 above.

§9. CRIMINAL PROCEEDINGS

9.1. In the petition and at the hearing the petitioner' lawyer focused on the criminal prosecutions affecting the settlor, who is serving a negotiated sentence, but is involved in further two proceedings, which are in their initial stages.

9.2. The petitioner's lawyer introduced the possibility that such new proceedings may not lead to further convictions involving deprivation of liberty, should a quick settlement with the receiver be reached in the civil case.

9.3. Besides those legal aspects, the petitioner's lawyer highlighted the damage suffered by the settlor to his physical and mental health and, consequently, by his wife and children, who are the trust beneficiaries.

9.4. The trustee may well evaluate the beneficiaries' positions also in terms of their psychological health. Indeed, the "A. trust" instrument, in art. 15.K reads: "The words 'for the benefit of', referred to the exercise of a fiduciary power in favour of a beneficiary, include the fulfilment of any interest of his, even non-pecuniary ones". As we have already pointed out, the "A. trust" is not a discretionary trust for the benefit of the beneficiaries. Therefore, non-pecuniary advantages may be taken into consideration, not to justify the exercise of powers by the trustee, but to predict some of the effects which would arise, should the authorization asked of the Court be granted.

§10. TRUSTEE'S CONFLICT OF INTEREST

10.1. The trustee submitted to this Court that a settlement with the receiver might be very useful also for the trustee, who has been the subject of accusations and criticism from the creditors of the bankrupt company.

10.2. This Court considers that the trustee's interest in a general settlement of the bankruptcy cases did not compromise his evaluations or his behaviour in any way. Moreover, considering that there is no trace of any act performed by the trustee in the management of company "A.", any claim for damages and repayment against him seems not to be soundly based.

§11. CONCLUSIONS

11.1. In a trust created for beneficiaries, anything that maximises their advantages is "useful". The word "useful" appears in art. 53 of the Trust Law to qualify the acts that the trustee may ask the Court to be authorised to execute, which are not included among his powers[28].

[28] See 2.2 above.

11.2. The prognostic judgment of the outcome of the action commenced by the receiver is in favour of the latter for the reasons explained above. Therefore, the continuation of the case up to the judgement or even to further appeals, would presumably lead just to trust fund depletion and loss to the beneficiaries. On the contrary, a settlement reached in this phase would permit more assets to go to the receiver, and hopefully it would not completely exhaust the trust fund.

11.3. Should such a settlement enable the settlor to avoid imprisonment in connection with the two new criminal proceedings, the beneficiaries would get a further advantage, namely the presence of their husband and father with evident positive effects on the family and, especially, on the two minor children.

11.4. It is from this point of view that this Court, accepting the conclusions of the special Protector, recommends the trustee to take particular care of the settlor's daughter, who is the weakest member of the family. Should the trustee, while reaching an agreement with the receiver, manage to retain a sum from the trust fund, this Court recommends that this amount, partially or entirely, according to its value, is secured in a trust suitably declared by the trustee, so that the girl may rely on some economic support to continue with her therapies and be prepared for her working life.

FOR THESE REASONS

Granting the petition, as originally submitted and further explained during the oral discussion, the Court authorises the Trustee of "[...]" trust, that is "P. S.A.", to settle the litigation with the receiver of the *de facto* company resulting from judgment no. 24/2013 issued by the Court of Torre Annunziata on such conditions as it deems most suitable but taking into account the Court's recommendation of the transfer of a sum to a sub-trust to safeguard the interests of [...],, a child affected by serious and permanent disability.

The Court hereby orders that the petitioner pay the special Protector's fees as per the invoice submitted.

The Court will return the dossier to the Registrar's Office so that this order be promptly published by recording it in the electronic dossier. This order shall be notified to the petitioner's lawyer and to the special Protector.

The Court orders that no copy of this order be given to anyone by the Registrar's Office for research purposes or to be published in legal journals without replacing the petitioner's and the trust's names as follows: "P. S.A." and "A. trust".

Borgo Maggiore, 5th December 2017