X Trust Company v Y Ltd and C and F and E and D and P and H and I and J and O and U and v and W and Minor and un-born beneficiaries of the Trusts and The adult children of C and F

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	06 April 2018
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Text

Between

IN THE MATTER OF THE REPRESENTATION OF X TRUST COMPANY AND Y LIMITED

AND IN THE MATTER OF THE A TRUST AND THE B TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984, AS AMENDED

(1) X Trust Company
Representors
(2) Y Limited
and
(1) C
Respondents
(2) F

(3) E
(4) D
(5) P
(6) H
(7) I
(8) J
(9) O
(10) U
(11) V
(12) W
(13) Minor and un-born beneficiaries of the Trusts
(14) The adult children of C and F

[2018] JRC 068

Before:

Advocate Matthew John Thompson, Master of the Royal Court

ROYAL COURT

(Samedi)

Trust — reasons for requiring the third to twelfth respondents to provide more information in relation to their particulars of claim.

Authorities

Royal Court Rules 2004.

Royal Court (Amendment No.20) Rules 2017.

Trust (Jersey) Law 1984.

Royal Court Rules 2004.

Practice Direction RC17/08

Advocate E. Moran **for the first Representors**.

Advocate N. N. E. Addis **for the First and Second Respondents**.

Advocate J. M. Dann **for the Third to Twelfth Respondents**.

Advocate S. A. Franckel **for the Thirteenth Respondent**.

Advocate J. Harvey Hills **for the Fourteenth Respondent**.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment contains my detailed written reasons for requiring the third to twelfth respondents to provide more information in relation to their particulars of claim, pursuant to Rule 6/15 of the Royal Court Rules 2004, as amended.

2 The issue at the heart of the dispute concerns whether or not the settlor's assets were settled into two trusts known as the A Trust and the B Trust. The representors are the present trustees of both trusts. The settlors of the disputed assets were the parents of the first to fourth respondents. The fifth to twelfth respondents are the adult children of the third and fourth respondents. Advocate Franckel represents minor and unborn beneficiaries and Advocate Harvey-Hills represents the adult children of the first and second respondents.

3 As is explained in more detail below, the rival protagonists of the dispute are the third to twelfth respondents on the one hand and Advocate Franckel for the minor and unborn beneficiaries on the other. The remaining beneficiaries and the representors are playing a neutral role in relation to the dispute.

Procedural history

4 What has led to the present dispute was first raised by the representors by way of a representation presented to the Royal Court in 2015. One of the directions sought was that, if any beneficiary wished to dispute the validity of the settlement of any asset into the A or B Trusts, that beneficiary had to commence proceedings within the following three months, failing which the trustees were entitled to administer assets free of any such claims.

5 In a judgment dated 23 rd June, 2015 sent to the parties only, at paragraph 1 (ii) the Royal Court stated:–

> ***"We therefore order that any beneficiary who proposes to contend that any transfer of assets to either of the trusts is invalid, by which we mean whether it is void or voidable, then that beneficiary or those beneficiaries must file particulars of claim setting out the exact nature and grounds of their challenge within a certain period…"***

6 At paragraph 1 (vi) of the said judgment, the Royal Court also stated:–

> ***"As at present advised we consider that this litigation will become hostile litigation, not administrative.*** It follows that costs orders should be considered in that light. We do not propose to make any order at present about the costs between now and the next hearing save that the trustee continues to have its costs order during that period. Advocate Franckel can continue to have his costs order for the unborn and unascertained during that period; we will hear him as to whether we should now suspend his order in so far as it relates to adult beneficiaries."

7 Advocate Franckel was first appointed by an act of court dated 6 th March, 2015. Following the Royal Court's judgment dated 23 rd June 2015, he has only represented minor and unborn beneficiaries with other adults being separately represented.

8 The act of court dated 23 rd June, 2015 at paragraph 3, in light of the judgment of the same day therefore, stated:–

> ***"3) any beneficiary who wishes to contend that the transfer of any asset to the [A] or [B] Trusts is void or voidable shall file Particulars of Claim setting out the exact nature and grounds of the claim by 30th September, 2015"*** .

9 On 7 th October, 2015 the third and fourth respondents filed particulars of claim challenging transfers of various assets into the A and B trusts. It now appears that all of the third to twelfth respondents who all have the same legal representation adopt the position set out in the particulars of claim.

10 On 30 th November, 2015 a further hearing took place before the Royal Court. This was to decide who would defend the particulars of claim. Paragraph 1 of the Royal Court's decision stated as follows:–

> ***"1. … The issue before me is a question as to who should put forward the case in defence of the assets being in these trusts. I think the starting point would be that it is for the minor beneficiaries, so that the trustee can remain neutral. It is clearly in the minor beneficiaries' interest to preserve assets in the trust. The argument put against that is that it is likely to be more expensive and I accept that it is, because I think there will be a fair amount of duplication of effort because Advocate Franckel will be very dependent on the information provided by the trustee and its officers."***

11 At paragraph 4 of the judgment, the Royal Court continued as follows:–

> ***"… I think in the overall interests of the trust relationship it is probably best that Advocate Franckel does it and that has a certain logic because he is representing those who have the financial interest in defending the trust.*** But I think everyone agrees that Advocate Franckel continues to have the benefit of being paid out of the trust. There is no alternative and it seems to me that has to be the case."

12 The judgment then concluded at paragraph 5 as follows:–

> ***"5. Certainly at some stage, information should be disclosed between the parties because if the documents are given to Advocate Franckel and they are thought to be conceivably relevant, they should be disclosed in the ordinary way. I know we are not into formal discovery but it is perfectly apparent that all the parties must have all the relevant documents…."***

13 The draft order approved by the Royal Court on 30 th November, 2015 firstly required Advocate Franckel to file an answer to the particulars of claim by 1 st March, 2016 and also gave permission to any other beneficiary to file a pleading in response. No other beneficiary has in fact done so. Advocate Franckel's answer was ultimately filed on the 15 th March 2016. Without any discourtesy to him, it is something of a holding answer as various paragraphs of the particulars of claim are said to lack sufficient detail.

14 A reply to Advocate Franckel's answer was filed on behalf of all the third to twelfth respondents on 29 th April 2016.

15 On 27 th June, 2016, the Royal Court approved a stay for mediation for one month. This stay was then extended until 14 th October, 2016. By an act of court dated 9 th November,

2016 the stay was further extended until 7 th December, 2016.

16 The Royal Court also made discovery orders in the event that the matter did not settle by 7 th December, 2016. This order also permitted further directions hearings either before the Royal Court or before the Master of the Royal Court.

17 On 26 th May, 2017 the Royal Court made further orders in respect of discovery requiring discovery to be completed by the middle of June 2017.

18 On 24 th July, 2017 I gave further directions in respect of discovery. I also directed Advocate Franckel to file any request for information about the particulars of claim by Friday, 22 nd December, 2017 and ordered him to provide an amended answer by 29 th January, 2018. The matter was also listed for a further directions hearing in March 2018, which ultimately took place on Monday, 12 th March, 2018.

19 By a letter sent by email at 17:23 on Thursday, 8 th March, 2018 for the directions hearing, Advocate Dann for the first time indicated that his clients would answer a number of the requests for information. The hearing before me, therefore, addressed those requests that his clients were not willing to answer.

20 Finally, I record, in light of the fact that no response was received to the requests for further and better particulars until 8 th March 2018, no amended answer has been filed. Yet, two years have passed since the answer was filed. I also record that it has taken over a year to complete the discovery process. The delays in responding to the requests and in relation to the discovery process are not satisfactory and not consistent with the overriding objective introduced by the Royal Court (Amendment No.20) Rules 2017 in June 2017. They mean that this action has not progressed in an appropriate timeframe. This will not be permitted to happen in the future.

The requests in dispute

21 The requests in dispute concerned the following areas:–

(a) Issues of Jersey law or foreign law — requests 7 and 22;

(b) Ownership of assets — requests 10, 11, 13, 15, 16, 19.2, 36 and 37;

(c) The meaning of ‘purported to agree’ — request 21; and

(d) Allegations of breach of duty against the former trustee(s) — requests 27 to 29 and 30;

Jersey law/foreign law

22 Request 7 related to paragraph 39 of the particulars of claim which pleaded that the transfer of certain shares had to be valid under the law of Jersey by reference to Article 9(1)(b) and 7 of the Trust (Jersey) Law 1984. Advocate Franckel's request observed that the provisions relied on by the third to twelfth respondents at paragraph 39 only came into force some ten years after the transfer of the shares. He, therefore, sought to understand the third to twelfth respondents' case on the validity of the transfer of the shares and whether this transfer was valid under the law of Jersey or Guernsey.

23 Advocate Dann argued that the questions of law were matters for trial and he did not have to plead to the same and his only obligation was to plead material facts.

24 The view I have reached is that I do not accept Advocate Dann's contention. Firstly, although Rule 6/8 of the Royal Court Rules 2004, as amended requires a party to plead the material facts, a party's pleadings may also raise a question of law. In my judgment, however, this is now subject to Rule 6/15, which permits the Court, at any time of its own motion or on the application of a party, to clarify any matter in dispute. Ultimately, a party's pleading must make their case clear so that the party required to respond to it understands what the case is. If that involves saying that particular facts as a matter of law had a certain effect, then a pleading should set that out. It is not, therefore, satisfactory simply to say matters of law are for trial without explaining in a pleading the legal issue or legal foundation a party is relying on. This is so the other party then knows the case they have to meet and can decide whether they dispute that part of the other party's claim. This does not require pleadings to become skeleton arguments or to cite legal authorities. However, if a party's case is that certain facts had a particular legal effect, then that effect must be pleaded.

25 Given that the relevant provision relied upon by Advocate Dann in the particulars of claim was not in force at the time of the transfer of shares, I was of the view that the request by Advocate Franckel in request 7 was a perfectly proper request to make. In ordering Advocate Dann to respond to this request, what he was required to do was to identify the legal issue arising in relation to the transfer of the shares so that Advocate Franckel could understand the claim he had to deal with. The same reasoning applies to request 22.

26 The same analysis also applies to that part of request 7 and 22 seeking to understand why Guernsey law applied. This request was also justified because questions of foreign law i.e. non- Jersey law are matters of fact and have to be proved by expert evidence, as is well known. The pleadings should therefore identify the relevant issue of foreign law so that the Court and the parties can consider what expert evidence is required.

Ownership of assets

27 The majority of the requests which Advocate Dann did not consider he was obliged to answer concerned ownership of assets, in particular, which cars were settled into the A Trust. Advocate Franckel's fundamental objection to Advocate Dann's pleading concerned the lack of identification of the vehicles transferred into the A trust. His position was that, if a transfer of assets into a trust was being challenged, then the assets said not to have been validly transferred should be identified.

28 While Advocate Dann did not demur from this contention in principle, the practical problem he faced was that to answer the requests required his clients to analyse in detail the discovery provided, which they would have had to pay for at their own expense. He encouraged me to require the current trustees to do this analysis. While there was an attraction to this suggestion, the first difficulty with it is that the current trustees could not identify the assets transferred without carrying out the same detailed exercise which Advocate Dann was reluctant to undertake. This is because the transfers of the relevant assets now challenged had all occurred before the present trustees were appointed.

29 Secondly, by reference to the judgment of the Royal Court dated 23 rd June, 2015, no beneficiary was compelled to challenge any transfer of assets. That decision made it clear that any beneficiary who elected to make such a challenge had to set out the ***"exact nature and grounds of their challenge"***. In this case, no one had compelled the third to twelfth respondents to make a challenge; rather they had elected to do so. It was also clear from the June 2015 judgment that any such challenge would have to be at their own expense because any dispute about ownership of assets was likely to be hostile litigation. The third to twelfth respondents were, therefore, on notice from June 2015 that any challenge to any transfer of assets carried both a costs risk and an expense in order to bring that challenge. In light of these observations, it would not be appropriate to require the trustees to analyse which transfers of vehicles it is said should be set aside. Rather, the onus should fall on those making the allegation.

30 Accordingly, I ordered Advocate Dann's clients to answer requests 10, 11, 13, 15, 16, 19(2), 36 and 37. However, his clients were not required to identify whether a transfer of assets was void or voidable. This is because it was accepted by all parties that at this stage there was no material difference in respect of any relief sought from the Royal Court whether a transaction was void or voidable due to the passage of time that occurred. Likewise, Advocate Dann was not required to identify whether assets in the joint names of the settlors were held as joint tenants or tenants in common because I did not regard this as material to the question of whether or not assets were validly transferred into the A or B Trusts.

31 I wish to add at this stage, given that all documents have been uploaded onto an electronic discovery platform, the third to twelfth respondents are encouraged to use electronic analytical tools available to them to identify the relevant vehicles and respond to the requests. Paragraph 4(c) of Practice Direction RC17/08 on electronic discovery is relevant and states:–

"c. Appropriate technology should be used in order to ensure that the disclosure of process is carried out efficiently and effectively" .

32 Such use of technology in disputes with large amounts of disclosure is generally more cost efficient and a more accurate method of gathering and analysing relevant documents than solely using a manual possess. In particular, parties in disputes of this kind should consider using artificial intelligence systems to identify relevant documents unless such systems could clearly be shown not to be reliable. The use of such systems does not cause any issue of principle; indeed, if parties were to attempt solely to analyse documents using exclusively or extensive manual processes alone, such a methodology runs a significant risk of being disproportionate and in breach of the overriding objective. I trust these observations assist the parties to progress this dispute more efficiently than has occurred over the last two years.

'Agree or purported to agree'

33 Request 21 concerned a pleading that the settlors had *"agreed or purported to agree"* to transfer certain shares into the A Trust. The request sought clarification as to whether the settlors in fact agreed or only purported to agree. If the third to twelfth respondents' case was that the settlors only purported to agree, all relevant facts or matters relied upon in support of this assertion were asked for.

34 In my judgment, this request was justified. There is a distinction between saying that someone agreed to do something and someone purported to agree. The latter implies an allegation that the person or entity did not in fact agree. Any party facing an allegation is entitled to know whether or not a particular course of conduct was agreed. If the facts appear to suggest that the particular step was agreed, but a party wishes to challenge that agreement, then that party should set out its case clearly as to why someone did not in fact agree. On this basis, I ordered request 21 to be provided.

Allegations relating to breaches of duty

35 This part of the dispute concerns request 27(2) to 29 and 30, all of which related to the section of the particulars of claim headed undue influence and breach of fiduciary duty from paragraphs 104 to 111.

36 The first request concerned an allegation concerning a Mr C who had acted as a private client lawyer to the settlors. When the trustee business of his firm was acquired by a third party, Mr C became chief executive. It was, therefore, alleged he "had a direct personal interest in obtaining and issuing funds to be settled in settlements in which those trustees were the trustees". This could be read as an allegation that Mr C had preferred the financial interests of the then trustee and his own interests, rather than acting in the interests of the settlors. Such an allegation is a serious allegation and one which could be said to amount

to an assertion of dishonesty. It is certainly the kind of allegation where a party making such an allegation must be clear about what is being alleged and set out all material facts relied upon. The pleading at present does not do this.

37 I should add in that regard that, during the course of the hearing, I revealed to the parties that I had worked in a professional capacity with Mr C over a number of years (but not in relation to this dispute). However, I did not consider this prevented me from giving directions, or deciding whether a party had made its case clear, as I was not being required to form a view on the evidence of Mr C.

38 These requests also led to a more general discussion about paragraphs 109 and 110 of the particulars of claim and whether the allegations in these paragraphs were clear. Paragraph 109 referred to transfers being made under the undue influence of Mr C and paragraph 110 referred to Mr C being in breach of fiduciary duty. To be fair to Advocate Dann, the allegation of undue influence only appears to be based on a presumption of undue influence. However, it is not clear whether paragraph 109 goes further. Furthermore, paragraph 110 does not set out why Mr C is said to have acted in breach of duty. It is also not clear whether this allegation is made on the basis of presumed undue influence or because Mr C acted knowing that the settlors did not have capacity or whether any other allegation is being made. Given these uncertainties, Advocate Dann was given permission to amend his particulars of claim if he felt that that was a better way to respond to the requests for information.

Other orders

39 I also issued directions for the filing of an amended answer by Advocate Franckel and for expert evidence relating to issues of capacity and any Guernsey law issues raised by reference to the pleaded cases of the third to twelfth respondents and Advocate Franckel. At this stage, I did not stay the matter further for mediation both because of the length of time this case has taken to get this far and because stays had already been granted to try to resolve matters. The parties were, therefore, required to prepare their factual and expert evidence for the court to consider whether trial dates could then be fixed. The question of any stay for mediation was, therefore, left over until the necessary work to get the evidence required for the case to proceed to trial had been carried out. This does not mean that the parties in the interim are not free to discuss issues or to carry out negotiations through their advisers but they should not delay compliance with the timetable and moving this action forward to a resolution.

Costs

40 Finally, in respect of the costs of those directions, the representors and Advocate Franckel continued to recover their costs out of trust assets by reference to previous orders of the Royal Court. I ruled that if any other party wanted an order for their costs to be payable out

of the trust fund it was a matter for that party to consider whether or not to apply to the Royal Court as only the Royal Court could make such a costs order in the context of a dispute concerning a trust.