

Representation of BNP Paribas

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	04 November 2010
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Text

[2010] JRC 199

ROYAL COURT

(Samedi Division)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and** Jurats de Veulle **and** Tibbo

In the Matter of the Representation of BNP Paribas Jersey Trust Corporation Limited and in
the Matter of the PW Trust and
In the Matter of Article 51 of the Trust (Jersey) Law 1984.

Advocate J. P. Speck for the Representor.

Advocate N. M. Sanders for the Sixth Respondent

Authorities

Barclays Private Bank and Trust Limited v Hsu and Others [\[2010\] JRC 003A](#).

Guardian Trust and Executors Company of New Zealand Limited v Public Trustee of New Zealand [\[1942\] AC 115](#) at 127.

Sinel Trust Limited and Others v Rothfield Investments Limited and Others [\[2003\] JCA 048](#).

Deputy Bailiff

THE

- 1 A hearing took place in private on 28th September, 2010, of the representation of the Representor, which first came before the Court on 12th March, 2010. Although the representation was heard in private, as is customary with Article 51 proceedings, this judgment is given in public.
- 2 When the matter first came before the Court in March, it was ordered that the representation be served on the Settlor, who is the widow of PW, ("the deceased"), and her four daughters and two sons, children of her union with the deceased. They were to be convened for a hearing before the Court on 14th June, 2010. At that time, only the Sixth Respondent appeared, and indeed he now appears again through his counsel. The Court is informed that the position adopted by the Sixth Respondent is in fact supported by the First to Fifth Respondents, his mother and four sisters, although they have not formally entered any appearance. His position is essentially not in accord with the approach taken by the Seventh Respondent, his elder brother, who had written two detailed letters to the Court, albeit he has not appeared either personally or through counsel. The first of these letters was apparently received shortly before the Court hearing in June, although for whatever reason the letter was not before the Court at that time. Both that letter and a subsequent letter have however been placed before us for the present hearing.
- 3 In its representation, the Representor Trustee asked the Court to give directions and declarations as to the claims of the Seventh Respondent and the origin of the trust assets; asked that the Seventh Respondent be removed or suspended as a Protector of the Trust forthwith; asked that the Court give directions as to the role and identity of the successor or interim Protector if any, or alternatively give directions as to the extent to which the Court considered the Protector was incapable of acting as such; and asked that the Representor be indemnified out of the trust assets in respect of the legal and administration costs and expenses of and incidental to the application.
- 4 On 14th June, 2010, the Court adjourned the Trustee's application until 27th and 28th September, 2010, and directed that all the beneficiaries be informed of the nature of the

Trustee's application to the Court; suspended the powers of the Protector until further order such that the Trust should be read and have effect as though references to the Protector were omitted, with liberty to apply, and made sundry other administrative orders. The intended effect of the sum of these orders was that when the matter came to be considered by the Court again in September, the Court would have sufficient information to be able to give directions to the Trustee on the future administration of the Trust. On 28th September, the Court was addressed by counsel for the Trustee and for the Sixth Respondent, but no other party appeared. The Court reserved its decision, and judgment is now given.

Background

- 5 The Court is informed that by an instrument dated 18th December, 2003, the widow executed a trust surrounding the payment of US\$100 to the Trustee. The beneficiaries were named as the Settlor, the Second to Seventh Respondents, any trust association body or other organisation the objects of which are charitable, and any person who might be the subject of an addition to the class of beneficiaries pursuant to the powers conferred on the Trustee. The First Protector was named as the Seventh Respondent, who is the elder son of the Settlor. Part D of the Trust Deed contains provisions regarding the Protector. The remainder of the trust instrument contains at different places various Protector powers including, importantly, at paragraph A16.02, the power to give directions to the Trustee as to the investment of the trust fund.
- 6 The Court is advised that the trust assets have a current value of approximately US\$40 million, those assets comprising cash and investments.
- 7 The nature of the claims which the Seventh Respondent has put to the Trustee is not entirely clear, but the broad thrust of it appears to be:-
 - (i) The trust assets were not in fact the property of the Settlor, who was thus unable to give the Trustees any better title than she had herself, and the gift into trust therefore would fail, in whole or in part.
 - (ii) The funds constituting the trust fell into and belonged to the estate of the deceased.
 - (iii) Probate has never been obtained in relation to the deceased's estate, either in Indonesia where he was domiciled at the date of his death or in Singapore where the underlying funds were held.
- 8 As a result of being placed on notice of these claims, the Trustee has not in fact made any distributions to the beneficiaries. Informal attempts at mediation have failed. Furthermore the Trustee is concerned that the Seventh Respondent as Protector of the Trust has a clear conflict of interest in that he cannot at the same time both act as Protector and assert that

the Trustee is not entitled to hold the assets on trust which it believes it does. This conflict of interest seemed to the Court in June to be self evident, which was accordingly why the Protector powers were suspended by the Court at that time with liberty to apply.

- 9 Advocate Speck, for the Trustee, rhetorically asks where the Trustee is supposed to go next. The Trustee is understandably anxious about making any payment out of the Trust fund where the legitimacy of the payments into trust is disputed. At the same time, the Seventh Respondent who is the only person who has disputed the legitimacy of these payments, has taken no action to pursue that claim during the last five years. The Trustee points to a number of inconsistencies in the Seventh Respondent's position, not least that whilst apparently wishing to contend that the transfers into Trust were not legitimate transfers, at the same time he wishes to maintain his position as Protector of the Trust. It would appear from the document which was forwarded to the Court in June that the Seventh Respondent also acknowledges that he attended when the Trust was set up in Jakarta, Indonesia in the sense that although he was asked to leave the room for a while when a discussion took place as to the structure of the class of beneficiaries, he was called back a few minutes later and was told that the Trust had been set up at that time on the signature of the Settlor, his mother, who had appointed him as Protector, to which he agreed. Accordingly, there might be estoppel or other arguments which might be run against him, including for that matter limitation arguments, in any claim which he wished to make as to the validity of the transfer of assets into Trust.
- 10 The real argument as to the legitimacy of the transfers into trust seems to turn upon whether the assets belonged genuinely to the widow Settlor, or by contrast belonged to the estate of the deceased, the late husband of the widow Settlor and father of the other personal beneficiaries. The deceased died as a national and domiciliary of Indonesia on 30th January, 2000. At that time he owned property in Singapore. It is alleged that this estate is governed by his will dated 13th February, 1996, made in Singapore, by which he appointed his widow as his sole Executrix and Trustee. The Court has been shown advice which suggests that the will is formally valid under the Law of Singapore. Under the will, the residue of the estate is disposed of as to 50% to his widow, the Settlor, 15% to each of his two sons and 5% to each of his four daughters. However, there is no information before the Court as to the extent of the estate, and even assuming the will to be formally valid, there is therefore the difficulty in ascertaining the extent of the assets to which any beneficiary of the estate might claim to be entitled, because, at this stage, the entitlement is to a percentage of an indeterminate amount. Accordingly one does not know the arithmetic relationship between the assets in trust and the assets in the estate.
- 11 The Court has also been shown advice from an Indonesian lawyer who indicates that the Law of Indonesia does not recognise trusts, but does confer *légitime* rights which might result in a different apportionment of the estate than that provided for by the will.
- 12 Advocate Speck told us that the Trustee intends to be neutral and impartial as between the beneficiaries, but does not intend to be supine. His contention was that it was necessary for

the Trustee to do something in the administration of the trusts. Ideally, the Trustee would have the following information:-

(i) What were the assets of the estate of the deceased at the date of his death?

(ii) What has happened to those assets since?

(iii) From what source do the assets settled into trust in 2003 derive? In particular, were they the widow's assets absolutely, or were they derived from the estate of her late husband? If the latter, there might be more concern over the legitimacy of the transfer into trust.

- 13 The Trustee took the view that ideally this information would be supplemented by the primary documents evidencing the answers to the questions which are set out.
- 14 In his written letters to the Court, the Seventh Respondent asserts that it is in his view important to identify the source of the funds coming into the Trust and also to establish the regular administration of the estate of his late father, the deceased. The Court has received a letter from the Jakarta Legal Aid Institute to the effect that only the District Court of Jakarta has the jurisdiction to handle the dispute dealing with the estate of the deceased, and accordingly that the Seventh Respondent should not attend and appear in front of the Royal Court. That letter is dated 15th June, 2010. The Seventh Respondent also has brought before the Court information which suggests that his financial position is not very good, which may cause him a practical difficulty in relation to the institution of proceedings before this Court.
- 15 By contrast, his younger brother, the Sixth Respondent, contends that he and the rest of the family consider that the assets in question did belong absolutely to their mother at the time of the settlement, and that the Seventh Respondent has had quite long enough in order to decide whether or not to bring a claim. The family do not apparently regard the Seventh Respondent as impecunious, but it is noted that we have no evidence of any real substance on that point one way or the other. The Sixth Respondent contended that the Seventh Respondent should be encouraged to bring his claim within a narrow timescale, or concede that if he failed to do that, the Trustees were entitled to be given protection for any distribution they might make.
- 16 Reliance was placed by both the Trustee and the Sixth Respondent on the case of *Barclays Private Bank and Trust Limited v Hsu and Others* [\[2010\] JRC 003A](#). In that case, on an Article 51 application, the Court directed that the Trustee should administer the Trust without regard to any possible claims by or on behalf of the estate of many of the beneficiaries convened, and that insofar as the plaintiff in parallel proceedings was bringing a claim that the deed of exclusion was invalid, the Court ordered that an application, seeking to amend the Order of Justice so as to limit the claims made therein to those which were properly brought in the Royal Court, must be brought within a seven or

eight week time span, and if not brought within that period, then the Order of Justice would be struck out without the need for further Court process.

17 Before us, the Trustee asserted that there were three possible courses of action:-

- (i) An order that the Seventh Respondent should be required to bring proceedings or be barred from any subsequent complaint — in effect put up or shut up.
- (ii) An order that the beneficiaries should all be advised that they will not benefit from the trust fund unless they provide to the Trustee all appropriate information on the source of funds.
- (iii) An acceptance of inaction such that the Trustee would do nothing until a 10 year period had expired when no further limitation issues could arise, and a distribution of the trust assets could be made safely in the absence of any claim as to their provenance by any third party.

18 Both the Trustee and the Sixth Respondent contended that the first of these options was the right course to follow.

The Law

19 It is trite law that where trustees are faced with an adverse claim in respect of the trust fund, yet the claimant has issued no proceedings and appears to have no immediate intention of doing so, the trustees are at risk if any distribution is made without the sanction of the Court. This statement of principle arises out of the dicta of Lord Romer in *Guardian Trust and Executors Company of New Zealand Limited v Public Trustee of New Zealand* [1942] AC 115 at 127:-

“...if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is, or may be, claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well-founded”.

20 That case involved a bank executor who had paid legacy under will after it had received notice from the next of kin that they intended to challenge the will. The executor was made personally liable to account for the amount of the legacy so paid after the next of kin's challenge proved successful and the grant to the executor was revoked. This decision of the Privy Council was considered by our Court of Appeal in *Sinel Trust Limited and Others v Rothfield Investments Limited and Others* [2003] JCA 048. In that case, the appeal succeeded on other grounds but the Court of Appeal nonetheless had some comments to make on the dicta of Lord Romer which is set out above. Southwell, J A, said this at paragraph 29:-

“Lord Romer was one of the greatest equity judges of the 20th century. It is clear that what he meant by “notice of the claim” was notice of a claim which is, prima facie, a reasonably arguable claim. Lord Romer was not referring to specious claims with no arguable foundation.”

- 21 The Court of Appeal therefore disapproved one of the contentions made by one of the parties in the Royal Court to the effect that if the test were as set out by Lord Romer, any rumoured claim, however outlandish, would paralyse the administration of the trust and the enjoyment of the trust assets by the beneficiaries. It was made plain that specious claims with no arguable foundation were not what Lord Romer had in mind.
- 22 This Court applies that approach in principle but of course it is impossible, at this stage, to know whether the claim which might be brought by the Seventh Respondent is or is not specious. We simply do not have enough information to be able to form a judgment on that issue. At the same time, it seems to us that equity demands that a person who has a claim brings it timeously, and does not sit on his hands making unparticularised threats or assertions and causing embarrassment thereby to a counterparty. When that counterparty is a trustee owing duties to others, that is a demand that the Courts of equity will support to the extent that they properly can. The Court's trust jurisdiction after all arises out of the need to apply equitable principles to the issues which are before it.
- 23 In this instance, the Court has no doubt whatsoever that it is wholly unacceptable for the present uncertain state of affairs to continue. It is quite wrong that the Trustee of what appears to be a perfectly valid Jersey trust should be hamstrung in the performance of its trustee duties by an unparticularised and vague complaint which has neither been substantiated by detail provided to the Trustee nor taken forward by any hostile litigation. It is not fair to the Trustee that it should be placed in this position. Neither is it fair to the other beneficiaries of the Trust, who are precluded thereby from receiving any benefit out of the Trust for as long as the Trustee does not know whether it holds assets on the trusts of the settlement or on trust for the would be claimant.
- 24 It goes without saying that this Court makes no finding whatsoever today as to the merits or otherwise of any claim which the Seventh Respondent might bring. However the Court does make the finding that it is incumbent on the Seventh Respondent to bring his claims before the Royal Court for adjudication, and that he should in effect be penalised, if he fails to do so, by being prevented from bringing any such claims without special leave of the Court to do so. It is inconceivable that leave would be given to bring such claims against the Trustee unless it could be shown that the Trustee had acted intentionally, recklessly or with gross negligence in misleading the Court on this current application.
- 25 Accordingly the Court now orders that unless the Seventh Respondent brings proceedings in Jersey within six months of the date of this judgment, seeking to set aside all or part of the original transfers of assets into the Trust, the Trustee shall be entitled to administer the Trust free and clear of all and any claims which the Seventh Respondent might have or

purport to have to the assets of the Trust (save as a beneficiary of the trust).

- 26 The Court has considered further the possibility of the Seventh Respondent being sufficiently impecunious that an order of the kind mentioned above may cause difficulty. The Trustee has conceded that it would be appropriate to make provision for payment of the costs of such proceedings albeit with a cap on the amount. Advocate Sanders for the Sixth Respondent said that in his view the same provisions ought to be available for other family beneficiaries. In the circumstances the Court considers that in order to be sure that the Seventh Respondent has access to justice in this matter, the Trustee should pay out of the trust fund the legal costs of the Seventh Respondent with a cap of £50,000, provided that these are incurred with a view to seeking advice upon and / or instituting a claim before the Royal Court of Jersey challenging the original transfers of assets into the Trust within the time set. The Trustee is clearly not entitled to see the detail of the legal advice which has been received, which is privileged, but a certificate from a Jersey lawyer to the effect that the bills, for which reimbursement is sought, have been incurred within the four corners of this order will be a sufficient discharge to the Trustee. The Seventh Respondent will have liberty to apply in relation to any legal fees which might be incurred and which would take him above the cap of £50,000 which has been imposed.
- 27 It does not appear to the Court that it is necessary at this stage to make provision for the costs of other family beneficiaries in the same way. However, if the Seventh Respondent does in fact bring claims within the next six months challenging the original transfers of assets into the Trust, the Trustee similarly has authority from this Court to reimburse the other respondents with legal fees incurred by them in relation to these proceedings, on the same terms *mutatis mutandis* as applied to the Seventh Respondent. Once again, the other family beneficiaries have liberty to apply if their costs look like exceeding the sum of £50,000. It is clear that the Court considering these costs applications will be differently constituted from the Court dealing with any claim as to the validity of the transfers of the assets into the Trust.