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## R v C

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith
<b>Judgment Date:</b>	23 October 2008
<b>Neutral Citation:</b>	[2008] JRC 179
<b>Reported In:</b>	[2008] JRC 179
<b>Court:</b>	Royal Court
<b>Date:</b>	23 October 2008

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### Text

[2008] JRC 179

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone.**

Between  
R  
Petitioner  
and  
C  
Respondent

**Advocate C. J. Scholefield for the Petitioner.**

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**Advocate E. L. Jordan for the Respondent.****Authorities**

*O'D v O'D* [\[1976\] Fam. 83](#) .

*D v M* [2000] JLR N 49c .

*B v B* [\[1978\] 3 W.L.R. 624](#) .

Rayden and Jackson on Divorce and Family Matters 18th Edition, Volume 1.

Royal Court Rules 2004.

*P v C* [2002] JLR N 26 .

*O v O* [\[2005\] JLR 535](#) .

Trusts (Jersey) Law 1984.

*In Re the Fountain Trust* [\[2005\] JLR 359](#) .

*In the matter of the Esteem Settlement* [\[2003\] JLR 188](#) .

*Charman v Charman* [\[2006\] 2 FLR 422](#) .

*J v M* [\[2002\] JLR 330](#) .

**THE COMMISSIONER:**

- 1 The petitioner's application for ancillary relief is scheduled to be heard on the 19th January, 2009. On the 7th October, 2008, I sat to hear an application by the petitioner, brought by way of summons, for an order that the respondent made good his failure to reply to certain questions in the petitioner's schedule of deficiencies and for leave for a letter of request to be issued to the Courts of Guernsey.

**Background**

- 2 The background to this matter is set out in the judgment of Birt, Deputy Bailiff, issued on the 28th December, 2007, in relation to the petitioner's application for interim maintenance. In that judgment the Court noted that the respondent had constructed a complex structure in respect of which much remained unclear and matters would need to be clarified before the Court could make a final decision. Accordingly it concluded that the petitioner needed to have access to accountancy and legal skills so that the true financial position of the respondent could be fully explored.

- 3 The respondent's summons is issued in the context of her affidavit of the 19th September 2008 in which she gave notice that, inter alia, she will be seeking orders to set aside as shams certain trusts to which I refer below.

## The EH

- 4 The Hotel in Jersey is owned by Takilla Limited ("Takilla") and operated by Anatole Limited ("Anatole"), both Jersey companies. Twelve of the twenty issued shares are held by a Jersey based corporate nominee on bare trust for the respondent's children. Four for the respondent which according to the respondent are held by him on bare trust for his children. Two of the remaining shares are held by the same nominee on bare trust for the respondent's brother and the remaining two are held personally by the manageress of the Hotel. In her affidavit the petitioner asserts that the declarations of trust executed by the corporate nominee are a sham and that the respondent beneficially owns at least 90% of the shares in Takilla and Anatole. To support this allegation the petitioner points to the following:-

- (i) In September 2003 the children wrote a letter to the previous corporate nominee in the following terms:-

*" My father has gifted me 4 shares in Anatole Enterprises Limited, 4 shares in Takilla Limited, 4 shares in Dataquill Limited (a Jersey registered company), 4 shares in Dataquill Limited (A BVI registered company).*

*During his lifetime my father has devoted considerable time, effort and financial resources in developing these companies. In recognition of this, I wish to appoint my father as my representative to vote on my behalf at all meetings of the company and deal with all matters concerning my shareholding. Furthermore, my father should receive all benefit from, and free use of the assets of the company for whatever purpose he should wish.*

*I confirm that whilst this agreement is in place, I do not wish to receive any dividends in respect of my shareholding. This agreement shall exist until such time as my father rescinds it or upon his death and shall be binding on me, my spouse and my issue."*

- (ii) Having thus apparently gifted shares to his children in 2003, the respondent then purported to settle the shares in the two Dataquill companies mentioned in the above letter upon trust, in that he wrote a letter to "Clifton Trust" in the Seychelles on the 2nd November, 2004 in the following terms:-

*" Re: The Highland Trust*

*As the Settlor of the above Trust of which you are the Trustees, I write to*

*inform you that in respect of the shares in Dataquill Limited which were gifted to my children (copies of letters are enclosed). [sic] I have informed my children that I now intend to have the shares held in trust and that they are to be beneficiaries."*

(iii) When the shares in Takilla and Anatole were transferred to the current corporate nominee in 2006, it is clear from its letter of the 23rd October, 2007, that it looked to the respondent (and not his children) for instructions as to how those shares were to be held, which instructions would appear to have been given by the respondent only in the latter part of 2007.

- 5 The Court is concerned here with allegations in relation to the shares in two Jersey companies which own and operate a local hotel and as to the true beneficial ownership of those shares. The Court has the jurisdiction both to determine that issue and to enforce any decision it may make. As a matter of natural justice however, neither party demurred from the proposition that the children and the respondent's brother, who would be the parties adversely affected by any finding in favour of the petitioner, should be convened so that they could have the opportunity of being heard on this issue. The corporate nominee should also be convened so that it can be bound by any orders made.

## **Dataquill**

- 6 As can be seen from the above, in 2004 the respondent appears to have settled the shares in Dataquill Limited (apparently then owned by his children) into a trust established in the Seychelles and known as the Highland Trust ("the Trust"). There are in fact two Dataquill companies, the first being a Jersey registered company which is dormant and the second being a BVI incorporated company which was originally established by the respondent and two partners, each owning one third, and which owns a number of patents in the mobile telephone field. Its income apparently comes primarily from litigation against telephone companies for alleged breach of patent. There are a number of other companies held within the Trust structure.
- 7 The respondent asserts that he is not a beneficiary of the Trust and has produced a copy of a schedule to the deed demonstrating this. However he maintains that the trustee has refused to give him, and he has no power to obtain the remainder of the deed or any other documents or information in relation to the Trust.
- 8 Notwithstanding the respondent's lack of status within the Trust, the petitioner's accountants Clive Tomes and Co, in their report of the 30th September, 2008, advise that the respondent and his related Jersey companies have received a total of £888,487.36 by way of non-commercial loans from the Trust and its underlying companies.
- 9 The respondent appears therefore to have settled material assets into a trust offshore of

which he says he is not a beneficiary but from which he has extracted very substantial benefit. Apart from one page of the trust deed, supporting his contention that he is not a beneficiary, no other information in relation to the trust is forthcoming. Although he has provided accounts for the companies held within the trust structure (but not the accounts of the trust itself) the respondent maintains that these assets should not be taken into account by the Court in considering the petitioners claim for ancillary relief.

- 10 The respondent asserts that the petitioner should direct its enquiries in relation to the Trust to the trustee. This her advisers have done but the trustee has not responded and it is understood that no response can be expected.
- 11 My role in this application is to ensure, as far as reasonably possible, that the Court dealing with the petitioner's application for ancillary relief in January 2009 will have sufficient information before it to assess the reality of the resources available to the respondent. The following extract from the judgment of Ormrod LJ in *O'D v O'D* [1976] Fam. 83 is often quoted in this respect:-

**" In approaching a case like the present case, the first stage should be to make as reliable an estimate as possible of the husband's current financial position and future prospects.** In making this assessment the court is concerned with the reality of the husband's resources, using that word in a broad sense to include not only what he is shown to have, but also what could reasonably be made available to him if he so wished. Much will depend upon the interpretation of accounts, balance sheets and so on, which will require in many cases the expert guidance of accountants. It will rarely be possible to arrive at arithmetically exact figures. The court must penetrate through the balance sheets and profit and loss accounts to the underlying realities, bearing in mind that prudent financial management and skilled presentation of accounts are unlikely to overstate the husband's real resources and, on the other side, that there may be a great difference between wealth on paper and **true wealth**. Valuations may overstate or understate the results of realisation of assets, many of which may not be realisable within the immediate or foreseeable future."

- 12 It is clear that the Court will not be able to assess the reality of the respondent's resources without further information in relation to the Trust. Whilst it is true that, if the Court were to find non-disclosure on the respondent's part, it can draw adverse inferences (see *D v M* [2000] JLR N 49c), as Dunn J said in *B v B* [1978] 3 W.L.R. 624 at page 191:-

**" It is said on behalf of the husband, and this is indeed the fact, that if the court decided that the husband has not made a full disclosure of all relevant documents the court will accept the evidence of the wife and draw adverse inferences against the husband.** It is said that this has been the practice ever since the days of the ecclesiastical courts, but it may result in injustice to one or both parties and it is no substitute for full discovery of all documents relating to the financial resources of the parties."

13 The petitioner seeks to remedy the position by two means, firstly by inviting the Court to order the respondent to discover the relevant documents which she says are within his possession, custody or power and secondly by issuing a letter of request for the evidence of the director responsible for the administration of the Trust to be obtained. I take each in turn.

### Order for discovery

14 In relation to the Trust, the petitioner seeks (in summary):-

- (i) A copy of the trust deed and all supplemental deeds.
- (ii) A copy of all trustee minutes from the day the Trust was settled to date.
- (iii) A copy of any loan agreements between the Trust and its underlying holding company.
- (iv) A schedule listing all of the bank accounts held in the name of the trust and its underlying holding company together with copies of bank statements from the 1st January, 2005 to date.

15 In relation to the companies within the trust structure, the petitioner seeks (in summary):-

- (i) A copy of any declarations of trust in respect of the shares issued for each of the companies.
- (ii) A schedule of the bank accounts held by the companies and copies of statements from the 1st January, 2005 to date.
- (iii) A copy of the minutes of the meetings of directors from the 1st January, 2005 to date, together with any supporting agreements.
- (iv) A copy of the patent right purchase agreement entered into between Dataquill Limited and a company known as Jebcom Limited.

16 The respondent says that none of these documents are in his possession, power or control. Paragraph 17.31 of Rayden and Jackson on Divorce and Family Matters 18th Edition, Volume 1 explains the meaning of the words possession, power or control as follows:-

**" In the context of discovery, 'documents' are given a wide interpretation and cover all mediums used for storing information, e.g. tape recordings and material stored on disk and computer.** Documents that are or have been in a party's (or his agent's) possession or custody are self explanatory; documents that are or have been in a party's power include documents which,

though they are not in his possession or custody, he has a right to obtain them from the person who has them. 'Power' in this context means the enforceable right to inspect or obtain possession or control of the document."

- 17 The respondent maintains that he has no enforceable right to obtain any of these documents because he is not a beneficiary of the Trust and is not a director or a shareholder in any of the underlying companies. In reply the petitioner maintains that the respondent is able to obtain these documents either because the Trust is a sham or because he is in *de facto* control of the Trust and all the underlying companies.
- 18 Before ordering the respondent to produce these documents (and thus subjecting him potentially to the penalties that would flow from non compliance), the court would have to make findings of fact which are in dispute, which I, sitting alone, have no power to do. I therefore decline to make the order for disclosure as requested.
- 19 Miss Jordan confirmed that the respondent had requested these documents from the Trustee who has not provided them. It is not clear whether that request was made orally or in writing but the respondent is in a position to provide details of that request; if made orally the date when the request was made, who he spoke to and what was said and if in writing copies of the relevant correspondence.

### **Letter of request**

- 20 In his response to the petitioner's questionnaire, the respondent has offered to ask his children to ask the trustee of the Trust for disclosure of the documents requested, if the Court will give leave to the respondent to disclose the affidavit of the petitioner dated the 19th September, 2008.
- 21 Mr Scholefield was not attracted by this offer because of the children's involvement in what the petitioner alleges is a sham arrangement in respect of Takilla and Anatole and the slim chance of their cooperating, let alone the trustee who has already declined to permit disclosure. I agree that the information required in relation to the Trust is too important to be left simply on the basis of such an offer.
- 22 Under Rule 6/20 of the Royal Court Rules 2004 any party may apply to the Court for letters of request to examine a person who is a witness at any suit and is not in the Island at the time of the application.
- 23 The respondent gave the name of a JD, a resident of Sark, as the person to whom the questionnaire addressed to the Trustee should be sent. Miss Jordan has confirmed that, to the best of the respondent's knowledge, JD is a resident of Sark and is a director of both the holding company of the Trust (Boldmine Limited) and Dataquill Limited which are both



managed and administered in Sark. It is understood by the petitioner that JD is also a director of the trustee Clifton Trustee Limited or otherwise involved in the administration of the Trust. Whilst discovery cannot be obtained against a person not a party to proceedings (see *B v B* page 185) the Court is not powerless in that it can give leave for the issuing of a subpoena *duces tecum* against a witness both for his evidence and for the production of relevant documents (see *P v C* [2002] JLR N 26). If JD were within the jurisdiction of this Court I would not hesitate to give such leave.

- 24 I have before me a party to matrimonial proceedings who has placed himself in a position in which resources from which he has substantially benefited and therefore might in the future be able to benefit have been placed beyond his control. The Court has an overarching objective of fairness in these proceedings (see *O v O* [2005] JLR 535) and that objective cannot be achieved in this case if vital information of this kind is withheld from it by those outside the jurisdiction with whom the assets have been placed. Furthermore it is intolerable in my view that any person in this jurisdiction can potentially avoid his or her potential liabilities by placing assets offshore in this way and whilst the Court, when it deals with the petitioner's claim for ancillary relief, may well draw adverse inferences, it is clearly preferable and in the interests of justice and fairness to both parties for the information in relation to the Trust to be obtained if that is reasonably possible. JD is not within this Court's jurisdiction but he is within the jurisdiction of our sister Island whose courts would I hope would wish, if in receipt of a letter of request, to ensure that this Court does have the fullest information before it in relation to the Trust so as to enable it to discharge its functions properly. I therefore grant leave for a letter of request to be issued.

## Sham

- 25 A further issue arises out of the petitioner's allegation that the Trust is a sham. Whilst I have not seen the trust deed it is understood that the Trust is a Seychelles trust. The trustee is not in this jurisdiction and there are no assets here. It is not administered in Jersey. Indeed the Trust has no connection with Jersey other than that the settlor resides here. The Court has no jurisdiction over it pursuant to Article 5 of the *Trusts (Jersey) Law 1984*. This Court has been critical of foreign Courts purporting to exercise jurisdiction over Jersey trusts in similar circumstances. In the case of *In Re the Fountain Trust* [2005] JLR 359 Bailhache, Bailiff, said this:-

**" As a matter of generality, we would regard an assumption of jurisdiction by a foreign court to declare a Jersey trust a sham to be exorbitant and we would be reluctant to enforce any judgment based upon such an assumption."**

- 26 Furthermore a finding that the Trust is a sham involves a finding of dishonesty on the part of the trustee, which is not a party to the proceedings (see *In the matter of the Esteem Settlement* [2003] JLR 188). Even if the Court were to find that the Trust is a sham, it has no ability to enforce its order either against the trustee or against the trust assets.



- 27 The real issue for the Court will be whether the assets of the trust are a resource available to the respondent. In *Charman v Charman* [2006] 2 FLR 422 the English Court of Appeal held this central question, whether the trust is a financial resource of the husband, should be expressed in terms of whether the trustee would be likely to advance capital immediately or in the foreseeable future rather than whether the husband had effective control over it. As the Royal Court found in *J v M* [2002] JLR 330, this issue can be resolved by the Court without determining whether the trust is a sham or the respondent has effective control over it. In my view this court should not assume jurisdiction to declare the Trust a sham.
- 28 This may have significance in relation to the letter of request. In the case of *In Re the L and M Trusts* [2003] JLR N 6, a US Court had, at the instance of a beneficiary, ordered a Jersey trustee to provide information in relation to a Jersey trust and this in the context of litigation in the US between the beneficiary and the settlor over the amount of child support being paid by the settlor. The Court held that the beneficiary could not see the documents whilst she intended to use them to attack the validity of the trust in foreign proceedings as, were she successful, the beneficiaries would receive nothing. However if the invalidity allegation were dropped the Court would view sympathetically an application by the beneficiary for disclosure of the trust accounts as the US Court needed to be fully aware of the settlor's financial position.
- 29 Whilst the petitioner is not a beneficiary of the Trust and any finding by the Jersey Court that it is a sham would have no effect upon the validity of the Trust under Seychelles Law, the fact that she is attacking the validity of the Trust in Jersey may be of concern to the Guernsey Courts. Mr Scolefield acknowledged this possibility and indicated that the claim would not be pursued if it were prejudicial to the letter of request being acceded to. Accordingly the letter of request will be issued conditional upon the petitioner formally abandoning the claim that the Trust is a sham and on the basis that, in any event, this Court will not entertain such a claim for the reasons set out above.

### Accountant's Report

- 30 The instructions given to Clive Tomes and Co are set out in its report, namely to ascertain an estimated current value of the business interests of the respondent, together with an estimation as to how much he had received from the business interest from the 4th November, 2004 to date.
- 31 Whilst that task was addressed by the accountants, their report is concerned in the main with the legitimacy and rationale behind the Trust structure and the extent of the respondent's control of the same. The accountants want extensive access to the documents underlying the accounts in order to opine on "the legitimacy and rationale behind the Trust structure", to ascertain "how the Trust and Boldmine were managed and controlled" and to conclude whether "their value should in fact accrue to [the respondent] personally". In my

view the accountants have strayed materially from their brief and expertise. They are competent to advise on the accounts, the value of the structure and the assets the respondent has received from them. They are not competent to advise on the legitimacy of the structure (i.e. whether or not it is a sham) or to make findings in relation to disputed issues of fact

## Summary

32 In summary:-

I will wish to hear from counsel on the precise form of the order.

- (i) The children and brother of the respondent and the corporate nominee will be convened to the proceedings,
- (ii) The petitioner's application that the respondent makes good the Schedule of Deficiencies is rejected.
- (iii) The petitioner's application that a letter of request be issued is granted on the basis set out. A draft of the letter of request will be forwarded to Counsel for their comment prior to issue.
- (iv) The respondent will file an affidavit detailing the request made to the trustee of the Trust for disclosure of documents.
- (v) The court will not assume jurisdiction to declare the Trust a sham.