

Herald Trustees Ltd v D

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Sparrow, Thomas
Judgment Date:	26 March 2019
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Text

[2019] JRC 45

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Sparrow **and** Thomas.

IN THE MATTER OF THE Q SETTLEMENT

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

Between
Herald Trustees Limited
Representor
and
D
First Respondent
C

Second Respondent
 E
 Third Respondent
 F
 Fourth Respondent
 G (on her own behalf and as guardian ad litem on behalf of A)
 Fifth Respondent
 H (together “the L beneficiaries”)
 Sixth Respondent
 I
 Seventh Respondent
 J
 Eighth Respondent
 K (together “the M beneficiaries”)
 Ninth Respondent

 And

 CRY S Finance S.A.
 Third Party

Advocate J. M. Sheedy for the Representor

Authorities

In the matter of Q Trust [\[2014\] JRC 119](#).

Trusts (Jersey) Law 1984

Trust — summons issued by the Representor.

THE COMMISSIONER:

- 1 On 21st February, 2019, the Court heard a summons issued by the Representor under its representation of 23rd August, 2013, in which it sought the following orders:-

“1. That JTC (Jersey) Limited, Herald Trust Company Limited and CRY S Finance SA be joined to the proceedings under RCR 6/36.

2. On a further date to be fixed the court shall sit to hear the Representor's prayer for the following relief:-

a. A determination as to the quantum of Herald Trustees Limited's liability to JTC (Jersey) Limited (as assignee of Herald Trust Company Limited) and the

other creditors of Herald Trustees Limited under the Act of Court.

b. A determination as to the quantum of the L Beneficiaries' liabilities to Herald Trustees Limited under the Act of Court dated 8 May 2014, as defined therein.

c. Based upon 2(a) and (b) above, a determination as to the quantum of the Secured Liabilities, as defined under a Security Interest Agreement dated 22 May 2014.

d. That the costs of and incidental to this summons be added to the L Beneficiaries' liabilities under the Act of Court dated 8 May 2014."

- 2 By way of brief background, the Representor was trustee of the Q Settlement ("the Settlement") created by the late N, the beneficiaries of which were his children by two marriages, defined as "L" and "the M beneficiaries".
- 3 The full background is set out in the Court's judgment of 28th May, 2014 *In the matter of Q Trust* [\[2014\] JRC 119](#), but suffice it to say that the Settlement had a history of illiquidity and litigation in both Jersey and Spain. After very considerable efforts on the part of the Representor, an agreement was brokered with all of the beneficiaries for the termination of the Settlement and distribution of the trust assets, in circumstances where substantial sums were owed to the Representor and it had incurred substantial liabilities in particular to its local lawyers. The Act of Court of 8th May, 2014, ("the Act") recited the agreement that L had entered into with the Representor as follows:-

"AND UPON noting that the Representor and L.

have agreed as follows:-

(1) L undertake to accept joint and several liability for all expenses and liabilities of the Trustee for which it would have been entitled to be indemnified from the Trust property if it had remained as Trustee, including the following:

(i) those of the Q Trust set out in the attached schedule entitled "Final Distribution Proposal";

(ii) to the extent that they are not included within the expenses and liabilities referred to at (i) above, the current outstanding fees and expenses of the Representor as at the date of this Order including the fees and expenses incurred by Bruce Ferguson in respect of the New Spanish Proceedings to date; and

(iii) The future liabilities, fees and expenses of the Representor including the fees and expenses of Bruce Ferguson in respect of the New Spanish Proceedings and any other proceedings issued against the Representor or any of the Herald group companies or any of their officers, servants, or

agents arising from the trusteeship of the Q Trust;

(2) L liability in respect of paragraph 1 above is limited to the extent that the Trustee would have been entitled to be identified from the Trust property had it remained as Trustee;

(3) L liability in respect of paragraph 1.(i) and (ii) above shall be capped at a maximum of €1,000,000;

(4) L will pay to the Representor the sum of €200,000 on or before 21st May, 2014, by way of part discharge of the current fees and expenses of the Representor as set out in paragraph 1.(i) and (ii) above;

(5) on or before 21st May 2014, the Representor will be provided with adequate security (capped in the sum of €1,000,000) to the reasonable satisfaction of the Representor for all liabilities above in the form of a security interest over all the shares in R;

(6) L agree to jointly and severally discharge the liabilities under 1.(i) and (ii) above up to the maximum sum of €1,000,000 in full on or before 21st May, 2015;

(7) the Representor will, upon the happening of the discharge outlined in paragraph 6 above, cancel the relevant security interests agreement over the shares in R;

(8) L will exercise their best endeavours to transfer the registered office of R from the Representor's address as soon as practicable.

(9) L hereby irrevocably appoint Mourant Ozannes of 22 Grenville Street, St Helier, Jersey, JE4 8PZX as their agent for service of all proceedings in connection with the matters addressed herein and submit to the jurisdiction of Jersey's Royal Court in relation thereto and Mourant Ozannes agree to such appointment."

4 The Act also recites that L comprise the following individuals (the First to Sixth Respondents):-

"C;

D;

E;

F;

G (on her own behalf and on behalf of the minor A);

H”

- 5 ***“The attached schedule entitlement entitled “Final Distribution Proposal”*** referred to in recital 1(i) of the Act set out the liabilities of L to the Representor totalling €884,839, of which €352,350 was owed by the Representor to Herald Trust Company Limited and €419,175 to its local lawyers Baker & Partners.
- 6 A word of explanation is required here. The Representor is Herald Trustee Limited, which forms part of a group of companies owned by Herald Trust Company Limited. Herald Trust Company Limited employed all of the staff engaged in the group, and carried out all of the administration, hence Herald Trust Company Limited being shown as a creditor of the Representor.
- 7 It is necessary to step back a little in time from this, in that some five months before the affairs of the Settlement were resolved, JTC (Jersey) Limited (“JTC”) acquired the business of Herald Trust Company Limited, pursuant to a transfer agreement dated 20th December, 2013. As part of the business transfer, some 27 members of staff from Herald Trust Company Limited moved over to JTC, which administered the business of Herald Trust Company Limited on a day to day basis. That arrangement was set out in a separate agreement dated 23rd December, 2013, between Herald Trust Company Limited and JTC.
- 8 By mid 2015, the transfer of the business of Herald Trust Company Limited to JTC had been all but completed and on 11th November 2015, Herald Trust Company Limited entered into a further agreement with JTC, whereby it assigned all unpaid fees or “aged debts” owing to Herald Trust Company Limited to JTC, which included the amounts owed to Herald Trust Company Limited by the Representor in respect of the Settlement. That assignment did not affect the obligation of L, which is still owed to the Representor, pursuant to the agreement recited in the Act.
- 9 The affidavit of Stephen Whale of 18th December 2018, a group director within the JTC group, shows that the L complied with their obligation to pay €200,000 pursuant to recital 4 of the Act and explains at paragraphs 40 – 41 how that sum was disbursed, leaving a pound sterling balance due as at the 23rd May, 2014, of £574,465.83p.
- 10 He goes on to say at paragraph 43 that in addition to this sum, further costs had been incurred and continued to be incurred in administering and putting in place the provisions set out in the Act and through the continued prosecution of New Spanish Proceedings.
- 11 On 22nd May, 2014, and pursuant to recital 5 of the Act, the Representor was provided with a security interest over the shares in the wholly owned holding company of the Settlement, R Holdings Limited, which in turn owns interests in three Spanish property owning companies, and this by way of a specific security agreement dated 22nd May, 2014, with

CRY S Finance S.A. ("CRY S") to whom the shares had been transferred for the benefit of L.

- 12 There followed years of correspondence between JTC and FF, the adviser to L as to how their liabilities were to be discharged, but at no stage up to and including September 2017 was that liability questioned. Indeed, at a meeting which took place in Marbella, Spain on 24th November, 2016, in the presence of one of L, the obligations of L was acknowledged.
- 13 In September 2017, the matter was referred within JTC to the group general counsel, Mr William Byrne, and in subsequent correspondence reference started to be made by FF to bad management by "the various trustees". We observe in this respect the prescription period of three years that applies to claims against trustees under Article 57 of the Trusts (Jersey) Law 1984. Having received a copy of this summons, FF wrote on 8th January 2019, formally opposing the summons, which he said was intended "*to carry on obtaining income for certain arrangements and costs which never existed.*" He made a demand for extensive documentation going back to the formation of the Settlement, giving notice that L opposed the summons, partly because it was filed in this jurisdiction and partly because it was based on unproven facts.
- 14 We were satisfied that the summons had been correctly served upon L through their irrevocably appointed agents, Mourant Ozannes, pursuant to recital 9 of the Act, and indeed in correspondence Advocate Lincoln of Mourant Ozannes has confirmed that his firm was appointed as service agent, although he held no current instructions. Advocate Lincoln confirmed receipt of the summons and that he had forwarded it to FF on behalf of L. Furthermore, under recital 9 of the Act L agreed irrevocably to submit to the jurisdiction of this Court in respect of all proceedings in connection with the matters addressed in the Act. L did not appear to defend the summons.
- 15 The total amount now being claimed by the Representor from L under the agreement recited in the Act is £822,174. The additional £247,708.17p (over the sum of £574,465.83p) is claimed under recital 1(iii) of the Act, in relation to future liabilities, fees and expenses of the Representor.
- 16 In discussion this additional sum for future liabilities, fees and expenses presented the Court with a problem, in that we provisionally interpreted recital 1(iii) of the Act to relate to liabilities, fees and expenses incurred by the Representor arising from its trusteeship of the Settlement. That trusteeship came to an end, we would suggest (although we make no formal finding to this effect), when the shares in R were distributed out to CRY S on behalf of L, as at that point there would no longer be any assets within the Settlement. We accept, however, that further fees may have properly been incurred thereafter in connection with the termination of the Settlement and thus arising "*out of it*".
- 17 However, it is arguable that at some point, JTC, which was carrying out the administration of the Settlement on behalf of the Representor, ceased to provide services for the

Representor as trustee and became concerned with the enforcement of the debt due to the Representor, the benefit of which had been assigned to it. Ordinarily a creditor is not entitled to claim the cost of enforcement of a debt, unless there is a contractual obligation on the part of the debtor to pay the same or a Court awards the creditor its costs when giving judgment for the sum claimed.

- 18 We have no basis, on the evidence currently before us, for determining at what point the Representor ceased to be able to claim under recital 1(iii) of the Act, if at all. That would require a detailed examination of the time charges of the JTC personnel. Accordingly, we cannot make a determination in relation to these additional sums claimed, and we will leave that part of the summons over. As these points arose only in discussion, out of fairness to the Representor it will remain open to the Representor to argue that all of the sums it is claiming are contractually due.
- 19 Advocate Sheedy did not pursue paragraph 2(a) of the summons. There is no issue currently between the Representor and JTC and the other creditors as to what is owed by the Representor and no remedy is sought by JTC and the other creditors against the Representor. There is nothing, therefore, for the Court to determine as between those parties.
- 20 For that reason, we could see no justification for the joinder of JTC and Herald Trust Company Limited to the summons. The purpose of Royal Court Rule 6/36 is to ensure that all matters in dispute in the cause or matter may be effectively and completely determined and adjudicated upon. There are no disputes between JTC, Herald Trust Company Limited and the Representor to be determined and adjudicated upon. JTC and Herald Trust Company Limited have no contractual nexus with L, and there is no dispute to be resolved as between them. The dispute is between the Representor and L.
- 21 We accept, however, that it would be appropriate to join CRYs as a party, because of the specific security interest held over the shares in R in favour of the Representor; the determination we are being asked to make being a precursor to enforcement of that security interest.
- 22 CRYs is incorporated in Switzerland, and ordinarily leave to serve out of the jurisdiction would be required, but under the terms of Clauses 17 and 18 of the specific security agreement, CRYs agreed:-
- (i) That the Courts of Jersey have jurisdiction to settle any dispute or claim arising under or in connection with it and submitted irrevocably to the jurisdiction of this Court.
 - (ii) Irrevocably appointed Mourant Ozannes as its agent for service of process in any proceedings before this Court.

(iii) We are satisfied that the summons had been properly served upon CRY5 through Mourant Ozannes, and that this Court has jurisdiction over CRY5 which did not appear to defend it.

Conclusion

23 In summary:-

- (i) We determine that L are jointly and severally liable to the Representor under the agreement recited in the Act in the sum of £574,465.83p, being the amount due as at 23rd May, 2014.
- (ii) We leave over the Representor's claim for further sums due from 23rd May, 2014.
- (iii) We join CRY5 to the proceedings pursuant to Royal Court Rule 6/36.
- (iv) We determine that the sum of £574,465.83p is a liability of L which has not been paid by them and which is secured under the specific security agreement within the definition of "Secure Liabilities".