Anne Marie Heinrichs and Werner Cornelius Heinrichs and G B Trustees Ltd v Pantrust International SA and Richard George De Winton Wigley and James Richard De Winton Wigley

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Thomas, Clyde-Smith
Judgment Date:	12 January 2017
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Text

[2017] JRC 006

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE BRAZILIAN TRUST

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

Between

Anne Marie Heinrichs
First Representor

and

Werner Cornelius Heinrichs
Second Representor

and

G B Trustees Limited
Third Representor
and
Pantrust International SA
First Respondent

and

Richard George De Winton Wigley
Second Respondent

and

James Richard De Winton Wigley
Third Respondent

Advocate S. C. Thomas **for the Representors**.

Advocate M. L. Preston **for the Third Representor**.

Authorities

Heinrichs -v- Pantrust and Ors [2016] JRC 106A.

Trusts (Jersey) Law 1984.

In re L & M Trust [2003] JLR N 6.

In re Avalon Trust [2006] JLR N 19.

Snell's Equity 33rd Edition.

In the matter of the Berthiaume Confiscation [2016] JRC 215.

Butler v Axco Trustees Limited [1997] JLR Note 17a.

Re Stevens [1897] 11 Ch. 422, 432.

Coultard v Disco Mix Club Ltd [2000] 1 WLR 207.

Trust — order sought by the third representor for account to be taken on basis of wilful default by the first to third respondent.

THE COMMISSIONER:

1 The third representor seeks an order for an account to be taken in relation to the Brazilian Trusts on the basis of wilful default on the part of the first to third respondents as former trustees.

2 The background is set out in the judgment of the Court of 16 th June, 2016, (*Heinrichs -v- Pantrust and Ors* [2016] JRC 106A) ("the first judgment") in which the first to third respondents, based in Panama, unsuccessfully sought to challenge the jurisdiction of the Court over the Brazilian Trusts. The Court went on to remove them as trustees and to appoint the third representor (then the fourth respondent) in their place. The first to third respondents were also ordered to transfer to the third representor the assets of the Brazilian Trusts and to provide an account of their trusteeships.

3 As explained in paragraphs 3–9 of the first judgment, there appear to be two trusts called the Brazilian Trust, an issue which we understand the Court is going to be asked to resolve shortly, but in the meantime, we shall refer to the Brazilian Trusts in the plural.

4 The first to third respondents deny the existence of any valid trusts, claiming that the assets that they hold are held for the second representor personally. Having failed in their challenge to the jurisdiction of the Court, the first to third respondents have given notice that they do not accept the jurisdiction of this Court and will not appear in any future proceedings. If any attempts are made to enforce any orders made by the Court against them, they will be strenuously resisted. Consistent with their stated position, the first to third respondents did not appear in this application, notwithstanding having been served with due notice of the relief being sought.

5 Not only have the first to third respondents not appeared, but they have failed to transfer the assets they hold, contrary to the indication given to the Court that they would do so — see paragraph 68 of the first judgment. They have also failed to provide any account of their trusteeships.

Assets of the Trust

6 Judging from the correspondence and in particular, the letter from Sinels of 21 st March, 2016, then acting for the first to third respondents, and from the first affidavit of the first representor, there appears to be consensus as to the known assets of the Brazilian Trusts (or on the case of the first to third respondents of the bare trusts for the second representor)

which comprise;

(i) Shares in a Dutch Antilles company, which ultimately owned a property in Canada, which has now been sold, with the proceeds of CA$591,500 held by a Canadian law firm, pursuant to the Ontario proceedings described in paragraphs 23 and 24 of the first judgment.

(ii) The benefit of a judgment against the second representor in the sum of CA$9.8M in favour of La Hougue Financial Management Services Limited ("La Hougue"), a company associated with the first to third respondents. The first representor says that her father, the second representor, allowed this judgment to be entered against him by consent because it was in favour of a friendly entity controlled by the trustee of the Brazilian Trusts.

(iii) Three life assurance policies on the life of the second representor and his wife, assigned to La Hougue as security for loans made to the second representor claimed to be in the sum of CA$16M. The first and second representors deny the existence of any such loans.

7 The third representor appears to have taken no steps to secure the transfer of these assets from the first to third respondents in Panama where they reside. The second representor similarly appears to have taken no steps to secure the transfer of these assets through the Ontario Courts, to whose jurisdiction the first to third respondents have submitted in the Ontario proceedings, and this on the basis of their stated position that they hold these assets for the second representor personally.

8 The interest of the representors appears to lie more in the possibility of potential claims against the first to third respondents arising out of their stewardship of the Brazilian Trusts over many years.

9 There being no liquid assets, or indeed any assets, currently under the control of the third representor, its activities are being funded by the second representor and his family.

Evidence of wilful default

10 The first representor has had access to boxes of documentation currently held by the police in Jersey, which contain the records of the Brazilian Trusts from the time when they were administered in Jersey. It is clear that she has undertaken a very comprehensive review of these documents, which, without going into detail, appear to show:–

(i) Secret interest turns being made by the first to third respondents on loans made to the Brazilian Trusts. An example is set out in paragraphs 18 and 19 of the first judgment.

(ii) The fabrication of documents and of accounting statements. Indeed, the second respondent has admitted fabricating loan documentation — see paragraphs 20 and 21 of the first judgment.

11 In addition to this, the first to third respondents are in default of their obligations to transfer the trust assets to the third representor, and to provide any accounting at all of their stewardship.

12 The Court accepts that the first to third respondents are in wilful default of their obligations as trustees in failing to account for and transfer the trust assets and that the evidence of fabrication and secret interest turns raises a *prime facie* inference that other breaches not yet known to the representors or the Court have occurred.

Account on the basis of wilful default

13 Article 21(5) of the Trusts (Jersey) Law 1984 imposes a duty upon trustees to keep accurate accounts and records of their trusteeship. A trustee's duty to account to beneficiaries is well established — see *In re L & M Trust* [2003] JLR N 6 and *In re Avalon Trust* [2006] JLR N 19.

14 What is meant by the taking of what is described under English law as a common account is explained in Snell's Equity 33rd Edition at paragraphs 20–012 and 20–013:–

> ***"20–012 Accountability for Funds***
>
> ***Equity polices a variety of relationships with the common characteristic that one party has custody of a fund which they are obliged to administer for the benefit of another or others.*** The central case is that of an express trustee, but similar principles apply to executors, agents who control property belonging to their principals, guardians, and indeed to anyone who holds assets for others in a custodial fiduciary capacity. In each case responsibility for the due administration of the fund may be enforced by holding the fiduciary to account: 'The taking of an account is the means by which a beneficiary requires a trustee to justify his stewardship of trust property.'
>
> ***20–013 The accounting procedure serves the informative purpose of allowing the beneficiaries to know the status of the fund and what transformations it has undergone.*** The accounting may identify specific assets in respect of which the beneficiaries may be entitled to proprietary relief. The procedure also has a substantive purpose. It is through the accounting procedure, and in accordance with the principles that govern it, that any personal liability a custodial fiduciary may have arising out of maladministration is ascertained and determined. For instance, where the fiduciary no longer has an asset which they should have, the accounting serves to convert the

obligation to make it over into a personal obligation to pay an equivalent sum as 'an equitable debt or liability in the nature of debt'. Even where a full and formal accounting is not necessary, the same principles apply. Third parties who receive misdirected trust assets with sufficient knowledge of their wrongful provenance are accountable in the same sense."

15 The procedure under English law for the taking of a common account is set out at paragraph 20–017:–

> ***"20–017 Taking the account*** .
>
> ***The accounting party first submits their verified accounts and supporting documents, and the beneficiary may then raise any specific objections they may have.*** Objections to an account presented to the court as complete are either by way of surcharge or falsification. The beneficiary surcharges the account when they contend that the accounting party should have charged themselves on the incoming side of the account with more than they had admitted. The beneficiary falsifies the account when they challenge an item of discharge entered into the outgoings side of the account."

16 We have not been made aware of the Court previously adopting this precise procedure, but being a procedural matter, it clearly has the inherent jurisdiction to do so. As the Court said in *In the matter of the Berthiaume Confiscation* [2016] JRC 215 at paragraph 36, following a review of the authorities on the Court's inherent jurisdiction:–

> ***"We draw from these authorities the proposition that the court's inherent jurisdiction is a virile and viable doctrine that forms part of procedural law and is derived from the need of the Court to have and to exercise powers to make it effective as a Court; the vital clue being necessity.*** The Court has a procedural power because it has to have it to be a Court in any meaningful sense (*Mayo v Cantrade*). ***The absence of precedent is no bar to its exercise and it can exist in respect of matters about which a statute is silent and co-exist with or supplement a statutory jurisdiction*** (*Eves v Hambros* ***and*** *Jones v Attorney General*). ***"***

17 Whether or not the Court would find it necessary to adopt this particular form of accounting procedure, we have no doubt that the Court can and will make whatever orders are necessary to require a trustee to account for his stewardship of trust property.

18 Common accounting implies no misconduct, as explained at paragraph 20–023:–

> ***"20–023 Accounts on the footing of wilful default*** .
>
> ***The usual order for common accounts considered under the previous heading is to be contrasted with accounts on the footing of wilful default.***

The difference has been said to be one of elementary principles. 'The one supposes no misconduct; the other is entirely grounded on misconduct."

19 Wilful default is synonymous in this context with breach of trust (see paragraph 20–024) and accounting on the footing of wilful default is explained in this way at paragraph 20–025:–

> ***"20–025 Accounting on the footing of wilful default***
>
> ***An accounting on the footing of wilful default covers the same ground as a common accounting but in addition the trustee's account may be surcharged with items, so it is said, that they would have received but for their wilful default.*** By an order for wilful default accounts, the master is granted a roving commission to inquire into all aspects of the fiduciary's administration. The purpose of the accounting is to discover concealed misconduct and to sort out thoroughly mismanaged estates. Misconduct may be investigated that was neither pleaded nor mentioned at the hearing at which the accounting was directed and the master may charge the defendant accordingly. For these and other reasons, a direction that accounts be taken on the footing of wilful default has been described as 'drastic' and 'a very strong' order to make, and in practice the courts are markedly reluctant to make them. The court exercises a discretion not to make the order if it would be oppressive or wasteful."

20 As to the availability of such a remedy, Snell's Equity goes on to say at paragraph 20–026:–

> ***"20–026 Availability***
>
> ***To obtain an account on the footing of wilful default, the beneficiaries must make out a special case by pleading and proving that the past conduct of the trustees raises a prima facie inference that other breaches not yet known to the claimant or the court have occurred.*** It is sometimes said that the burden can be discharged by proving one instance of wilful default, but that would have to be a very telling instance. North J said in *Re Stevens* ***that 'Possibly one clear case might be enough; but it is desirable to have more'.*** The court may also take into account evidence of bad faith as well as the trustees' conduct in the litigation. The mere fact that record keeping has been inadequate is not sufficient. If the admissions and proofs before the court are conflicting or raise only a weak suspicion then an inquiry may be directed in order to gather further evidence. Where individual instances of wilful default are proven but the evidence is not strong enough to support an order for a general accounting, the court may give relief in respect of the proven breaches only. In practice, this is normally what happens."

21 There is some indication that this procedure was adopted by the Court in the case of *Butler v Axco Trustees Limited* [1997] JLR Note 17a, but whilst the Court has the inherent

jurisdiction to do so, we share the reluctance of the English courts. It involves the Court going beyond making orders for disclosure against a trustee at the behest of beneficiaries, to taking on, through the Master, an investigation of its own and then "charging" a trustee for any misconduct it finds. The circumstances in which the Court will allow itself to be used in this way will in our view be rare. Ordinarily it will be for the beneficiaries, given disclosure, to take on the burden of proving breaches of trust and the Court giving relief where proven.

Form of inquiry in this case

22 The summons of the third representor asks that the accounting on the basis of wilful default take place before the Master, and Advocate Preston, for the third representor, provided a draft of the kind of orders the third representor will be seeking from the Master, which it is helpful to set out. Having sought leave to serve the proceedings out of the jurisdiction upon a number of entities associated with the first to third respondents, the draft continues:–

> " *(2) The First to Third respondents ("the Accounting Parties") shall within 28 days lodge and serve on the Representors*:
>
> > *(i) their books of account of the Brazilian Trust*.
> >
> > *(ii) their books of account of every corporation ever comprised within the Brazilian Trust;*
>
> *which shall be taken to be admissible evidence of the matters contained therein*.
>
> *(3) The Act of Court shall be endorsed with a penal notice and shall be served in accordance with the directions for service contained in the Act of Court of the Master of the Royal Court dated 4 October 2016*.
>
> *(4) In default of the Accounting Parties' compliance with paragraph (2) above, the Representors may lodge with the court and serve such records and books of accounts for the Brazilian Trust as they are able to from material in their possession and provided to them by the Accounting Parties*.
>
> *(5) The parties shall be at liberty to instruct an accountant to file and serve a report*.
>
> *(6) The entries in the books of account shall*:
>
> > *i. be sequentially numbered on each side of the account in chronological order;*
> >
> > *ii. be sub-totalled and the balance carried forward*.
>
> *(7) The books of account shall be verified and exhibited to an affidavit*.

(8) Without prejudice to the above paragraphs, the parties interested shall be at liberty to take such objections as they think fit.

(9) Any party who seeks to charge the Accounting Parties with an amount beyond which is shown by the books of account to have admitted to have been received, or who alleges an entry on either side of the account is erroneous in respect either of the amount or in any other respect, shall give the Accounting Parties written notice stating so far as the party challenging the account is able;

i. which entry in the account is challenged,

ii the amount sought to be charged or falsified, with brief particulars thereof, or, as the case may be,

iii the grounds for alleging that any item in the account is erroneous.

(10) In support of any notice given under (9) above, the challenging party may file an affidavit stating their objections to the account and their reasons. The Accounting Parties may, with the leave of the court, file an affidavit in reply.

(11) By [**] any party may, with the leave of the court, deliver interrogatories in writing for the examination of any other party.

i. A copy of any interrogatories proposed to be delivered must be filed with the court when the summons is issued and a further copy must be served with the summons.

ii. interrogatories must, unless otherwise ordered, be answered by affidavit to be filed within 14 days.

(12) Any party may apply for letters of request to the judicial authorities of a country to take, or cause to be taken, the evidence of any person who is a party or witness who is not in Jersey.

(13) Any party may apply for an order authorizing the Greffier or the Viscount or an advocate of the Royal Court to take in writing, on oath, the evidence of any person who is a party or witness in any proceedings and/or to produce documents under his or her control relevant to the account.

(14) There shall be liberty to apply."

Decision

23 In terms of availability, the third representor has made out a case in wilful default against the first to third respondents, and raised a *prima facie* inference that breaches of trust not

yet known to the third representor have occurred. There are serious questions about the way these trusts, assuming their validity, appear to have been administered. The issue is whether this is one of those rare cases when the Court should, in its discretion, order an accounting on the basis of wilful default. In our view, it is not.

24 For a start the parameters of the proposed roving commission are far too wide and would involve a disproportionate use of the Court's resources. The second respondent has been involved in the administration of the Brazilian Trusts from 1977 until 2015 — some 38 years, with the first and third respondents being involved in later years. The Brazilian Trusts have been active during that period and an immediate concern is the potential enormity of the investigation that the Master would have to undertake. The earliest loan to which the first representor refers was made in 1993 and if that were to be taken as the starting date, it would mean a period of investigation by the Master of some 22 years.

25 Advocate Preston submitted that in practice, the Master's role would be limited to investigating within limitations set by the third representor in terms of the orders that would be sought from the Master, but on the basis of the authorities we have seen, namely *Re Stevens* [1897] 11 Ch. 422, 432 and *Coultard v Disco Mix Club Ltd* [2000] 1 WLR 207, at 734, and by reference to the extract from Snell's Equity cited above, he is given a roving commission by the Court which implies a proactive role on his part. If any such order were to be made, then we think it would be incumbent on the Court to set out the parameters of the Master's investigation in clear terms and to be satisfied that it is a proportionate use of the resources of the Court.

26 The next point is that the principal persons the Master needs to investigate, the first to third respondents, are outside this jurisdiction and will ignore any orders that he may make against them. The bulk of the orders set out in the draft relate to them and as they are not within the jurisdiction, the Master has no means of coercing them to respond. In effect, the Master will be making orders which we are on notice will be ignored.

27 It is the case that there are potentially at least two people in this jurisdiction who may have had some involvement in these loans when the Brazilian Trusts were being administered here, but the third representor has not approached them to ascertain what assistance they can and are prepared to give.

28 A further concern to the Court is the fact that:–

(i) No consideration appears to have been given to seeking an account against the first to third respondents in Panama, whose courts have jurisdiction over them. Certainly no advice has been taken by the third representor from Panamanian lawyers in that respect.

(ii) No advice has been taken from Panamanian lawyers as to whether Panamanian courts will give effect to any letter of request that may be issued by the Court, as

contemplated in the draft order.

29 We then turn to the complete absence of any evidence from the second representor, the real settlor of the Brazilian Trusts, and the principal with whom the first to third respondents dealt, to explain his knowledge of the Brazilian Trusts and the activities of the first to third respondents. The documentation we have seen shows him, an experienced businessman, having a close working relationship with the second respondent up until 2014. We have examples of memoranda being sent to him by the second respondent of the kind that you would see between people working in the same office. There is no evidence that he ever complained about the way the first to third respondents were administering these assets.

30 The evidence we have comes entirely from his daughter, the first representor. Whilst the documents she exhibits raise serious questions about the administration of the Brazilian Trusts, the second representor's knowledge of and/or participation in the transactions concerned may throw a different light upon them.

31 We also have no evidence from the second representor about the proceedings in Ontario, the somewhat curious judgment against him by La Hougue and the state of the loan claims being made against him by the first to third respondents.

32 Finally it is clear that the first representor has already had access to extensive records of the administration of the Brazilian Trusts over a substantial part of the period concerned, but no advice appears to have been taken as to whether that documentation is sufficient to ground a claim against the first to third respondents for breach of trust which can be pursued against them in Panama in the ordinary way. If it is sufficient then there is no reason why the third representor should not take on the burden of pursuing such claims.

33 In essence, we see no grounds to justify the Court, through the Master, taking on an investigatory role. In particular:–

(i) The parameters of the proposed roving commission are far too wide and would involve a disproportionate use of the Court's resources.

(ii) The persons who are best able to provide the account are outside this jurisdiction and will ignore any orders that the Master may make against them.

(iii) No advice has been obtained about the ability of the third representor to seek an account from the first to third respondents through the courts of Panama, which have jurisdiction over them.

(iv) The second representor has not given the Court the assistance that such an order warrants.

(v) The third representor, through the first representor, has already had access to

extensive records of the administration of the Brazilian Trusts which may be sufficient to ground a claim in breach of trust against the first to third respondents directly in Panama.

34 Accordingly, we decline to order an accounting on the footing of wilful default.