The Bird Trusts

Jurisdiction:	Jersey
Judge:	The Bailiff
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[2012] JRC 6

ROYAL COURT

(Samedi)

Before:

M.C. St. J. Birt, **Esq.**, Bailiff, **and** Jurats Le Breton **and** Marett-Crosby.

IN THE MATTER OF THE BIRD CHARITABLE TRUST AND THE BIRD PURPOSE TRUST

Between
Equity Trust (Bahamas) Limited
Representor
and
Basel Trust Corporation (Channel Islands) Limited
Respondent

Advocate J. Harvey-Hills **for the Representor.**

Advocate M. J. Thompson **for the Respondent.**

Authorities

Proceeds of Crime (Jersey) Law 1999.

Trusts (Jersey) Law 1984.

Warner -v- Equity Trust (Jersey) Limited [2008] JLR

In re Kaplan [2009] JLR 88.

Ogier Trustee (Jersey) Limited -v- CI Law Trustees Limited [2006] JRC 158.

Ogier Trustee (Jersey) Limited -v- CI Law Trustees Limited [2006] JLR N 35.

Tiger -v- Barclays Bank Limited [1952] 1 All ER 85.

Schmidt -v- Rosewood Trust Limited [2003] 2 AC 709.

Lewin on Trusts (18th Edition).

A Settlement [2011] JRC 109.

Trust — application by the Representor for disclosure of certain documents.

The Bailiff

1 This is an application by Equity Trust (Bahamas) Limited ("Equity") as the current trustee of the Bird Charitable Trust ("the Charitable Trust") and the Bird Purpose Trust ("the Purpose Trust") (together "the Trusts") for an order that Basel Trust Corporation (Channel Islands) Limited ("Basel") as former trustee of the Trusts, should disclose certain documents to it. It requires the Court to consider the nature of a trustee's obligation to hand over documents and information to an incoming trustee upon retiring as a trustee.

2 The application originally related to a wide category of documents but, by the time of the hearing, it appeared that that aspect may have been satisfactorily resolved and the parties agreed that it should be adjourned for further discussion between them. However, the parties disagreed as to whether certain legal advice obtained by Basel at the cost of the Trust should be disclosed and we were asked to rule on that aspect.

The background

3 There is a complex history to this matter which has been described in two previous judgments of this Court, which are to be found in the Jersey Law Reports at *Warner -v- Equity Trust (Jersey) Limited* [2008] JLR 1 ("the validity proceedings") and at In *re Kaplan* [2009] JLR 88 ("the saisie proceedings"). However the relevant background for present purposes can be stated as follows.

4 Over the years Mr Gary Kaplan ("Mr Kaplan") built up a substantial internet gaming business under the name BetonSports. In 2004 shares in BetonSports PLC ("BOS") were placed on the London AIM market. The proceeds of the listing were placed in two trusts.

5 The first was the Charitable Trust, created on 16th January, 2004, between Clement Bird as settlor and Basel as original trustee. Although not initially beneficiaries, Mr Kaplan and his family were subsequently added as such. Mr Kaplan was the original protector. There are a number of underlying companies within the structure of the Charitable Trust.

6 Secondly, the Purpose Trust was established by declaration of trust dated 19th April, 2004, with Basel as the original trustee. Mr Kaplan was named as protector and enforcer.

7 On 17th July, 2006, an indictment in the United States against Mr Kaplan and others was unsealed. This indictment charged various offences relating to the provision of internet gambling services to US residents.

8 Until then, there had been a close relationship between Basel and Mr Kaplan and, although technically Mr Kaplan and his family were not at that stage beneficiaries of the Charitable Trust, Basel clearly regarded them as such pursuant to a relevant letter of wishes. Once Mr Kaplan had been indicted and this came to the knowledge of Basel, Basel came under an obligation to make a suspicious activity report ("SAR") to the police pursuant to the provisions of the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law"). Having made an SAR on 20th July, 2006, Basel was unable for some weeks to communicate with Mr Kaplan for fear of committing a "tipping off" offence under the 1999 Law. This inability to communicate and explain why Basel was unable to act in relation to the Trusts (because of the need to obtain the consent of the police) undoubtedly damaged relations between Mr Kaplan and Basel and led to a decision by Mr Kaplan to sideline Basel.

9 Accordingly, on 6th September, 2006, he executed two deeds purporting to appoint Ghirlandina Anstalt ("Ghirlandina") as protector of both Trusts in his place. On 8th September, Ghirlandina executed a deed appointing Larona Trust Reg ("Larona") and Roenne Trust Corporation ("Roenne") as additional trustees of the Charitable Trust and a further deed removing Basel as trustee of the Purpose Trust and replacing it with Larona and Roenne. Subsequently, it transpired that this latter removal was invalid, and accordingly on 13th April, 2007, Ghirlandina appointed Larona and Roenne as additional trustees of the Purpose Trust.

10 On 30th March, 2007, Basel issued the validity proceedings challenging the validity of the appointments of Ghirlandina, Larona and Roenne respectively in relation to both Trusts.

11 On 24th May, 2007, a *saisie judiciare* (the " *saisie"*) was granted on the application of the Attorney General in respect of the realisable property held by Mr Kaplan in Jersey, including the assets of both Trusts.

12 On 28th January, 2008, the Royal Court gave judgment in the validity proceedings. It held that Ghirlandina had been validly appointed as protector of the Charitable Trust and that Larona and Roenne had been validly appointed as additional trustees of that Trust. In relation to the Purpose Trust, it held that the appointments of Larona and Roenne were not valid because Ghirlandina was not yet the protector. However Ghirlandina would be validly appointed as protector on submission by Mr Kaplan of a letter of resignation to Ghirlandina and Basel and the expiry of a 30 day period. Mr Kaplan subsequently took the relevant steps so that Larona, Roenne and Ghirlandina were validly appointed to their respective positions in relation to the Purpose Trust.

13 By letter dated 21st November, 2008, Basel gave notice that it would retire as a trustee of each of the Trusts with effect from 18th December, 2008. That duly took effect but, because of the *saisie*, the assets remained invested in Basel, albeit that the assets were for the most part in Switzerland and Costa Rica.

14 In the meantime Mr Kaplan had issued the *saisie* proceedings seeking the discharge of the *saisie*. The Royal Court delivered judgment in this matter on 29th April, 2009. It held that, as a matter of discretion, the *saisie* should be lifted because the assets were not in Jersey and nor were Larona and Roenne as the current trustees. Furthermore the US Government had obtained a freezing order over the assets in Switzerland and there was therefore no need for the continuation of the *saisie*. Following this decision, the assets of the Trusts, which had remained vested in Basel because of the *saisie*, were transferred to Larona and Roenne on 1st December, 2009.

15 Subsequently, on 23rd April, 2010, Equity was appointed as co-trustee of the Trusts with Larona and Roenne, who resigned on 30th September, 2010, leaving Equity as the sole trustee of both Trusts.

16 Equity has taken delivery of trust documents from Larona and Roenne in relation to both Trusts but has concluded that a large number of the records of both the Trusts and their underlying companies are missing. In particular, for present purposes, it noted that there was no record of the instructions to lawyers or legal advice received in relation to the validity proceedings or the *saisie* proceedings. There is no dispute that legal advice on these matters was taken by Basel and that it was at the cost of the Trusts. Indeed the total costs of legal advice are said to be in the region of $1 million.

17 Accordingly, Equity now seeks disclosure from Basel of the legal advice and the instructions giving rise to that advice in relation to those two matters ("the Legal Advice").

The Law

18 It seemed from the parties' skeleton arguments that there was no agreement as to the law dealing with the duty of a retiring trustee to hand over documents and information to an incoming trustee. In particular, Equity appeared to be arguing that it was entitled to see the Legal Advice and that the Court had no discretion in the matter. However, that stance was not maintained and ultimately there was little between the parties as to the applicable test; the differences lay in its application to the facts of this case. Nevertheless, there appears to be little authority on the topic and accordingly we propose briefly to set out our views as to the legal position.

19 Article 34(1) of the Trusts (Jersey) Law 1984 ("the 1984 Law") provides as follows:-

> ***"(1) Subject to paragraph (2), when a trustee resigns, retires or is removed, he or she shall duly surrender trust property in his or her possession or under his or her control."***
>
> In turn, ***"trust property"*** is defined in Article 1(1) of the 1984 Law as meaning ***"the property for the time being held in a trust"***.

20 Equity argued in its skeleton that legal advice obtained at the cost of a trust was "trust property" and that accordingly a retiring trustee was obliged to hand it over to his successor under Article 34(1). There was no discretion in the Court.

21 During the course of the hearing, Advocate Harvey-Hills retreated from this position and accepted that the Court had a discretion. We think that he was right to do so. In our judgment, the expression "trust property" refers to the assets in the trust which are being held for the benefit of the beneficiaries and may be paid or applied for their benefit. It is not possible to distribute legal advice; it is simply something which is obtained by a trustee in order to help him in connection with the administration of the trust. This is so even where the legal advice is paid for out of the trust property.

22 One must therefore revert to general principles of trust law in order to ascertain the nature of a trustee's duty to pass on legal advice to his successor as trustee.

23 One starts from the position that a successor trustee is stepping into the shoes of a retiring trustee. He is assuming the same duties as the retiring trustee towards the beneficiaries. He is therefore on the face of it entitled to be placed in the same position as the retiring trustee so far as possible. Thus, if the retiring trustee has information or documents about the administration of a trust, he must normally make these available to the incoming trustee.

24 In *Ogier Trustee (Jersey) Limited -v- CI Law Trustees Limited* [2006] JRC 158, noted at [2006] JLR N 35, I summarised the position as follows at paragraph 7:-

> ***"On the transfer of a trusteeship the outgoing trustee is under a duty to co-operate fully and actively in the transfer by making all relevant documents and correspondence available promptly to the incoming trustee and by providing any explanation to questions reasonably raised by the incoming trustee."***

This was an *ex-tempore* judgment and no authorities were cited to the Court on that occasion. Nevertheless, having had the benefit of argument in this case, the Court sees no reason to depart from what was said there.

25 Although one starts from a presumption that an incoming trustee should be placed in just as good a position in all respects as the outgoing trustee, nevertheless the Court has, in our judgment, a discretion as to whether specific documents or information are to be supplied in a particular case. We say that for the following reasons:-

(i) The only case to which we were referred (apart from *Ogier Trustee*) which deals specifically with this issue, namely *Tiger -v- Barclays Bank Limited* [1952] 1 All ER 85 suggests that there is such a discretion, albeit that that observation is *obiter* because of the way in which the case proceeded before the Court of Appeal.

(ii) Given that the obligation of an outgoing trustee extends to providing explanations to questions asked by an incoming trustee, it seems to us important that there be some element of control as to the reasonableness of such requests for information. One can envisage a situation where an outgoing trustee is plagued with unreasonable requests. There must be a mechanism for resolving a dispute of this nature and the Court must therefore be able to adjudicate on whether a particular matter needs to be explained or not.

(iii) The existence of a discretion is consistent with the approach of the Privy Council in *Schmidt -v- Rosewood Trust Limited* [2003] 2 AC 709. That case was of course concerned with questions of disclosure to a beneficiary rather than to an incoming trustee, but the Privy Council made it clear that questions of disclosure were best approached as one aspect of the Court's inherent jurisdiction to supervise, and where appropriate, intervene in the administration of trusts. We see no reason why that approach is not equally applicable to issues as between retiring and incoming trustees.

26 In our judgment, the position is accurately stated in Lewin on Trusts (18th Edition) at paragraphs 23–97, 23–98 and 23–99 as follows:-

> ***"23–97 A new trustee is entitled to require the former trustee to deliver up to him all records, books and other papers belonging to the trust.*** He is also entitled to inspect and copy other papers (not belonging to the trust) in the

hands of the former trustees so far as they contain information relating to the trust. The papers to which he is so entitled include the minutes of meetings of the trustees and the internal memoranda of a corporate trustee and correspondence files.

23–98 We consider that the court may, in exercise of the trust supervisory jurisdiction, qualify the above rights of [a] new trustee to delivery up and disclosure in special circumstances. But we do not consider that the same restrictions apply as in the case of disclosure to and inspection by beneficiaries. A beneficiary, for example, is not normally entitled to a sight of documents concerning the trustees' exercise of discretions under discretionary trusts or fiduciary powers, but they contain precisely the kind of information which a new trustee may need to have from the former trustee to enable him to exercise the discretions in the light of what has been done before. The same applies to a settlor's letter of wishes.

23–99 The new trustee may need to approach a former trustee for information and explanations not apparent from the trust papers. The former trustee is, to the extent that the request for information or explanation is reasonable in the circumstances, under an obligation to supply the information requested, and he must take reasonable care that any information which he does supply is accurate."

27 Contrary to Advocate Thompson's submission, we do not consider that cases concerning disclosure to beneficiaries are likely to be of great assistance in relation to issues of disclosure by an outgoing trustee to an incoming trustee. The Court will quite often conclude that the interests of the beneficiaries as a whole point against disclosure of particular information or documents to a beneficiary. Examples of some of the considerations which may be relevant can be found in *Schmidt* at paragraph 67 and in the observations of Commissioner Clyde-Smith at paragraphs 11 and 15 of *A Settlement* [2011] JRC 109. However, most of such considerations are unlikely to apply as between incoming and outgoing trustee. For example, as mentioned by *Lewin*, the reasons for discretionary decisions are not usually disclosable to a beneficiary but will normally need to be disclosed to a new trustee. As already stated, the new trustee is, *prima facie*, entitled to be placed in just a good as position as the outgoing trustee in relation to all aspects of the administration of the trust.

28 In relation to legal advice obtained at the cost of the trust, this will often be disclosable to a beneficiary in any event (see paras 22–45 and 22–46 of *Lewin*). However, it is likely to be even more relevant for an incoming trustee to see legal advice obtained by a previous trustee as it may well be relevant for the future administration of the trust.

29 In summary, an outgoing trustee will normally be under a duty to hand over to an incoming trustee all documents and information which relate to the administration of the trust so as to enable the incoming trustee to fulfil his duties. However, the Court has a discretion to direct that documents or information not be supplied where satisfied, in its supervisory role, that

this is the appropriate course. The onus lies on the outgoing trustee to show why the normal rule should not be followed.

Application to the facts

30 Equity argued that it needed to see the Legal Advice for two reasons. First, it might well be of significant value and utility in the future administration of the Trusts. Equity should be aware of the contents of the advice so that the Trusts would not be in a position where, if similar issues arose again, they would have to take and pay for the same advice all over again. Secondly, as an incoming trustee, Equity was under a duty to satisfy itself that the Trusts had been administered in an appropriate manner with due regard to the interests of the beneficiaries. The legal advice had been extremely expensive and Equity was entitled to consider whether the expenditure on obtaining it had been properly and reasonably incurred.

31 Advocate Thompson argued that the first reason given by Equity could not possibly justify production of the legal advice. In relation to the validity proceedings, the Court had ruled on what was necessary for the appointment of protectors and trustees. The position was now quite clear; it mattered not what the legal advice to Basel had been. On any future retirement or appointment of protectors or trustees, it would only be necessary to look at the Court's judgment. Similarly, the *saisie* proceedings related to an unusual and one-off situation which could never recur. The advice was given in the context of that particular factual situation and could not be relevant for the future administration of the Trusts.

32 As to the second reason given by Equity, Advocate Thompson argued that the Court had ordered that Basel's costs should come out of the Trusts on the usual trustee indemnity basis. Thus Equity could not re-open that aspect. The sole issue would be as to quantum. As to that, the details as to quantum have been given some time ago to Larona and Roenne, neither of whom had raised any objection. It was too late now to seek to re-open that issue.

33 He went on to argue that the real concern in this case was that Basel and Mr Kaplan had parted on bad terms given the SAR and the litigation, which had had certain adversarial elements to it. Equity was represented by Advocate Harvey-Hills who had represented Mr Kaplan personally in relation to the *saisie* proceedings and the concern was that Equity was simply acting in the interests of Mr Kaplan so that, on receipt of the legal advice, he could seek to re-open matters and fight old battles all over again. In the absence of convincing reasons as to why the legal advice was required, the balance came down in favour of protecting Basel from unwarranted attack about historic matters.

Decision

34 Although the onus is on an outgoing trustee to show that a document or information is not reasonably necessary for an incoming trustee, Basel has satisfied us in relation to the first

of the arguments put forward by Equity. When pressed by the Court, Advocate Harvey-Hills was wholly unable to come up with any reason why the legal advice would assist in the future administration of the Trusts. The legal advice related to two very specific issues. In relation to the validity issue, the matter has now been authoritatively resolved by the decision of the Court and that decision will be the only necessary reference point in future. What Basel said to its lawyers or what its lawyers advised Basel is irrelevant now that the Court had given a fully reasoned judgment. In relation to the *saisie* proceedings, they were entirely fact specific and it is impossible to see that any advice in relation to those specific facts would assist on any future occasion, particularly given that neither Equity nor any of the beneficiaries are resident in Jersey so as to be subject to the 1999 Law.

35 However, in our judgment, Basel has failed to satisfy the burden of showing that the legal advice could not be of assistance in relation to the second ground relied upon by Equity, namely the need to satisfy itself that the Trusts have been properly administered. We understand the concerns put forward on behalf of Basel by Advocate Thompson referred to at paragraph 33 above, but substantial sums were spent on the legal advice and it is entirely proper for an incoming trustee to wish to satisfy itself that these sums were reasonably and properly incurred. We accept that the principle of Basel being reimbursed for its legal fees out of the trust fund cannot be questioned, but there may be issues as to quantum. The fact that an outgoing trustee is concerned that information provided may lead to (in its opinion, unjustified) action against it is not a reason to refuse provision of that information provided that it is otherwise properly and reasonably required. It makes no difference that in this case the information is being sought by the next but one trustee rather than the immediately following trustees (i.e. Larona and Roenne).

36 In all the circumstances Basel has failed to displace the burden which lies upon it and we order that it disclose the legal advice to Equity.