

Lincoln Trust Company (Jersey) Ltd (Trustee of the C Settlement) v JDC

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	18 September 2007
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Text

[2007] JRC 173

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Bullen **and** Clapham.

Between

(1) Lincoln Trust Company (Jersey) Limited (Trustee of the C Settlement)

(2) Russell Shelton Homer (as Trustee of the C Settlement)

(3) Mitchell Bisland Tulloch (as Trustee of the C Trust)

Representors

and

(1) JDC

(2) DDC

- (3) MEC
- (4) MDC
- (5) DMC
- (6) VJC
- (7) VLC
- (8) AWC
- (9) LC
- (10) SWC
- (11) ERC
- (12) JC

(13) Advocate S J Pearmain as a representative of the unascertained beneficiaries.
Respondents

Advocate R. J. Michel for the Representors.

Advocate F. B. Robertson for the Second Respondent.

Advocate C. J. Scholefield for the Third Respondent.

Advocate N. G. A. Pearmain as guardian ad litem of the Fifth, Sixth and Seventh Respondents and representative of the unascertained beneficiaries.

The other parties were not represented.

Authorities

Re H Trust [\[2006\] JLR 280](#).

The Deputy Bailiff

- 1 This is an application by Lincoln Trust Company (Jersey) Limited ("Lincoln"), Russell Homer and Mitchell Tulloch (together "the Trustees") for directions as to whether they should appear in certain divorce proceedings taking place in England between the second respondent ("the husband") and the third respondent ("the wife") and whether they should disclose certain information for the purposes of those proceedings. We gave our decision at the close of the hearing and now give our reasons.

The factual background

- 2 The C Settlement ("the Settlement") is a trust governed by the law of England. It was established by trust deed dated 8th February 1989 made between the first respondent ("the Settlor") as settlor and the Settlor and his two sons, namely the husband and the eighth respondent ("Andrew"), as original trustees. All parties were resident in England at the time and the courts of England were designated as the forum for administration of the trusts

under the trust deed. There have been various retirements and appointments of new trustees since then. In 1989 the original trustees retired and were replaced by Jersey trustees. Since then there have been further changes. Lincoln was appointed as a trustee on 5th February 2005 and Mr Homer and Mr Tulloch were appointed as additional trustees on 8th December 2006. The Trustees have exercised the power conferred on them by clause 15(c)(iii) to declare the forum for administration now to be that of the courts of Jersey.

- 3 The trust deed defined the beneficiaries as the 'Principal Beneficiary' (in turn defined as the Settlor), the children and remoter issue of the Principal Beneficiary and the spouses, widows and widowers of the Principal Beneficiary and issue. The Settlor has two children, namely the husband and Andrew. Andrew is married with three children (all minors) and the husband and the wife have four children, three of whom are minors.
- 4 Under clause 4 of the trust deed, the Trustees are given an overriding power of appointment in respect of the capital and income of the trust fund in favour of such one or more of the beneficiaries as they should think fit. However such power may only be exercised with the written consent of the Settlor. In default of such appointment the trust fund is held on the trusts set out in clause 5 of the deed.
- 5 On 2nd April 1992 the then trustees exercised their power of appointment under clause 4 irrevocably to create four separate funds. The first of these is known as 'David's Fund'. The husband is the life tenant of the income of David's Fund. He is also the sole discretionary beneficiary of capital. After his death his surviving spouse will benefit similarly. In both the husband's and his surviving spouse's cases, the Trustees may determine that some or all of David's Fund be held immediately on the trusts arising if the husband or (as the case may be) the spouse has died. After the death of the spouse, the capital will be held in equal shares for such of the husband's children as reach the age of 25 before the end of the trust period or are under that age and living at the end of the trust period.
- 6 Andrew's Fund was created on the same day and the trusts are in identical form save that they relate to Andrew and his immediate family rather than the husband and his immediate family. The sum of £150,000 was appointed to each of David's Fund and Andrew's Fund.
- 7 On the same date two further funds were created, David's Children's Fund and Andrew's Children's Fund. Each comprises an accumulation and maintenance trust for the relevant children. Thus neither the husband nor the wife are beneficiaries of David's Children's Fund.
- 8 What is left in the original settlement is known as the General Fund. In the events which have happened the Settlor is the life tenant of the income of the General Fund and during his lifetime the sole discretionary beneficiary of its capital. By a revocable deed of appointment dated 29th March 1994, the General Fund will be divided on the Settlor's death and will fall in equal shares into David's Fund and Andrew's Fund.

- 9 As can be seen, the husband and the wife are beneficiaries of David's Fund and of the General Fund. However they are not beneficiaries of David Children's Fund nor of Andrew's Fund or Andrew's Children's Fund.
- 10 The husband and the wife are getting divorced. A decree nisi was issued in June 2006 out of the Leeds County Court. However property matters have still to be resolved. The wife has obtained an order that Lincoln be joined as a party to the proceedings and Lincoln has been ordered to respond to a questionnaire dated 28th December 2006 seeking information about the Settlement. Mr Homer and Mr Tulloch have not yet been joined to the divorce proceedings.
- 11 It is in these circumstances that the Trustees seek the directions of the Court referred to at the beginning of this judgment.

Submission to the English jurisdiction

- 12 On a number of occasions the Court has had to consider applications by trustees for directions as to whether or not they should participate in overseas divorce proceedings. In *Re H Trust* [2006] JLR 280 the Court said this at 283:-

"12 Significant consequences may flow from a decision by a trustee of a Jersey trust to submit to the jurisdiction of the Family Division of the High Court or indeed any other court considering the matrimonial affairs of beneficiaries of a trust. Any order subsequently made by the Family Division would be made in proceedings to which the trustee had voluntarily submitted and in which therefore it had full opportunity to put forward submissions on the order which the court should make. It follows that the trustee would be in some difficulty in arguing subsequently before this court against the proposition that any order of the Family Division relating to the trust should be enforced without reconsideration of the merits of such order .

13 Conversely, if the trustee has not submitted to the jurisdiction of the Family Division, any order will not be enforceable in Jersey under the rules of private international law. On any subsequent application to this court to vary the trust so as to achieve the effect of any variation or other order made by the Family Division, this court would have complete discretion as to the course it should take .

14 In this respect, it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved.

Conversely, this court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This court's primary consideration is to make or approve decisions in the **interests of the beneficiaries**. It has, therefore, a very different focus from the Family Division .

15 It follows that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment of the beneficiaries of a trust when the primary focus of that court is the interests of the two spouses before it. It is more likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases, e.g. where all the trust assets are in England, it may well be in the interests of a trustee to appear before the English court in order to put forward its point of view because, by reason of the location of the assets, that court will be able to enforce its order without regard to the trustee or this court."

13 In this case the Trustees have sought advice from Mr Giles Richardson, chancery counsel in England. He has advised that this is one of those cases where it would be in the best interests of the Settlement and the beneficiaries as a whole for the Trustees to participate in the divorce proceedings. His opinion has been supplied to all the parties. The wife and Advocate Pearmain agree with counsel and the husband does not oppose such a course if this Court thinks it appropriate to authorise it.

14 We have concluded that this is indeed one of those comparatively rare cases where the trustees of a trust administered in Jersey should submit to the jurisdiction of the English divorce court. Our reasons are essentially as follows:-

(i) It is of the first importance that the County Court should be made aware of the fact that there are various different funds with different beneficial interests. Thus the husband and the wife only have any interest in two of the funds, namely David's Fund and (indirectly) the General Fund. Andrew's Fund and Andrew's Children's Fund are held exclusively for his side of the family and David's Children's Fund is held exclusively for the children of the husband and wife. Even in relation to the General Fund, it will be necessary to ensure that the court is fully aware that it was the Settlor who provided the assets, that he retains a life interest and that, at present, it will only be following his death that the husband and wife will have an interest through David's Fund. There will be a number of other matters which it will be important for the County Court to be fully aware of. We think that the best way of ensuring that this is the case is for the Trustees to appear through counsel who is well versed in trust matters, so that the necessary assistance can be provided to the County Court.

(ii) The Settlement is governed by English law and the beneficiaries are resident in England.

(iii) Although the assets in the General Fund would appear to be situated in Jersey, the major part in value of David's Fund (although we were only given historic values) would appear to be situated in England. Thus the former matrimonial home is owned by David's Fund as is 100% of the share capital of a company called A Limited and 42.5% of the share capital of a company called S Limited. These latter two companies are both registered in England and carry on their business in England. S Limited appears to be a company through which the husband carries on business and A Limited has acquired a portfolio of English properties.

(iv) It is clear that the tax position of the Settlement and the beneficiaries is not straightforward. It will be important for the County Court to be fully informed as to the taxation consequences of any order which it makes. The Trustees would be in the best position to produce impartial evidence in this respect and ensure that such matters are drawn to the County Court's attention.

- 15 We have of course borne in mind that, if the Trustees submit to the jurisdiction of the County Court, they will be subject to any orders of that court in relation to discovery and, as mentioned in *Re H Trust*, the Trustees would have some difficulty in seeking to oppose enforcement of any judgment in proceedings where they have participated. Nevertheless, for the reasons summarised above and described in more detail in counsel's opinion, we think that the best interests of the beneficiaries as a whole will be served by the Trustees appearing before the County Court in a neutral role to assist, intervene and make submissions as necessary in the interests of the Settlement and the beneficiaries as a whole.

Provision of information

- 16 Having directed the Trustees that they should submit to the jurisdiction and participate in the divorce proceedings, it follows that the Trustee should provide all information necessary to ensure that the County Court has an accurate picture of the position. However the Trustees should only disclose what is relevant to the matrimonial proceedings. The position in relation to Andrew's Fund and Andrew's Children's Fund is confidential to Andrew's side of the family and is of no relevance to the matrimonial proceedings between the husband and his wife, because neither of them nor their children are beneficiaries of Andrew's Fund or Andrew's Children's Fund. In the circumstances we direct the Trustees not to provide any information in relation to those two funds.
- 17 However, in relation to the General Fund (50% of which will pass to David's Fund on the death of the Settlor) and David's Fund itself, we think it important that the County Court should be fully informed of the picture and we authorise the Trustees to make full disclosure of any financial information necessary to ensure that this is the case. As to David Children's Fund, the husband and the wife cannot benefit from this fund but nevertheless we think it is

in the interests of their children that the financial position in relation to this fund should be made available to the County Court, so that it is aware of the assets which may be available to the children both presently and in the future. We therefore authorise the Trustees to make disclosure of the financial position of this fund.

- 18 We have been provided with a draft response which the Trustees intend to make to the questionnaire and, subject to a few changes which we suggested during the course of the hearing, we authorise the provision of the response. One particular change which we suggested was that the Trustees should do all they can to ascertain and disclose the full financial position of A Limited. Although the wife is a director of the company we were informed in her affidavit that she has had some difficulty in discovering what its assets are etc. It is an English company and the English court could no doubt take appropriate steps to ensure that the necessary information was forthcoming. Nevertheless, given that it is owned as to 100% by the Trustees, we think that the Trustees should do all they can to establish its financial position - this is of course information they should already know and have in their possession - and disclose this to the Court. In essence, having submitted to the jurisdiction with the intention of acting neutrally between the husband and the wife by way of assistance to the English court in fully understanding the position of the Settlement, it seems to us that the Trustees should assist as much as possible by disclosing all information which might reasonably be thought relevant to the issues before the County Court.
- 19 Finally, we would mention the following points. The husband did not object to the provision of information by the Trustees although neither he nor the other beneficiaries saw the draft response in advance of the hearing as this would have defeated the object of the hearing. However he did ask the Court to bear in mind the following points:-
- (i) He reminded us that letters of wishes were normally treated as confidential. This is of course correct. However he accepted that in this case the two letters of wishes had already been disclosed because they were in the possession of the husband and accordingly he did not object to formal disclosure by the Trustees of the same two letters of wishes, which are apparently the only letters.
 - (ii) He also reminded the Court of the principle that beneficiaries are not entitled to know the reasons for an exercise of discretion by trustees and that trustees do not normally have to disclose documents disclosing their reasons. We agree with the general principle but it did not appear to us that any of the documents (such as trustee minutes), which the Trustee proposes to disclose infringe this principle.
 - (iii) He submitted that letters between a beneficiary and the Trustees were confidential and should not be disclosed to other beneficiaries. We accept that the Court must always consider whether it is right to disclose correspondence between trustees and one beneficiary to another beneficiary but we think that, given the issues before the County Court, it is reasonable in this case for letters between the husband and the Trustees to be disclosed.

20 We are of course sitting as a court having supervisory jurisdiction over trusts. Our task is to consider whether it is appropriate to make disclosure having regard to the relevant principles of trust law concerning disclosure of information. Once the Trustees have submitted to the jurisdiction of the English County Court, they will be subject to any orders for discovery which that court may make in connection with the adversarial proceedings before it. The Trustees will of course have the opportunity to make submissions to the English court if they consider that applications for disclosure are being made which go beyond that which is necessary.

Conclusion

21 For the reasons given we authorise the Trustees to enter an appearance and submit to the jurisdiction of the Leeds County Court in connection with the divorce proceedings and we also authorise the Trustees to respond to the questionnaire in the manner proposed. We further authorise the Trustees to disclose to all the beneficiaries the letter from the Trustees' advocate seeking tax advice, the response of the tax advisers and the second part of counsel's second opinion which deals with that tax advice. We further order that the Trustees should be indemnified in the usual way as to their costs both in respect of these proceedings and in respect of the proceedings before the English county court. In that latter connection we authorise the Trustees to instruct English solicitors and junior counsel versed in trust matters. The costs of the Trustees in respect of both sets of proceedings are to be taken from David's Fund.