A v Roker Trustees (Switzerland) Ltd and Strachans SA ((in Liquidation)) and Grasselle SA and Philip Jepson Egglishaw

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Crill, Milner
Judgment Date:	05 July 2013
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Text

[2013] JRC 135

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Commissioner, and**Jurats Crill**and**Milner.

IN THE MATTER OF THE B TRUST

AND IN THE MATTER OF THE TRUSTS (JERSEY) LAW 1984 AS AMENDED

Between
A
Representor

and
Roker Trustees (Switzerland) Limited
First Respondent

and

Strachans SA (in liquidation)
Second Respondent

and

Grasselle SA
Third Respondent

and

Philip Jepson Egglishaw
Fourth Respondent

Advocate D. M. Cadin **for the Representor.**

Advocate A. D. Hoy **for the First and Third Respondents.**

Authorities

Service of Process Rules 1994.

Trusts (Jersey) Law 1984.

Royal Court Rules 2004.

In the matter of the Rabaiotti (1989) Settlement [2000] JLR 173 .

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

Spellson -v- George [1987] NSWLR 300 .

Trust — representation seeking disclosure of information from the respondents.

THE COMMISSIONER:

1 By his representation dated 11 th April, 2013, the representor seeks disclosure of information from the respondents in particular in relation to a substantial bank account in which he asserts a beneficial interest.

2 The background (which we set out in very broad terms) is taken from the representation and

supporting affidavits, the latter being the only evidence currently before the Court.

3 In or about 1986, offshore structures were set up for the representor and a business colleague into which a proportion of the royalties from films in which they had an involvement would be paid in consideration of an assignment of part of the copyright and distribution rights.

4 The structure set up for the representor underwent various changes in management and operational location until in or around 1995, when the predecessor of the second respondent, Strachans SA ("Strachans") started providing services. The principals behind Strachans were the fourth respondent, Mr Philip Jepson Egglishaw ("Mr Egglishaw") and Mr Philip de Figueiredo ("Mr de Figueiredo").

5 Revenue from the film copyright found its way into an account in Switzerland held by the third respondent, Grasselle SA ("Grasselle") with Corner Banca SA, which bank account was held by Grasselle as bare trustee for the first respondent Roker Trustees (Switzerland) Limited ("Roker") in its capacity as trustee of the B Trust which is governed by Jersey law. All of the trust documentation in relation to the B Trust was held by Strachans in Switzerland.

6 Roker, despite its name, is a Nevis incorporated company but it is a Strachans entity and it wholly owns Grasselle, which is a BVI incorporated company. In the bank account documentation we have seen, Grasselle declares the beneficial owner of the account with Corner Banca SA as the representor. Information provided by Strachans indicated that as of 30 th June, 2009, the account held a substantial amount.

7 In or around 2005, a new structure was proposed for the representor, which involved the appointment of the assets of the B Trust to a new trust, to be called the C Trust, governed by Californian law of which the representor's US attorney was to be the sole trustee; the C Trust would appear to be a bare trust for the benefit of the representor. An instrument of appointment and indemnity governed by Jersey law and a nomineeship agreement governed by English law, by which Grasselle held the bank account on bare trust for the C Trust, were executed by the representor's US attorney and sent to Strachans and its advisers on 30 th December, 2005. There is no record of copies of these documents being returned showing them to have been duly executed by Roker, Grasselle and the other parties to them. However from that point on, it would appear that Strachans and all those involved in the representor's affairs proceeded on the basis that the bank account was now held for the C Trust and accounting information was routinely provided to the representor and his advisors by Strachans on that basis.

8 Since 2010, the representor has requested, without success, copies of the bank statements for the bank account. In May 2012 the representor and his US Attorney met with Mr Egglishaw and his Swiss legal adviser Mr Paul Gully-Hart ("Mr Gully-Hart") of Schellenberg

Wittmer in Geneva to discuss the bank account but were not permitted sight of the bank statements. The reason put forward by Mr Egglishaw was that to do so created a risk of exposing him to money laundering or proceeds of crime charges.

9 It is the case that the Australian Crime Commission had commenced an investigation into the misuse of tax havens by Strachans and its clients including the representor. However in late 2010 the Australian Crime Commission abandoned its investigation into the affairs of the representor and he reached a *"without admission"* settlement over the government's civil claims. We pause to comment that even if in 2012 there remained a concern over the status of the funds in the bank account, we struggle to see how that would exonerate Roker from its duty to account for what it was holding; no such contention was made before us.

10 In the meantime Mr de Figueiredo had been arrested in Jersey in late 2009 and extradition proceedings commenced against him. He was extradited to Australia in December 2010 and pleaded guilty to conspiracy to defraud in October 2012 for which he was sentenced to 6 years' imprisonment. An Interpol warrant for the arrest of Mr Egglishaw has been issued and remains current.

11 Strachans continued to provide quarterly financial information (but not copies of the underlying statements) until October 2012, when Mr Gully-Hart wrote on the 9 th October, 2012, in the following terms:–

> *"We have recently reviewed the drafts of all documents which relate to the proposed C Trust.* This review has led us to conclude that the C Trust did not, in fact, assume ownership of the assets held by Grasselle; those assets remain owned by the B Trust.
>
> *Previous requests for quarterly balances have erroneously referred to C/Grasselle.* For some time our client's staff have provided the requested financial information without correcting the error, in the absence of any understanding of the correct legal position. They now understand the true state of affairs. Naturally, how the income is reported in the USA is a matter for your client and his advisers.
>
> *We would be grateful if you could ensure that your client's requests refer to the correct ownership entity, i.e. the B Trust.* Our client will of course endeavour to provide the information that is being sought."

12 This evoked an angry response from the representor's US Attorney but the position would appear to be that either the C Trust documents were not in fact executed by Roker, Grasselle and the other parties to them or some precondition had not been met (it is not clear which), but either way it would mean that the bank account remained an asset of the B Trust.

13 In November 2012, the representor's US attorney (as trustee of the C Trust) instituted proceedings in the State of California against Strachans, Grasselle and Mr Egglishaw in an attempt to obtain information regarding the bank account and to prevent those respondents from dissipating the trust assets. The proceedings were dismissed for, amongst other reasons, the court determining there to be a lack of personal jurisdiction over those respondents.

14 The representor remains, however, a beneficiary of the B Trust but despite repeated requests he does not have copies of the trust deed or instrument or of any other formal trust documents or of the trust accounts and in particular, copies of the bank account statements. He requires this information not only as a beneficiary seeking to hold his trustee to account but also to properly make his US tax returns and avoid being in breach of US law. On the case presented to us there has been a wholesale refusal by Roker to account to him.

15 The representor is concerned that this failure to account may mask a misappropriation of the funds in the bank account.

Process to date

16 On 16 th April, 2013, the Court convened Roker, Grasselle, Strachans and Mr Egglishaw to the representation and gave leave to serve summonses out of the jurisdiction for their appearance before the Court on 1 st July, 2013. Roker and Grasselle were to be served by ordinary post and, on the advice of the representor's Swiss lawyers, Strachans and Mr Egglishaw through official channels, namely in accordance with Article 3 of the Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters (the “Hague Convention”). The transmission of documents under Article 3 of the Hague Convention is governed by Section 13 of the Service of Process Rules 1994 which provide that documents for service must be lodged with the Bailiff's office for stamping and sealing and will then be forwarded to Her Majesty's Secretary of State for the Home Department for transmission to the foreign country.

17 Miss Jessica Jane Bermingham, an English solicitor at Bedell Cristin, explains in her affidavit of 26 th June, 2013, how she has tried to track the progress of the documents in a route which she described as highly protracted. The documents have to pass from the Bailiff's office to the Lieutenant Governor, to the Ministry of Justice in London, to the Foreign and Commonwealth Office in London, and then, as she understands it, to the Ministry of Foreign Affairs in Switzerland (the Federal Office) possibly via the Ministry of Justice in Switzerland and then ultimately to the Ministère Publique in Geneva for service. It would appear that at least six months should be allowed for this process but it was clear that the documents had not reached the Ministère Publique in time for service to be effected for the hearing on 1 st July, 2013. Apparently the way the Hague Convention operates it will now be necessary for a new summons and Act of Court to be issued and served and, adopting a cautious approach, a new hearing date of January next year would need to be proposed in

respect of these respondents.

18 At the request of the Court Miss Bermingham has sworn another affidavit explaining in detail why service in this way was required in this case. Time does not permit us to set out that explanation in full but suffice it to say that they were advised by their Swiss lawyers that under Swiss law service under the Hague Convention operates to the exclusion of all other methods of service of foreign proceedings in Switzerland and any attempt to do otherwise could lay the representor or his advisors open to criminal charges under Article 271 of the Swiss Criminal Code. We do not know how widespread such protective provisions are internationally but it makes convening Swiss residents to foreign proceedings very difficult and impossible in any case involving urgency.

19 The representor has decided at this stage not to attempt service through this tortuous route again with the further substantial delays that will entail but to seek orders against Roker and Grasselle. At the hearing on 1 st July, 2013, the order sought was that Roker and Grasselle should jointly and severally make available or procure that Strachans and Mr Egglishaw make available to the representor's legal representatives for inspection and copying the information detailed in a schedule by noon on 22 nd July, 2013. The schedule is in the following terms:–

"SCHEDULE

1. The trust accounts of the B Trust from inception of the B Trust to the date hereof;

2. The trust accounts of the C Trust from inception of the C Trust to the date hereof;

3. The trust accounts relating to the bare trust(s) between the B Trust and/or the C Trust and Grasselle from inception of the same to the date hereof;

4. Without prejudice to the generality of the foregoing the term "trust accounts" shall include all documents, accounts and records (electronically held or otherwise) comprising:

(a) all original and supplemental trust deeds relating to the B Trust and/or the C Trust;

(b) all documents relating to the establishment (whether purported or otherwise) of the C Trust;

(c) all statements and records held for the bank account at Corner Banca SA, Switzerland in the name of Grasselle (the "Bank Account");

(d) all accounting records whether in the form of accounts, ledgers,

bank statements, correspondence or otherwise, and including all such information for any underlying companies, as may be required in order to give a full account of all dealings with the trust assets and the Bank Account from inception of the said trust arrangements to date hereof."

Submissions of Roker and Grasselle

20 Mr Hoy appeared for Roker and Grasselle. He had been instructed by Roker some two weeks ago and by Grasselle over the previous weekend. He did not seek to challenge the service of the proceedings upon Roker out of the jurisdiction or the Court's jurisdiction over it, accepting that under Article 5 of the Trusts (Jersey) Law 1984 the Court has jurisdiction where the trust is a "Jersey trust". He had been instructed to present whatever arguments for Roker appeared to him from the papers. He appeared to have been given no other instructions and was not able to assist the Court in any way in its supervisory role over the B Trust. Implicit however in his position was an acceptance on behalf of Roker that the B Trust existed, was governed by Jersey law, that the representor was a beneficiary entitled to require Roker to account and that the bank account was still held by Grasselle as its nominee.

21 He had, however, been instructed by Grasselle to challenge both the order giving leave to serve proceedings out of the jurisdiction upon it and the Court's jurisdiction over it. The application for leave to serve out of the jurisdiction had been made under Rule 7(j) of the Service of Process Rules 1994 which provides that service out of the jurisdiction of a summons may be allowed by the Court whenever:–

"(j) the claim or application is brought within the terms of Article 5 of the Trusts (Jersey) Law 1984."

There was, he said, no evidence before the Court that Grasselle was a trustee of a Jersey trust. On the representor's case, Grasselle was a BVI company which held a bank account situated in Switzerland on bare trust for Roker. The nominee agreement between Grasselle and Roker did not contain a proper law clause and the jurisdiction with which it was most closely associated was Switzerland.

22 Rule 6/7 of the Royal Court Rules 2004 provides that where a party wishes to dispute the jurisdiction of the Court, then on the return date fixed for appearance before the Court he could ask the Court to order that the proceedings be placed on the pending list and not later than 28 days thereafter, apply to the Bailiff in chambers for a date to be fixed for the hearing of that challenge, on one or more of the grounds set out in Rule 6/7(4). These proceedings had of course been commenced by way of representation but under Rule 6/37 of the Royal Court Rules the procedure to be followed was at the Court's discretion.

23 Mr Cadin accepted that Grasselle was entitled to have its challenge to the Court's

jurisdiction properly heard and determined on the basis that this would not prevent the Court from making orders against Roker over whom the Court's jurisdiction was clearly established. We agree and on the basis that the 1 st July, 2013, was the first return date will allow Grasselle 28 days from that date to apply to the Bailiff in chambers for a date to be fixed for the hearing of one or more of the applications mentioned in paragraph (4) of Rule 6/7. That application must be made by summons which (a) states grounds of the application; and (b) is supported by an accompanying affidavit verifying the facts upon which the application is based. If Grasselle fails to make the application within the time specified, it shall be deemed to have submitted to the jurisdiction of the Court in these proceedings.

24 In relation to Roker Mr Hoy submitted that A's case was premised upon the assertion that Roker was trustee in name only; that Grasselle and Mr Egglishaw were the true controllers of the B Trust acting as *de facto* trustees. He pointed to the affidavit of 9 th April, 2013, of Andrew George Robinson, the solicitor acting for the representor, who stated at paragraph 21 that any order the representor managed to obtain against Roker and Grasselle for disclosure of trust documents would be "useless unless backed by similar orders against Strachans and Egglishaw. Enforcement of an order against Roker in Nevis and Grasselle in BVI would be a dead end road …. It is clearly Strachans and Egglishaw who have control of the trust account information and are in a position to provide this."

25 That being the case, Mr Hoy submitted that before making any orders for disclosure against Roker and Grasselle, the Court should await the proper joining in of Strachans and Mr Egglishaw, so that orders could be made against the " *de facto"* trustees. In the context of these proceedings, he said that Roker and Grasselle " *had no body to kick or soul to damn"*. There were no documents in Nevis that Roker could hand over as a corporate entity. He informed us that the directors of Roker were themselves corporate entities, namely Hadrian Directors Limited and San Creno Secretaries Limited, both Nevis incorporated companies. Mr Hoy has subsequently informed the Court that his instructions come from Mr Egglishaw either directly or through Mr Egglishaw's Australian lawyers; it is Mr Egglishaw therefore who is the "mind" of Roker.

26 Finally Mr Hoy submitted that if the Court was minded to make a disclosure order it should be limited to the production of the bank account statements.

Legal principles

27 In the case of *In the matter of the Rabaiotti (1989) Settlement* [2000] JLR 173, it was held that the starting point in terms of disclosure to beneficiaries is the presumption that they are entitled to see trust documents, including the trust deed, the accounts, bank statements, portfolio valuations and generally documents which show how the assets have been dealt with. Quoting from paragraph 67:–

"A beneficiary is normally entitled to inspect trust documents such as the

trust deed and documents which show the nature and value of the trust property, the trust income and how the trustees have been investing and distributing the trust property."

28 In *Schmidt -v- Rosewood Trust Limited* [2003] 2 AC 709, the Privy Council held that although a beneficiary's right to seek disclosure of trust documents could be described as a proprietary right, it was best approached as one aspect of the court's inherent and fundamental jurisdiction to supervise and if appropriate, intervene in the administration of a trust, including a discretionary trust. The case refers to situations of personal or commercial confidentiality where the trustee may need to balance competing interests. There would not appear to be any competing interests here; the representor is simply trying to ascertain how the trust assets have been dealt with since inception and obtain information for use in filing his own tax returns.

29 In *Schmidt -v- Rosewood*, the Privy Council approved the judgment of Powell J in *Spellson -v- George* [1987] NSWLR 300 at pages 315–316, the whole of which it said merited study. The Privy Council quoted this passage:–

"At the risk of being regarded as overly simplistic, it is as well to start with the fundamental proposition that one of the essential elements of a private trust, be it a discretionary trust or some other form of trust, is that the Trustee is subject to a personal obligation to hold, and to deal with, the trust property for the benefit of some identified, or identifiable, person or groups of persons."

The judgment of Powell J goes on to say:–

"It is, so it seems to me, a necessary corollary of the existence of that obligation that the Trustee is liable to account to the person, or group of persons for whose benefit he holds the trust property … and, that being so, the Trustee is obliged not only to keep proper accounts and allow a cestui que trust to inspect them, but he must also, on demand, give a cestui que trust information and explanations as to the investment of, and dealings with, the trust property."

The obligations of a trustee are therefore clear. As a corollary of its obligation to hold and deal with the trust property for the benefit of the beneficiaries, it is liable to account to them by the provision of information and explanations.

Decision in respect of Roker

30 We proceed on the basis that Roker is the trustee of the B Trust, that the representor is a beneficiary and that, as stated by Strachans in 2012, the bank account is still held by its wholly owned company Grasselle as bare nominee for it. Roker has not sought to argue to the contrary.

31 The duty of Roker to account to the representor as a beneficiary for its stewardship of the trust assets goes to the core of the trustee/beneficiary relationship. It is fundamental and it is a duty that the Court will enforce vigorously.

32 It would seem that Roker has no presence in Nevis but is a corporate vehicle used by Strachans to provide trusteeships. The “mind” of Roker will be the relevant principals of Strachans; in this case Mr Egglishaw. Whatever the actual arrangements in place, Roker is the trustee and it cannot avoid its obligations as trustee by seeking to hide behind those who may control it. We unhesitatingly reject the submissions made by Mr Hoy as being wholly without merit.

33 Subject to the points we make below, we will order Roker to provide or to procure the provision of the documentation sought by the representor under pain of contempt. Turning to the orders sought by the representor:–

> (i) In view of the slight delay in handing down this judgement we are going to extend the deadline for compliance to close of business on the 29th July, 2013.
>
> (ii) Roker was not trustee of the C Trust, to the extent that trust ever existed, and whilst Strachans and Mr Egglishaw may have information in relation to it, Roker, as trustee of the B Trust, would have no obvious access or right to it. We are not therefore prepared to order Roker to provide information in relation to the C Trust.
>
> (iii) We are conscious that paragraph 4(d) of the schedule produced by Mr Cadin is drawn in very wide terms and involves the production of information going back to the inception of the B Trust in 1995. In addition to a general liberty to apply we are therefore going to give Roker a specific liberty to apply for an extension of time for it to comply with paragraph 4(d) provided that:–
>
> > (a) any such application is made before 29th July, 2013, and
> >
> > (b) the application is supported by an affidavit setting out in detail what steps Roker has taken to comply with all of the orders made for disclosure against it and what steps need to be taken and the timeframe required for compliance with paragraph 4(d).

34 Thus in relation to Roker, the order of the Court is that it shall make available or shall procure that Strachans, Grasselle and Egglishaw shall make available to the representor's legal representatives (for the avoidance of doubt those legal representatives include any of Bedell Cristin — Jersey, Lenz & Stachelin — Geneva and Robinson Legal — Sydney) for inspection and copying the information detailed in the schedule below by close of business on the 29 th July, 2013, on pain of contempt:–

> *“SCHEDULE*

1. The trust accounts of the B Trust from inception of the B Trust to the date hereof.

2. The trust accounts relating to the bare trust between the B Trust and Grasselle from inception of the same to the date hereof.

3. Without prejudice to the generality of the foregoing the term "trust accounts" shall include all documents, accounts and records (electronically held or otherwise) comprising:–

(i) all original and supplemental trust deeds relating to the B Trust.

(ii) all statements and records for the bank account held at Corner Banca SA, Switzerland in the name of Grasselle or such other bank account or accounts as may have succeeded it ("the Bank Account").

(iii) all accounting records whether in the form of accounts, ledgers, bank statements, correspondence or otherwise, and including all such information for any underlying companies as may be required in order to give a full account of all dealings with the trust assets and the Bank Account from inception of the said trust arrangements to the date hereof."

35 Roker shall have liberty to apply for an extension of time for its compliance with paragraph 3(c) of the Schedule, provided that (a) any such application is made before the 29 th July, 2013, and (b) the application is supported by an affidavit setting out in detail what steps Roker has taken to comply with all of the orders made for disclosure against it and what steps need to be taken and the timeframe required for compliance with paragraph 3(c).

36 Roker shall pay the costs of and incidental to this application on an indemnity basis to be taxed if not agreed.

37 The representor shall have leave to disclose to such person or persons (whether parties hereto or not) such copies of and/or such of the contents of the representation, the affidavits in support and any orders made in these proceedings as he thinks fit to facilitate enforcement of this order.

38 The representation shall be adjourned generally to 18 th September, 2013, at 2:30pm with liberty to apply in chambers to fix an earlier date should one become available.

39 There shall be liberty to apply generally.

40 Even with these orders the Court is deeply troubled by this failure to account by the trustee of a Jersey trust. Roker is a corporate vehicle clearly controlled by Mr Egglishaw and on his

instructions it has appeared before us with the sole aim of delaying any order for disclosure that may be made. Roker's conduct inevitably creates suspicion as to its motives and the motives of those who control it. What had happened to the monies in the bank account? What withdrawals have been made? Have funds been misappropriated?

41 Until such time (at least) as full disclosure is achieved, as surely it will be, we are minded in our supervisory capacity to order that Roker shall not make and shall procure that Strachans and Egglishaw or any other person shall not make any withdrawals from the bank account of any kind and for any purpose without the prior written consent of the representor or his advisers or without the leave of the Court. Having jurisdiction over Roker as we do, the effect of this will be to make any such withdrawals not only a breach of the Court's order but an actionable breach of trust. To the extent, for example, that Mr Egglishaw may have used these funds in the past to pay the legal fees of his Swiss and Australian advisors, then any further payments to such advisors from that source will render them liable to account. Before making such an order we will first hear from counsel when this judgement is handed down.