MacKinnon v The Regent Trust Company Ltd

Jurisdiction:	Jersey
Judge:	F.C. Hamon, O.B.E., Jurats Georgelin, Morgan
Judgment Date:	25 April 2005
Neutral Citation:	[2005] JRC 55
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Court:	Royal Court
Date:	25 April 2005

Text

[2005] JRC 55

ROYAL COURT

Before:

F.C. Hamon, **Esq.**, O.B.E., **Commissioner, and** Jurats Georgelin **and** Morgan.

IN THE MATTER OF

an appeal by the Plaintiff/APPELLANT against the Order of the Royal Court of 6th December, 2004, whereby the Royal Court ordered that certain paragraphs of the Plaintiff/APPELLANT's Order of Justice be struck out as disclosing no reasonable cause of action.

Andrew Kinross MacKinnon
Plaintiff/ APPELLANT
and
The Regent Trust Company Limited
First Defendant/ RESPONDENT

and

Kenneth James MacKinnon
Second Defendant

and

Elizabeth Victoria MacKinnon (née Sharman)
Third Defendant

and

Sebastian James MacKinnon
Fourth Defendant

and

Benjamin Thomas Skok MacKinnon
Fifth Defendant

and

Thomasin Anne Skok MacKinnon
Sixth Defendant

and

Sophie Linda Skok MacKinnon
Seventh Defendant

and

Alistair Kinross MacKinnon
Eighth Defendant

and

Ian James MacKinnon
Ninth Defendant

Advocate N.M. Santos Costa **for the Plaintiff/ APPELLANT**.

Advocate J.P. Speck **for the First Defendant/ RESPONDENT**.

Advocate C.G.P. Lakeman **for the Second, Third, Eighth and Ninth Defendants**.

Advocate M.L. Preston **for the Fourth to Seventh Defendants**.

No Authorities

Application to approve an agreement between the Plaintiff/APPELLANT and the First Defendant/RESPONDENT and to amend the Order of Justice accordingly.

JUDGMENT.

THE COMMISSIONER:

1 The Regent Trust Company is the Trustee of three discretionary Trusts each of which is expressed to be governed by Jersey Law.

2 We do not need to enter into the complexity of the Trust structures. The Trusts are known as the Mrs D.E. S Mackinnon 1981 Settlement the Mrs D.E.S. Mackinnon 1998 Settlement and the Mrs D.E.S. Mackinnon 1999 Settlement. It will be seen that the Trusts have been administered by the Trustee for over 20 years.

3 The beneficiaries of the trusts were identical. They are Kenneth James Mackinnon (the son of the settlor) and his wife, Andrew Kinross Mackinnon (the other son of the Settlor), Andrew's four children and James' two children.

4 Matters came to a head on the 29 th May, 2003, when the Trustee issued a Representation in relation to the administration of the Trusts. The proposals were far-reaching. It was proposed that Andrew be revocably excluded from benefit under the 1981 Trust and the 1998 Trust. There would be an appointment of a portion of the shares held under the 1999 Trust to the 1981 Trust. James and his issue would be revocably excluded as beneficiaries from the 1999 Trust and after the appointment the Trustee would resign as a trustee of the 1999 Trust.

5 It was at the summons for directions on the 14 th October, 2003, in the Trustee's representation that the attack came. It was totally unexpected, Andrew swore an affidavit in which he said (*inter alia*):

> *"I make this affidavit in support of an application that the Representation be stayed pending the issuance and resolution of proceedings attacking the validity of one or more of the Trusts for the reason that they are shams and/or, in the case of the 1981 Settlement for the reason that it is in breach of the maxim of Jersey customary law known as "donner et retenir ne vaut"".*

6 The Order of Justice followed on 12 th December, 2003 and the Trustee (perhaps not unnaturally) took the view that the Order of Justice amounted to an attack on its integrity.

7 It is in our view regrettable that the Trustee did not make a Beddoes application. It is a fact that it did not but it chose to defend the action.

8 On 25 th February, 2004 the trustee issued three interlocutory applications including one which contained an application that various paragraphs of the Order of Justice be struck out.

9 The fourth, fifth, sixth and seventh defendants filed an answer on 28 th May, 2004.

10 The Master heard the matter on 27 th May and he delivered judgment on 29 th June, 2004.

11 The Master, feeling that the law was “uncertain and developing” declined to strike out.

12 The Trustee served its Answer on the 27 th July and James on the 9 th August 2004.

13 The Trustee appealed and Sir Philip Bailhache, sitting alone, gave a detailed judgment on the facts and law which was delivered on 6 th December, 2004. The only counsel represented were Advocate Speck for the Trustee and Advocate Santos-Costa for the Plaintiff.

14 Without in any way commenting on the decision of the learned Bailiff (for the matter is to come before the Court of Appeal) it is useful to set out the final two paragraphs of the judgment:

> ***“46. For all these reasons, and having had the benefit of rather fuller argument than the judge below, I respectfully differ from the conclusion at which the learned Master arrived. I do not think that this is “an uncertain and developing field of law”. The law relating to sham trusts was exhaustively examined by Birt, Deputy Bailiff, in Esteem and conclusively determined. I reject the contention that there is broad jurisdiction vested in the Court allowing it to look behind a trust deed in order to determine the subjective intentions of a settlor and to set aside the terms of a trust deed if those subjective intentions differ from the express trusts. Subject only to established causes of action, none of which is pleaded in this Order of Justice, the intentions of a settlor must be ascertained from the trust deed.***
>
> ***47. The trustee's appeal is accordingly allowed and the relevant paragraphs of the Order of Justice are struck out as disclosing no reasonable cause of action.”***

15 The matter did not end there. In this developing internecine war Andrew served his Notice

of Appeal against the Bailiff's judgment. This was on the 5 th January, 2005.

16 On the 28 th February, 2005, the Court of Appeal (and all the parties were represented) adjourned the appeal to the week beginning 16 th May and directed that a "hearing (limited to not more than half a day) was to take place (If necessary) not later than the 30 th April, 2005.

17 It is for this reason that we sat to hear argument. Again, all the parties were represented. The skeleton argument of James Mackinnon was handed up to us (and to the other parties) during the course of the afternoon hearing (at 20 minutes past 3 o'clock).

18 Advocate Speck (for the Trustee) handed up to us an agreement which was, of course, subject to Court approval. It has been made on the 13 th April between Andrew MacKinnon (the Plaintiff), the Trust Company (with its three directors) and the Plaintiff's adult children.

19 The objection to the Agreement came forcefully from Advocate Lakeman acting for James Mackinnon and the other defendants (the wife and adult children of Kenneth).

20 It should be pointed out that the original Answer of Kenneth and "his defendants" filed on the 9 th August is not resting " *à la sagesse de la Cour"*. It runs to 164 paragraphs and is very detailed. It does not blindly follow the Answer of the Trustee, though it's arguments are often similar.

21 Again, it is not for us to comment on the merits or demerits of any of the arguments.

22 The Agreement which the Court is asked to sanction essentially allows Andrew to withdraw his claim against the Trustee. The background is well expressed on the 3 rd March, 2004 in a letter from Mourant (The Trustee) to Crill Canavan (Andrew) which states at its third paragraph :

> *"We find the contents of paragraph 4 of your letter confusing and inappropriate.* We cannot see how our client could, on the one hand, have an identity of interest with James and, on the other, be expected to take a neutral stance in response to you client's claims. Moreover, the purpose of an application for directions as per *Alsop Wilkinson v Neary is of course to provide the Trustee with pre-emptive costs protection.* Our client has sought no such protection because it takes the view that none would be forthcoming unless it adopted a neutral stance. This it is unprepared to do when the conduct of its personnel over a period of some 20 odd years is comprehensively impugned in your client's Order of Justice. Before you may properly "expect" our client to adopt a neutral stance, we would expect the Order of Justice to be substantially amended to remove any criticism of it and its personnel."

23 The exchange of correspondence is described by Mourant's as “vitriolic” and the letter of 12 th January, 2005, from Crill Canavan (“Andrew”) to James' lawyer is in the mould:

> *“It would be wholly inappropriate for Regent Trust Company to have any part in a mediation of the fundamental issue between Andrew and James.* It come as no surprise that James is desperate to have Regent on his side in the suggested mediation nor indeed that Regent are just as desperate to influence its outcome. Regent has nothing to offer or contribute in the matter.
>
> *This proposal and Mourant's preposterous suggestion in its letter of 23rd December, 2004, that Regent could perform some sort of “middle man” function, indicates to us that Regent's entire rôle in these proceedings should be reviewed.*
>
> *Regent is merely the present successor trustee to Salamis.* There are no claims against Regent personally; it was made a defendant to the Order of Justice solely in its capacity as trustee and merely to ensure that orders can be made against it (essentially, to account to the rightful owner of the assets). It has no personal interest in the outcome of the proceedings, that is to say, in the assets of the three trusts. Its stated position is that it and its personnel have been “comprehensively impugned” but this is not true; Regent barely figures in the factual allegations and none of its personnel in their capacity as such have been criticised at all. Why, therefore, it has chosen to take sides in the matter and, in doing so, risk hundreds of thousands of pounds in costs, is a mystery to us. Of course, in doing so, it has enabled James to adopt a completely parasitic role in these proceedings, providing him with an immense saving in costs.”

24 We must repeat that, in our view, James and “his defendants” were not “parasitic”, nor were they entirely “riding on the Trustee's coat tails”. As is said in the skeleton argument of the second, third, eighth and ninth defendants (James, his wife and their Children): “ *The second defendant has played a lesser role in the litigation*.”

25 The second defendant upheld the attitude of the Trustee. It was right to attempt to strike out parts of the Order of Justice and to appeal the Master's decision to refuse to do so. All of this (according to the second defendant) required an enormous amount of work. It required the second defendant (this is his argument) and his family to work with the trustee to ensure that the consequences which might flow from allegations of sham etc. did not occur, including re-calculating the value of the estate to potential tax.

26 It is clear that the arguments that will have to be advanced in the Court of Appeal are not unknown to the Second Defendant.

27 Advocate Lakeman objected, on behalf of James, to the Agreement being approved. He argued that James felt that the trustee having taken what he deemed “an aggressive

judgment call" was now suddenly reversing the position. He felt that there had been a massive change since the draft agreement was notified to the second defendant in February 2005.

28 That point is covered in the Affidavit of Graham Arthur Huelin, a director of the Regent Trust Company, handed to us in the Bundle for the hearing but which does not appear to have been sworn.

29 He says at Paragraph 78 of his Affidavit:

> *"Although James and his advisors have seen one of the working drafts of the Agreement, I confirm that until now, he has not seen the most recent draft.* I am informed and believe that James feels abandoned by Regent which, hitherto, has robustly defended Andrew's allegations."

30 Advocate Lakeman took exception to various paragraphs of the signed Agreement which was, of course, signed subject to this Court's approval. By Clause 4 "Regent will not pursue its entitlement to security for costs."

31 We can deal with that part later in the judgment. We are more troubled by Clause 12 of the agreement. The case, if it comes to Court, will turn on the "sham" aspect of the trusts.

32 There does seem to be a conflict within this clause which may become painfully apparent if any of Messrs Pirouet, Schindler and Nutbrown are called to give evidence. How will the Court view evidence given on oath if, when a question is asked, they are precluded from answering because of the signed agreement? We have no idea (having come to this matter at very short notice) what "dealings (including communications)" are in the forefront of the parties minds, particularly when the wording is "in relation to or in connection with the 1981, 1998 or 1999 Settlements of the assets purportedly settled thereon or otherwise howsoever" (our underlining).

33 Despite the forceful arguments of Advocate Lakeman it is in the interests of all parties to allow the agreement. We approve it but without the inclusion of Clause 12. We are of course prepared to hear further argument on this point alone.

34 We do not agree that the amended Order of Justice needs to go before the Master. We have the prepared amendments marked in red before us. We have initialled each page of the amended Order of Justice to show our acceptance of it.

35 Advocate Lakeman strenuously argued that he only had to the 16 th May, 2005, to prepare his case before the Court of Appeal, he does not come to it (as we have done) " *de novo"* and the Trustee has undertaken to provide him with all possible documentation. That must

of course be done, without delay.

36 We turn now to the question of costs. Andrew (who started this action) has borne his own costs to date; the Trustee will bear the costs of the action whereby its directors were impugned but the Trustee requires indemnity costs back to the time when (had the impugning not been made) it would have applied to Court and been given authority to defend with the usual costs order.

37 We have sympathy with the Trustees but we will reserve any costs order until the Court of Appeal has made its decision in May.