Hhh

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	15 December 2011
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Text

[2011] JRC 235

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Commissioner., sitting alone**.

IN THE MATTER OF HHH TRUST

AND IN THE MATTER OF THE A FUND

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

Between
B
Representor

and

C

First Respondent

D

and

E

Second Respondent

Advocate A. D. Hoy **for the Representor**.

Advocate R. J. MacRae **for the First Respondent**.

Advocate E. C. P. MacKereth **for the Second respondent**.

Authorities

Trusts (Jersey) Law 1984.

Schmidt -v- Rosewood Trust [2003] UKPC 26 .

Spellson -v- George (1987) 11 NSWLR 300 .

Underhill and Hayton Law of Trusts and Trustees 18th Edition.

In Re C Settlement [2002] JLR 312 .

In Re Internine and Azali Trusts [2006] JLR 195 .

Lewin on Trusts.

Crowe -v- Stevedoring Employees' Retirement Fund (2003) PLR 353 .

Re Londonderry's Settlement (1965) 1 Ch 918 .

Trust — directions in relation to disclosure and other matters.

THE COMMISSIONER:

1 I sat on the afternoon of 30 th November, 2011, to give directions in relation to this matter in which the Representor ("B") seeks disclosure of information from the settlor (the second respondent, which I will refer to as "E") and the current trustee (the first respondent, which I will refer to as "C") of the HHH Trust, of a sub trust created under it on 18 th February, 2000, ("the B sub trust") and of other sub trusts created under it. B was an employee of E until 2005.

2 Specifically there were three applications before me, the first by B for leave to file a re-amended representation and the second and third being applications by C and E to have an amended representation which had been filed by B on 30 th August, 2010, struck out. Generally I was concerned with how best to take the matter forward. It is necessary to recap briefly the history of the matter.

3 Working from the affidavit of B's French advocate Véronique Favreau, sworn on 21 st January, 2011, in support of the original representation brought by B, it would seem that he had lost confidence in C as trustee in 2007 and was seeking to have another trustee appointed to the B sub trust which had been established for his benefit and that of his family. It holds substantial assets.

4 Véronique Favreau alleges that she had difficulty obtaining disclosure of information in relation to the HHH, in particular in relation to B's tax affairs. Tax advice had been obtained by C from KPMG which led her to believe that she had not been provided with all the documentation she needed to properly advise B. A particular concern was the possibility that a number of UK resident companies may have made contributions to the HHH. She had not been given a copy of counsel's advice referred to by KPMG or the underlying documents upon which that advice was based.

5 Without going into the detail of the history as related and alleged by Véronique Favreau a point was reached when she wrote to C on 27 th May, 2010, making serious allegations about the conduct of C and E and giving notice that she had been instructed to institute proceedings. On 10 th November, 2010, she wrote to Carey Olsen and Ogier, acting for C and E respectively, enclosing a draft representation requesting complete and far ranging disclosure which she characterised as “substantial pre-action disclosure”.

6 At paragraph 117 of her affidavit, she states her belief that full disclosure of the facts would demonstrate *inter alia* that E was not the real settlor of the HHH, casting doubts on the nature of the HHH itself, and that disclosure may reveal that C are acting as nominees for E, thus putting the very existence of the HHH at risk.

7 The representation came before the Court on 13 th April, 2011. It was accepted by Mr Hoy on that occasion that it had clearly been drafted principally for the purpose of seeking the removal of C as trustee. However, the relief sought was limited in the main to one of disclosure, the grounds for which were set out in only two out of the 67 paragraphs. Furthermore, the prayer sought an order against C and E personally for wasted costs in tax advice obtained, a hostile claim that the Court could only make following a finding that they had acted improperly. Mr Hoy did not want the application delayed on account of this, and asked for it to be set aside for the moment. In my short oral judgment I went on to say this:-

“As far as E is concerned the representation is entirely unclear as to its

role, why it has been convened and the basis upon which disclosure and other relief is sought from it. A further issue has arisen, namely the effects of HMRC's "Employment Income through Third Parties document" in respect of which Mr Hoy has said it may still be possible to mitigate the consequences with the co-operation of the trustee. Accordingly he saw merit in Mr MacRae's suggestion of a stay to allow the parties to work together on this .

Clearly the Court should encourage resolution of these issues between the parties and I therefore agree to grant a stay for that period. Thereafter if the Representor wishes to pursue his representation seeking information then he has leave to file an amended representation within twenty-eight days of the expiration of the stay. In my view that would involve a substantial re-writing of the representation, deleting all that part of it which currently relates to a potential removal of the trustee and prayer g, and setting out clearly and with particularity, what information is sought, the purpose for which it is being sought and the basis upon which disclosure should be ordered by the Court. It should also address the issue of confidentiality in so far as other beneficiaries not convened are concerned and of who should pay the costs of the exercise. In so far as the purpose for seeking disclosure relates to tax matters, then I would expect the application to be supported by the advice of tax counsel."

8 Accordingly, the representation was stayed for six weeks to allow the parties to resolve the matter by agreement, if possible, and B was given leave to file an amended representation within 28 days of the expiration of that stay.

9 The parties were unable to resolve matters during the six week stay. On 18 th May, 2011, Véronique Favreau wrote to Carey Olsen and Ogier and set out the list of documents she said were needed to develop a solution. The request identified specified documents or categories of documents. Ogier responded on 25 th May, expressing E willingness to meet to try and resolve matters, reiterating the position of E that it was under no legal obligation to provide disclosure, but volunteering certain documents provided to E employees in 2002.

10 Véronique Favreau replied on 13 th June, 2011, saying that a meeting would be a costly and unnecessary exercise because of the failure of E and C to start disclosing documents as requested. The list of documents required was repeated.

11 Carey Olsen wrote to Véronique Favreau on 13 th June, 2011, *inter alia*:-

(i) stating that a substantial amount of documentation had already been provided by C;

(ii) objecting to the provision of certain categories of documents which would amount to pre-action disclosure, maintaining that the Court had made it clear on a number of occasions that Article 51 of the Trusts (Jersey) Law 1984 ("the Trusts Law") could not

be used to circumvent the rule preventing pre-action disclosure;

(iii) maintaining that certain categories of documents were either not relevant or had not been paid for out of the B sub trust or related to other beneficiaries of the HHH or other sub trusts and was therefore privileged, such privilege held by C for the benefit of those other beneficiaries.

12 On 21 st June, 2011, Carey Olsen wrote to Véronique Favreau with a schedule setting out a summary of the contributions made to the HHH and stating that minutes of trustee's meetings in relation to loans made to B out of the B sub trust together with other documents relating to the loans would be made available.

13 The time for filing the amended representation expired on 22 nd June, 2011. On 30 th August, 2011, Voisins, on behalf of B, filed an amended representation. That was met with the issuing of summonses by E and C to strike it out on the grounds that it was out of time and it failed to comply with the requirements of the Court's judgment of 13 th April, 2011; in particular, it continued to combine both an application for disclosure and now enhanced hostile claims. On 20 th November, 2011, Voisins circulated a re-amended representation in which the hostile claims had been removed and which it now seeks leave to file.

14 On 13 th April, I had said that in so far as the purpose for seeking disclosure related to tax matters, I expected the application to be supported by the advice of tax counsel. What I had in mind was that tax counsel advising B on his tax affairs might have been able to set out with some particularity precisely what information he needed and what documents or categories of documents he needed to see. Voisins instructed Michael Sherry QC, who had previously advised B on this matter, and in their instructions, rather than ask counsel what he needed to see in order to advise, asked counsel to list any documents or class of documents he would expect to exist and to be provided in order to resolve *"any tax or legal issues"*. The categories of documents suggested by counsel are not surprisingly very wide. The re-amended representation seeks disclosure of any documents which fall within those wide categories identified by counsel. Counsel suggested that in order to be more precise it would be a sensible and practical step if E and C could first list the materials in their possession and indicate what materials they would not object to disclosing (whether or not redacted) and materials in respect of which disclosure is objected to and why.

15 That suggestion was taken up by Mr Hoy in the draft directions he put forward at the hearing, in which C and E would be required to file and serve a list of the documents in their possession, custody or control which fall within the categories identified in counsel's opinion and an affidavit indicating what materials they would not object to disclosing (whether or not redacted) and materials in which disclosure is objected to and why. It is clear from counsel's opinion that subject to issues of confidentiality that request would extend to the HHH, to the B sub trust and to all of the other sub trusts established under the HHH.

16 C submits that this request hardly sets out “clearly and with particularity, what information is sought, the purpose for which it is being sought and the basis on which disclosure should be ordered by the Court” as required by the Court's judgment of 13 th April, 2011. It says that substantial and voluminous disclosure has already been made to B by C and indeed E and if directed C proposes to provide a schedule and bundle of all the information already disclosed. Counsel's “category” of documentation is so broad as to be practically unworkable. The HHH dates back to 1998, some thirteen years, and has had many thousands of beneficiaries. Up to 2000 sub trusts have apparently been created. The documentation referred to would be voluminous (potentially up to five million documents) and largely irrelevant to the Representor in his current situation. It is noteworthy Mr MacRae said that the question posed to counsel refers to the Representor's need to understand “the losses” that have arisen. It would be an extremely lengthy, time-consuming and therefore costly exercise for C to list out all the documentation in its possession which would fall within such broad categories.

17 C accepts, however, that the Representor needs to understand his own tax position in relation to the HHH but what it says is not explained is how taxation and legal advice obtained by C during the lifetime of the HHH could be required by any particular beneficiary in order to understand his own particular tax position. It is for the individual beneficiary to obtain his own advice on his own particular circumstances.

18 C and E put forward a set of directions which, consistent with the directions given on the 13 th April, 2011, place the onus upon B to state what categories of documents he is seeking, and for each category to state the purpose for which it is sought and the basis upon which the Court has the authority to compel disclosure.

19 There was only limited time at the hearing for discussion as to the legal principles to be applied in relation to this request for disclosure and therefore any comments that I make on those principles are by way of provisional observation only.

20 A beneficiary's right to disclosure of trust documents is a core right to make the trustees account for their stewardship of the trust property. In *Schmidt -v- Rosewood Trust* [2003] UKPC 26, the Privy Council approved the following from the judgment of Powell J of the Supreme Court of New South Wales in *Spellson -v- George* (1987) 11 NSWLR 300:-

> ***“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: … 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."

21 It is clear that there is a distinction between disclosure under trust law and under civil proceedings. Quoting from *Underhill and Hayton Law of Trusts and Trustees 18th Edition* at paragraph 56.38:-

> ***"However, despite the change in the procedural rules, the broad distinction between on the one hand disclosure to a trust beneficiary as such beneficiary and on the other disclosure to a litigant in civil proceedings remains the same.*** Disclosure is a process only coming into play once civil proceedings have been commenced, and only in relation to matters in issue in those proceedings. But trust beneficiaries or objects have the right to seek to hold their trustees to account irrespective of litigation, and covering the whole range of their interests in the trust, not restricted to any matters which might be in dispute. But it should be noted that the scope of disclosure in civil procedure is more pervasive than the right to hold trustees to account, and covers, for example, documents withheld under the latter right because they might reveal the trustees' private deliberations."

22 This distinction informed the Court's desire in April of this year to clarify the nature of the proceedings commenced by B, which although brought under Article 51 of the Trusts Law combined both hostile proceedings and an application for disclosure. There was nothing to prevent B from bringing hostile proceedings but if so they would be better commenced by way of Order of Justice and disclosure in those proceedings will follow as a procedural matter ancillary to the enforcement of the hostile claim. B has now extracted the hostile claims from the representation so that it is clear that by that representation he is invoking the supervisory jurisdiction of the Court pursuant to Article 51 of the Trusts Law in which he seeks disclosure as a beneficiary.

23 C maintains that it has made very full disclosure and that there are proper grounds for refusing any further disclosure. However, it would seem that beneficiaries of a trust exercising their rights as such, unlike ordinary litigants, are not restricted by the general rule against pre-action disclosure. Both *In Re C Settlement* [2002] JLR 312 and *In Re Internine and Azali Trusts* [2006] JLR 195 are authority, I believe, for the proposition that strangers to a trust cannot attempt to circumvent the general principle against pre-action disclosure by the use of Article 51 but I am not aware of any principle preventing beneficiaries, who may be concerned about the actions of their trustees or actually contemplating hostile action, from independently exercising their rights as beneficiaries to seek disclosure generally. The very purpose of such disclosure is to ascertain whether the trustees have fulfilled their duties and if not, to take action to remedy the same. B is not, of course, a stranger to the HHH or to the B sub trust.

Disclosure by E

24 Whilst the rights of a beneficiary to seek disclosure from a trustee are well established, E does not accept that any such right exists as against it as settlor. B asserts that E owes beneficiaries of the HHH fiduciary duties on account of the powers it retains under the HHH to make certain amendments to it with the consent of the trustee, to appoint new trustees and a protector. Mr Hoy says there can be no difference between the nature and breadth of a trustee's obligation to make disclosure and those of a settlor owing fiduciary duties, but he has produced no authority to support that contention. I would make the initial observation that a trustee's obligation to make disclosure is premised upon its duty to account for its stewardship of the trust property and E has no trust property to account for. The question arises as to whether E is a trustee for the purposes of the Trusts (Jersey) Law 1984. In view of E's denial that it has any such duty, this matter must be the subject of full argument. Counsel in his opinion makes reference to the possibility of claims against E and it seems to me that careful consideration will need to be given as to whether the application for disclosure against E contravenes in whole or in part the general principle against pre-action disclosure.

Disclosure by C

25 As to the request made of C as trustee, it seems to me that it would be helpful to consider the three categories of trusteeship that it holds.

B sub trust

26 The B sub trust (which is revocable) was created for the benefit of B and his family. Mr MacRae I believe accepted that B should be able to seek disclosure of the documents held by C as trustee of this sub trust on the basis, presumably, that few issues of confidentiality should arise and that disclosure would not be detrimental to the beneficiaries as a whole.

27 My understanding has always been that a beneficiary's right to disclosure and to be furnished with copies of documents is at his own expense (see *Lewin* at paragraph 23.15). In principle that must be right, because the trustee cannot be required to fund the cost of making disclosure at its own personal cost (absent a finding against the trustee) and it is not fair for the other beneficiaries to be prejudiced by the cost of such provision being borne out of the trust fund as a whole. I am sure that trustees in practice do not apply this principle strictly to reasonable requests by beneficiaries for copies of documents that are easily produced and that the other beneficiaries would not be able to complain about the negligible administrative cost of producing such limited documents being borne out of the trust fund. However, the position is different when the trustee is faced with a request for disclosure which will require material work, for example, where a beneficiary seeks to have copies of all of the trustee's documents going back many years. In that situation, it seems to me that the trustee should estimate the likely cost of the exercise and require that cost to be paid by the beneficiary in advance, so that the trust fund is not burdened by the cost.

28 Therefore, if B wishes to have copies of all of C's documents in relation to the B sub trust, which goes back to 18 th February, 2000, then, unless there are legitimate objections C may have to such disclosure or any part of it, it should be made without delay, but at his cost.

Other sub trusts

29 The position in relation to the 2000 or so other sub trusts is arguably quite different. There, I presume, B is not a beneficiary and even if those sub trusts are revocable he might properly be equated to a stranger to them. If so, the circumstances in which he can legitimately call for documentation is likely to be very restricted and it would be appropriate to give consideration for those interested in those other sub trusts to be allowed to express their views to disclosure being made. If B maintains his request for disclosure of documents in relation to the other sub trusts then there will need to be a further hearing to consider his right to do so and whether and indeed how, in practice, the views of other persons interested in those sub trusts can be heard.

The HHH

30 Turning to the HHH, B is not a stranger to this trust and in principle he is able to seek disclosure of its documentation. However, I question whether the approach to disclosure can be the same as between a private trust with a limited group of beneficiaries and an employee benefit trust with thousands of beneficiaries or say a superannuation scheme. In the Australian case of *Crowe -v- Stevedoring Employees' Retirement Fund* (2003) PLR 353 it was held that the principles established in *Re Londonderry's Settlement* (1965) 1 Ch 918, that beneficiaries have no right to see documents private to the trustees which may evidence the reasons why the trustees have made their decisions, applied to a superannuation scheme that had 12,500 members and some 50 participating companies. What I note from that case is that the request for disclosure by the applicant set out with clarity the information that the applicant sought and the categories of documents he wanted to inspect. The trustee was not first required to list all the documents that it had under very wide categories and then to state those which it objected to produce. It is arguable in my view that with a trust of the kind of this HHH which has many thousands of beneficiaries a sense of proportion must be applied to requests from any one beneficiary for disclosure. It does not detract from the trustee's core duty to account, I would suggest, to require that beneficiary to set out with clarity the information he or she seeks and the documents or category of documents he or she requires to inspect.

31 B has invoked the Court's supervisory jurisdiction and it is therefore for the Court to decide how to take forward his application for disclosure and in my view it should be taken forward by requiring him first to set out with as much clarity as is reasonably possible the documents or categories of documents he wishes to see. It can then be ascertained whether such documents exist. The task of deciding whether there should be disclosure is

more easily undertaken by reference to actual documents. I accept Mr Hoy's submission that as against C the purpose for seeking such disclosure is clear and is as set out in paragraph 41 of the affidavit of F of 21 st January, 2011, and paragraph 52 of the re-amended representation namely so that B can properly ascertain his liability to UK taxes. Furthermore there would seem to be little doubt about the basis upon which the Court has the authority to order such disclosure from C as trustee exercising its supervisory jurisdiction.

Conclusion

32 Acknowledging that applications by beneficiaries for disclosure strike at the core of a trustee's duty to account for its trusteeship, B's application should be dealt with as soon as possible, with disclosure being made without delay where there is no proper objection to it. Subject to the further input of counsel, I would therefore propose to give directions along the following lines:-

(i) Leave will be given to B to file the re-amended representation in its current form but the application for disclosure will proceed in the manner directed by the Court.

(ii) If B wishes to have copies of all of the documents held by C as trustee of the B sub trust, then subject to any issues of confidentiality and to it not being detrimental to the beneficiaries of that sub trust as a whole, he should be allowed to do so without delay and at his cost payable in advance in the manner suggested above.

(iii) B is directed to file within say fourteen days of the filing of the re-amended representation the documents or categories of documents which are being sought from C in relation to the HHH and, unless the option set out in sub paragraph (ii) above is taken up by him, the B sub trust.

(iv) Within say 28 days of B filing the category of documents, C shall file a list identifying the documents or categories of documents sought by B that it holds, identifying those, if any, that it objects to disclosing and the grounds for such objection. Those documents it has no objection to disclosing should be disclosed to B without delay and further intervention of the Court.

(v) Counsel for B and C should attend upon the Bailiff's Judicial Secretary now to fix a day for the hearing of any objections by C to disclosure (estimated half a day). E need not be involved in this hearing.

(vi) Counsel for B and E shall attend upon the Bailiff's Judicial Secretary now to fix a date for a hearing as to whether E is under an obligation to make any disclosure at all to B and if so, the extent of that obligation (estimated half a day). That argument would be assisted by B filing in advance with E and the Court the categories of documents he seeks from E. C need not be involved in this hearing.

(vii) If B wishes to pursue his application for disclosure of documents relating to the

other sub trusts, then counsel for B and C should attend upon the Bailiff's Judicial Secretary to fix a date for a hearing as to whether he has a right to do so and if so whether and how in practice the views of the other persons interested in those sub trusts should be heard (estimated half a day). E need not be involved in this hearing.

(viii) There will need to be directions for the filing of skeleton arguments and authorities for the hearings fixed as above which I would expect counsel to agree.

(ix) The strike out summonses will be dismissed as they are now otiose but subject to costs which I come to next.

Costs

33 I have heard sufficient argument on costs to be able fairly to order B to pay the costs on the standard basis of C and E thrown away as a result of his filing the amended representation out of time and in clear breach of the directions of the Court given on 13 th April, 2011, which costs will for the avoidance of doubt include the costs of the strike out summonses. No good reasons were provided for his failure to do so. Otherwise, costs will be deferred. In addition to the costs of the representation and of the two directions hearings so far, the Court will need to consider at the appropriate time and make orders as to who should pay for the cost of any disclosure undertaken by either C or E, if any, pursuant to this process.

34 I invite counsel for B to prepare a set of draft directions to reflect the above but subject, as I have said, to further submissions of counsel as to what is proposed.