

Representation of BNP Paribas

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| Jurisdiction: | Jersey |
| Judge: | J. A. Clyde-Smith, Esq, Jurats Le Breton, Marett-Crosby |
| Judgment Date: | 03 November 2011 |
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| Date: | 03 November 2011 |

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Text

[2011] JRC 213

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., **Commissioner, and** Jurats Le Breton **and** Marett-Crosby.

IN THE MATTER OF THE REPRESENTATION OF BNP PARIBAS JERSEY TRUST
CORPORATION LIMITED

AND IN THE MATTER OF THE PW TRUST

Between
BNP Paribas Jersey Trust Corporation Limited
Representor
and
A

First Respondent
B
Second Respondent
C
Third Respondent
D
Fourth Respondent
E
Fifth Respondent
F
Sixth Respondent

and

G
Seventh Respondent

Advocate J. P. Speck for the Representor

Authorities

Representation of BNP Paribas [\[2010\] JRC 199](#).

The S Settlement 2001/154.

Trust — further proceedings relating to the seventh respondent and the trust.

THE COMMISSIONER:

- 1 On 26th October, 2011, the Court gave directions to the Representor (“the Trustee”) in its capacity as trustee of the PW Trust dated 18th December, 2003, (“the Trust”) in a Beddoes application as to how it should conduct itself in proceedings that had been commenced by the seventh respondent, in the High Court of Singapore.
- 2 The hearing was in private and whereas ordinarily a judgment in a Beddoes application would not be disclosed either to the seventh respondent, bearing in mind he is the plaintiff in the Singapore proceedings, or to the High Court of Singapore which has the conduct of the proceedings, we have at the request of the Trustee given leave for this judgment to be so disclosed in order to assist the High Court of Singapore as to the stance taken by the Trustee in the proceedings and to help dispel certain misunderstandings that the seventh respondent appears to have in relation to the position of the Trustee.
- 3 The claims of the seventh respondent, which are now the subject of the Singapore

proceedings, have already been the subject of a representation brought by the Trustee for directions (Court file 2010/87) which culminated in the judgment of the Court dated 4th November, 2010, (*Representation of BNP Paribas* [[2010\]JRC 199](#)] which needs to be read in conjunction with this judgment as it sets out the background which we will not repeat here, but quoting from paragraphs 23 and 24, Bailhache, Deputy Bailiff, said this:-

“23 In this instance, the Court has no doubt whatsoever that it is wholly unacceptable for the present uncertain state of affairs to continue. It is quite wrong that the Trustee of what appears to be a perfectly valid Jersey trust should be hamstrung in the performance of its trustee duties by an unparticularised and vague complaint which has neither been substantiated by detail provided to the Trustee nor taken forward by any hostile litigation. It is not fair to the Trustee that it should be placed in this position. Neither is it fair to the other beneficiaries of the Trust, who are precluded thereby from receiving any benefit out of the Trust for as long as the Trustee does not know whether it holds assets on the trusts of the settlement or on trust for the would be claimant .

24. It goes without saying that this Court makes no finding whatsoever today as to the merits or otherwise of any claim which the Seventh Respondent might bring. However the Court does make the finding that it is incumbent on the Seventh Respondent to bring his claims before the Royal Court for adjudication, and that he should in effect be penalised, if he fails to do so, by being prevented from bringing any such claims without special leave of the Court to do so. It is inconceivable that leave would be given to bring such claims against the Trustee unless it could be shown that the Trustee had acted intentionally, recklessly or with gross negligence in misleading the Court on this current application .

25. Accordingly the Court now orders that unless the Seventh Respondent brings proceedings in Jersey within six months of the date of this judgment, seeking to set aside all or part of the original transfers of assets into the Trust, the Trustee shall be entitled to administer the Trust free and clear of all and any claims which the Seventh Respondent might have or purport to have to the assets of the Trust (save as a beneficiary of the Trust).”

- 4 The Court was also concerned with the ability of the seventh respondent to finance such proceedings and it therefore went on to provide as follows:-

“26. The Court has considered further the possibility of the Seventh Respondent being sufficiently impecunious that an order of the kind mentioned above may cause difficulty. The Trustee has conceded that it would be appropriate to make provision for payment of the costs of such proceedings albeit with a cap on the amount. Advocate Sanders for the Sixth Respondent said that in his view the same provisions ought to be available for other family beneficiaries. In the circumstances the Court considers that in order to be sure

that the seventh Respondent has access to justice in this matter, the Trustee should pay out of the trust fund the legal costs of the Seventh Respondent with a cap of £50,000, provided that these are incurred with a view to seeking advice upon and/or instituting a claim before the Royal Court of Jersey challenging the original transfers of assets into the Trust within the time set. The Trustee is clearly not entitled to see the detail of the legal advice which has been received, which is privileged, but a certificate from a Jersey lawyer to the effect that the bills, for which reimbursement is sought, have been incurred within the four corners of this order will be a sufficient discharge to the Trustee. The seventh Respondent will have liberty to apply in relation to any legal fees which might be incurred and which would take him above the cap of £50,000 which has been imposed .

27. It does not appear to the Court that it is necessary at this stage to make provision for the costs of other family beneficiaries in the same way. However, if the Seventh Respondent does in fact bring claims within the next six months challenging the original transfers of assets into the Trust, the Trustee similarly has authority from this Court to reimburse the other respondents with legal fees incurred by them in relation to these proceedings, on the same terms mutatis mutandis as applied to the Seventh Respondent. Once again, the other family beneficiaries have liberty to apply if their costs look like exceeding the sum of £50,000. It is clear that the Court considering these costs applications will be differently constituted from the Court dealing with any claim as to the validity of the transfers of the assets into the Trust.”

- 5 It is clear from the fourth affidavit of H, a director of the Trustee, sworn on the 7th September, 2011, that careful steps were taken by the Trustee to apprise the seventh respondent of the terms of these orders by not only sending him copies of the same (and the skeleton arguments of the Trustee at the hearing) but through Advocate Craig Swart of Mourant Ozannes (which firm acts for the Trustee in this matter) attending upon him on the telephone to explain the same.
- 6 On the 20th April, 2011, the seventh respondent wrote a letter to the Court asking for further directions from the Court. He stated that he had no capacity to seek legal representation because the offer of financial assistance was subject to a pre condition that requires no “hostile” action in relation to the Trustee. It is manifest from the judgment of the Court and of the Act of Court that no such pre condition existed. The Deputy Judicial Greffier responded by letter dated 28th April, 2011, in the following terms:-

“ ...

The order made by the Royal Court on the 4th November, 2010, provides that unless you bring proceedings in Jersey within six months seeking to set aside all or part of the original transfers of assets into the PW Trust the Trustee shall be entitled to administer the Trust free and clear of all and any claims which you might have or purport to have to the assets of the Trust (save as beneficiary of

the Trust). The Court order also makes provision for the payment of the sum of £50,000 in relation to seeking legal advice on and/or instituting proceedings before the Royal Court of Jersey with the six month time period challenging the original transfers of assets into the Trust. If you wish to apply for this funding you should write to the Trustee.

The time limit expires on 4th May, 2011. In my view your letter of 20th April, 2011, addressed to the Royal Court is not the institution of legal proceedings in Jersey. Legal proceedings must be brought by way of an Order of Justice or formal Representation.

If you wish to institute legal proceedings you should instruct a Jersey lawyer. Contact details of Jersey lawyers can be found on the following website.”

- 7 The unless order expired on 4th May, 2011, and no proceedings had been issue by the seventh respondent. Advocate Swart emailed him on 16th May, 2011, setting out again the relevant parts of the judgment of the Court and suggesting that he immediately engage a Jersey lawyer to advise on his ability to obtain special leave. He confirmed that if so requested the Trustee would make funds available to enable him to seek such advice in line with the order of the Court.
- 8 On 12th June, 2011, Advocate Swart wrote to the seventh respondent noting that there had been no application for special leave and confirming that in the circumstances the Trustee considered itself at liberty to administer the Trust free and clear of all or any claims which he might have or purport to have to the assets of the Trust. On 27th June, 2011, Advocate Swart wrote again inviting the seventh respondent to retire as Protector, his powers having been suspended by the Court on 14th June, 2010.
- 9 In June and July 2011, the Trustee made distributions totalling US\$7,950,000 at the request of the first respondent (the settlor and mother of the other respondents) in reliance on the terms of the Act of Court. The current value of the assets of the trust is over US\$37,000,000 held in the main in bank accounts in Singapore in the name of J Limited a Jersey registered company wholly owned by the Trustee. The Trustee had been considering further requests from the first respondent but in the light of developments, to which we come in a moment, placed that on hold, pending further directions from the Court.
- 10 On 5th August, Mourant Ozannes received a letter from Tommy Choo Mark Go & Partners, Advocates and Solicitors in Singapore, saying that they represented the seventh respondent who was taking advice with a view inter alia to bringing proceedings in Singapore. A summons was issued out of the High Court of Singapore on 22nd September, 2011.
- 11 On 17th October, 2011, the seventh respondent obtained an injunction before the

Singapore High Court freezing funds in the account of J Limited with BNP Private Bank up to the sum of US\$10,800,000.

Two Representations

- 12 As a consequence of these developments, the Trustee has issued two representations. The first is dated 8th September, 2011, pre dating the Singapore proceedings, and which seeks directions in relation to the seventh respondent's request for the funding of his legal costs, to the claims he was making and to the future administration of the Trust generally. That representation (brought as a continuation of the earlier proceedings within Court File 2010/87) has been served on the respondents, but no date has yet been fixed for it to be heard.
- 13 The second representation is dated 29th September, 2011, and is the Beddoes application which is the subject of this judgment which we heard on 26th October, 2011. This representation has also been served upon the respondents who were convened to appear on 26th October, 2011. The Court had received correspondence from Tommy Choo Mark Go & Partners to which we come in a moment, but none of the respondents appeared.

The Singapore Proceedings

- 14 The crux of the seventh respondent's complaint is that the assets settled into the Trust by his mother were not beneficially hers, but belonged to the estate of his late father, probate for which had never been obtained ("the Substantive Issue"). The defendants comprise his mother and siblings (the other respondents to this second representation), J Limited, the Trustee and BNP Paribas Wealth Management, formerly known as BNP Paribas Private Bank, which has a banking branch in Singapore.
- 15 The seventh respondent asserts that the Trustee and J Limited were aware that the assets settled into the Trust did not belong beneficially to his mother and are therefore constructive trustees or trustees "*de son tort*" of the same. Distributions or withdrawals (including the substantial distributions made this summer) have been made in wilful breach of such trusts. These constitute personal claims in substance against the Trustee.

Conflict

- 16 The Trustee submitted that the personal allegations being made by the seventh respondent against it in the Singapore proceedings placed it in a position of conflict which made it appropriate to surrender its discretion, applying the principles in *The S Settlement 2001/154*. Whilst it is clear that the Court should be slow to accept a surrender of discretion, we determined that it was right to do so in this case.

Directions

- 17 The Trustee has taken advice in relation to the Singapore proceedings. For obvious reasons it would be inappropriate in this judgment to disclose the content of that advice or the discussions that took place as to how the Trustee should act but after due consideration the Court has directed the Trustee as follows:-

"(ii) That the Trustee shall procure that its Singapore lawyers accept service of proceedings on behalf of J Limited, but not on behalf of the Trustee .

(iii) That the Trustee shall procure that its Singapore lawyers be instructed to seek the removal of the personal claims against the Trustee and J Limited, including if so advised by way of application to strike out (and in the case of the Trustee whether of the whole claim or of any order for leave to serve out or otherwise) or equivalent .

(iv) The Trustee shall, and shall procure that J Limited will, otherwise adopt a neutral stance in relation to the substantive issue in the Singapore proceedings, whilst cooperating for example in giving discovery as advised by its Singapore lawyers .

(v) That the costs of the Trustee and of J Limited of and incidental to this application and in and about the Singapore proceedings up to the stage of discovery and inspection by all parties thereto, be discharged out of the trust fund .

(vi) That there be liberty to apply."

- 18 It will be clear from these directions that, notwithstanding the judgement of the Court of the 4th November, 2010, (which made no finding as to the merits of the Substantive Issue), this Court accepts that Singapore is the appropriate forum for adjudicating the Substantive Issue because most of the defendants are in Singapore or Jakarta, J Limited's bank accounts are there, most of the documentary evidence is within the banking branch of BNP Paribas in Singapore and most of the material witnesses are in Singapore.

Distributions

- 19 Although general issues as to the administration of the Trust are the subject of the first representation dated 8th September, 2011, which is yet to be heard, the Trustee drew to our attention allegations made by the seventh respondent in an affidavit of 6th October, 2011, sworn in support of the Singapore proceedings, that the family are colluding with the Trustee to use proceedings in Jersey to distribute away the trust fund in order to render any judgment he might obtain in Singapore nugatory. The Trustee strongly refuted any such

collusion or improper conduct and we could see nothing to support such an allegation, but agreed with the Trustee that it would be helpful if we were formally to direct the Trustee not to exercise its dispositive powers as trustee pending the determination of the Singapore proceedings (and any appeals arising therefrom) or further order of this Court. The respondents would, of course, receive notice of any application to lift that direction. A formal direction to that effect was therefore given.

Application for stay

- 20 Tommy Choo Mark Go & Partners sent to the Court a letter from the seventh respondent dated 12th October, 2011, enclosing a summons seeking an order staying the proceedings on the ground of *forum non conveniens* pursuant to Royal Court Rule 6/7(4)(g) and the inherent jurisdiction of the Court, on the basis that the Singapore court is the more appropriate forum to try and determine the Substantive Issue. An affidavit sworn by the seventh respondent on 25th October, 2011, in support of the summons was also delivered to us. Tommy Choo Mark Go & Partners informed us that the seventh respondent did not have funds to enable him to instruct Jersey lawyers to represent him.
- 21 It appears to us that the seventh respondent has misunderstood the purpose of the hearing before us. It was not an application by the Trustee for an order that the Substantive Issue be heard before the Jersey Court. It was a Beddoes application by which the Trustee sought the directions of this Court as to how it should conduct itself in the Singapore proceedings. As it transpires the Trustee did not contend that it should be directed, and we did not direct it, to argue in the Singapore court that it was not the appropriate forum to deal with the Substantive Issue.
- 22 We declined to stay the Beddoes application. Proceedings have been issued in Singapore and steps will have to be taken in early course by both the Trustee and J Limited in relation to those proceedings. The Trustee is entitled to the directions of this Court without any delay as to how it should conduct itself in those proceedings. We adjourned the seventh respondent's application for a stay to be heard on the same date that we requested the Trustee to fix for the hearing of the first representation dated 8th September, 2011, which will deal *inter alia* with funding for the seventh respondent and the other respondents.
- 23 We would however make the observation that we were shown a letter from Maurant Ozannes to Tommy Choo Mark Go & Partners dated 9th August, 2011, in which it was made clear that the Trustee was prepared to pay £20,000 upon invoices raised by Jersey counsel engaged by the seventh respondent to advise him, subject only to sight of a certified copy of his passport and proof of his residential address in the form of a recent utility bill – the usual KYC requirements. We were informed by Mr Speck that this information has not been provided.