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Jurisdiction:	Jersey
Judge:	The Deputy Bailiff:
Judgment Date:	24 July 2012
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Text

[2012] JRC 141

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and**Jurats Kerley**and**Liston.

Between
E
Representor
and
A
First Respondent
B
Second Respondent
F
Third Respondent

G
Fourth Respondent

Advocate B. R. Lincoln **for the Representor.**

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

Authorities

In the Matter of the S Settlement 2001/154 .

In the Matter of the S Settlement [2001] JLR N 37 .

The Public Trustee -v- Cooper (20th December, 1999) Unreported Judgment of the High Court of England.

Trust — various claims made against the representor by the first respondent and matters relating thereto.

The Deputy Bailiff:

1 The first respondent is trustee of the M Trust. The Trust was established by an instrument dated 10 th December, 1996, between the settlor and the representor. By proceedings started in the Royal Court in 2011, the first respondent made various claims against the representor asserting a breach of its duties as trustee. These alleged breaches of duty have at all times been denied. Nonetheless, a settlement agreement has been made, entered into by all the parties to the present proceedings, by C Limited, a company wholly owned by the representor as trustee, and by D Limited, a corporate director of C Limited and also owned by the first respondent. The terms of the settlement agreement are subject to a condition precedent that the Court sanction the compromise which the agreement contains. The existence and terms of the settlement are confidential outside the present application. As is commonplace in trust applications of this kind the Court has agreed to sit in private, and the Court has also directed that the judgment be fully anonymised so as to protect the confidentiality which the parties have agreed, and which in all the circumstances that liability asserted by the first respondent against the representor has been denied, seems to us to be fair and reasonable.

2 The first respondent appears not only for himself but also as representing the interests of minor, unborn and unascertained beneficiaries of the M Trust. The Court is informed that only one minor beneficiary of the M Trust has been ascertained but there are potentially unborn beneficiaries. We return later in this judgment to the position of the minor and unborn beneficiaries. The second, third and fourth respondents are children of the first respondent.

3 In its representation the representor surrenders its discretion to the Court and the first question for us is therefore as to whether or not we should accept that surrender.

4 The purpose of the settlement agreement is to settle all claims which the beneficiaries might have against the representor, its officers and employees, C Limited and C Limited's directors whether as to alleged breaches of trust, fees and expenses incurred by the representor, costs or otherwise. It is intended by the settlement agreement to compromise all claims against the representor in relation to these issues. To the extent that the result of the settlement agreement therefore would inhibit any future action against the representor which might benefit the Trust, it is clear that the representor had and has a conflict of interest in relation to the settlement agreement. *In the Matter of the S Settlement 2001/154*, [2001] JLR N 37 the Royal Court considered the role of the court in connection with an application of this kind. Birt, DB cited with approval an extract from the English case of *Public Trustee -v- Cooper*, an unreported decision of Hart J dated 20 th December, 1999, which in turn cited from a judgment of Robert Walker J in an unnamed case which took place in chambers in 1995. In that unnamed case, Robert Walker J analysed four different situations where the court had to adjudicate on a course of action which was proposed or actually taken by trustees. The third category of such cases was this:-

> ***"(3) The third category is that of surrender of discretion properly so called.*** There the court will only accept a surrender of discretion for a good reason, the most obvious good reason being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest. The cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in chambers in which adversarial argument is not essential, although it sometimes occurs. It may be that ultimately all will agree on some particular course of action, or at any rate will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)), approving the exercise of discretion by trustees or (under category (3)), exercising its own discretion."

5 Of course it is arguable here that the representor has not made the settlement agreement as a trustee of the M Settlement, but as a defendant to proceedings, and therefore that any decision which it makes in that context is a commercial decision for the representor with which the Court is not concerned – indeed on this analysis, the Court's supervisory jurisdiction over a trustee is not engaged, one way or another. Indeed that is, so it seems to us, the position insofar as the representor is concerned. However the Court's sanction of the settlement agreement is necessary because if any claims against it are to be compromised, then all claims must be compromised. The Court's approval of the settlement arrangements is therefore necessary on behalf of the minor and unborn beneficiaries, for whom there would be an obvious conflict of interest if the representor were to seek to represent them. In the circumstances it is entirely right that the discretion is surrendered to the Court and that we should accept it and exercise that discretion on their behalf. Adult

beneficiaries can agree to compromise claims if they so choose. The Court's engagement is to sanction or bless the settlement agreement on behalf of the minor and unborn beneficiaries of the Trust.

The nature of the claims

6 By an Order of Justice dated 17 th March, 2011, the first respondent asserts various breaches of trustee duty by the representor. The backdrop for the claims is that C Limited, 100% owned by the trustee on the trusts of this settlement, entered into several loan facilities with a bank for the purposes of its business as a property developer. C Limited had also made an agreement with the first respondent ("the procurement agreement"), by which the first respondent was appointed to locate residential or commercial properties available for purchase, and procure finance or capital from third parties to assist C Limited with the acquisition of its property portfolio. The procurement agreement also provided that the first respondent accepted no liability for any defects in relation to property, availability of finance, or advice received, and that C Limited should take its own professional advice and use the services of solicitors and other experts for whose fees C Limited would be solely responsible, even if those parties had been introduced by the first respondent. The first respondent claimed as part of the financing arrangements, he participated in a meeting between the representor and Barclays Capital to discuss possible interest rate protection solutions for one of the facilities. The assertion was made in the order of justice that C Limited entered into an interest rate swap agreement on terms which turned out to be very adverse to the Trust. The first respondent alleged that the representatives of the representor who agreed the swap lacked experience or knowledge of hedging arrangements, failed properly to consider or understand the terms of the swap, failed to recognise and understand that Barclays and Barclays Capital took no responsibility for advising the representor or C Limited as to the appropriateness of the products they were offering, failed to take independent financial advice before committing C Limited to the swap, and generally agreed a swap on terms which were entirely inappropriate, unnecessarily exposing C Limited to interest and early termination costs. As a result of these alleged breaches of duty, it was claimed that C Limited and the Trust had suffered loss because C Limited had incurred arrangements fees and bank charges to put the swap in place, was obliged to service very high interest payments under a loan facility of £3.8m, had been unable to make its contracted amortisation payments or make prepayments of principal without incurring substantial penalties for early termination of the swap, and faced a termination fee if the swap was to be terminated. As a result, it was asserted that C Limited had been forced to sell investments on disadvantageous terms due to pressure from the counterparty to refinance its loans, and legal fees, financial advice and trustee fees had been unnecessarily incurred. The order of justice claimed an enquiry as to what the value of the trust fund would have been if the representor had acted with the care and skill which the first respondent asserted should have been expected of it, and what amounts had been expended and charged to the trust fund including swap arrangement fees and bank charges, legal feels, financial advice and trustee fees which were not properly incurred resulting, so the first respondent claimed, from the representor's breach of duty. The loss claimed by the order of justice was £1,099,776 and costs. However further and better particulars of the losses claimed suggested a total loss of somewhere in the order of £3m.

These particulars were filed on 25 th October, 2011.

7 The answer filed by the representor, in summary, asserted that C Limited was managed by its directors, and that the representor was not responsible as trustee for defaults which, if they existed at all which was denied, were defaults of the directors and/or the first respondent. The representor asserted that the claim in breach of trust was prescribed; that in any event C Limited's decision to enter into the interest rate swap agreement was taken in order to mitigate a serious interest rate exposure and was a reasonable commercial judgment; that the fact that rates have fallen and to that extent the swap has proved disadvantageous does not mean that the Trust or the first respondent has suffered any actionable damage; that the swap documentation provided by Barclays and signed by C Limited was inaccurate and contrary to the advice which Barclays have previously given, and that it was therefore Barclays which was the party at fault and the provisions complained about were not the true terms of the swap agreement. Finally, in all the circumstances, the fixed sum hedge that was entered into by virtue of the swap agreement was reasonable and appropriate.

8 Notwithstanding the terms of the answer, there was no specific counterclaim against the first respondent nor was there any third party claim brought against Barclays. We were informed by Advocate MacRae that the first respondent had always accepted in fact that the maximum realistic value of the claim was in the region of £1.1m, notwithstanding the further and better particulars which asserted a loss of approximately £3m. The first respondent accepted that quantum was a difficult part of his claim, and it was submitted that the Court should proceed upon the basis that that was so. The first respondent had been informed that the costs of trial would be in the order of £300,000 as far as the trustee was concerned and given the maximum realistic value of the claim as assessed, this was a considerable incentive to find terms of settlement.

9 Furthermore we were informed that two Calderbank offers were made. The second Calderbank offer was in the sum of £750,000 “in full and final settlement of all claims against [the representor] in the above mentioned proceedings and all actual or potential claims arising from the subject matter of the proceedings, by way of reconstitution of the trust fund of the [M] Trust. That sum includes interest. In addition, our client will pay your client's costs of the claims against it made in these proceedings up to and including the date of acceptance, to be taxed on the standard basis if not agreed. This offer will automatically lapse at 5 pm on 5 January, 2012”.

10 There were a number of other terms of the Calderbank offer which are fully set out in the relevant correspondence.

11 Faced with all these considerations, the first respondent entered into negotiations for settlement of his claims against the representor and ultimately a settlement agreement was signed on 23 rd May, 2012. The settlement agreement was expressly conditional upon obtaining the Court's approval to the settlement so as to bind all beneficiaries including

unborn or unascertained beneficiaries. By virtue of the settlement agreement, all claims, actual or potential, and all causes of action rights and obligations of whatsoever nature which the beneficiaries might have against all or any of the defendant, C Limited, or any of their respective affiliates, agents, directors, officers, employees or representatives whether directly or indirectly. There were covenants on the part of the adult beneficiaries not to sue the defendant or C Limited in respect of any of these claims, and not to impugn the conduct and/or integrity of the defendant, C Limited or its directors, former directors, officers, employees or personnel in their capacities as such, whether in relation to their administration of the Trust or their dealings with the assets of the Trust. In consideration of these obligations on the part of the beneficiaries, the representor agreed to pay £750,000 to C Limited by way of reconstitution of the Trust, and to pay various costs and disbursements of the proceedings incurred by the plaintiff on the standard basis up to 7 th February, and on an indemnity basis in relation to the sanction application. The representor agreed to write off the sum of £50,000 against trustee fees which were outstanding leaving an agreed balance of £274,716.31 which was payable to the representor from the trust fund on the payment date as defined in the agreement.

12 For the purposes of the sanction application it was accepted by the representor and the first respondent that the first respondent would procure a chancery barrister to give advice to the Court in relation to whether it was reasonable to sanction the settlement agreement on behalf of the minor and unborn beneficiaries, and the representor was to pay the first respondent's costs and disbursements of instructing such chancery barrister on an indemnity basis. On these terms, the proceedings would be settled, with neither the representor nor C Limited nor C Limited's directors making any admission of liability whether by entering into the settlement agreement or otherwise.

13 The Court was presented with an opinion from Mr Daniel Hochberg, a chancery barrister from Wilberforce Chambers in Lincolns Inn. Mr Hochberg very properly indicated that he gave his advice based upon English law, in the belief that there was no significant difference between English law and Jersey law for the purposes of the application before the Court on this occasion. While the Court naturally applies Jersey law to this matter, we have found the analysis contained in Mr Hochberg's opinion to be very helpful notwithstanding that we may not accept all of it. The material conclusion which Mr Hochberg reaches is that the first respondent's claim has considerable merit and the representor's defences put forward on liability and the ability to rely on the exculpation clause do not carry much credibility. However, there was a risk that the first respondent would be cross examined at length on his business experience with a view to the representor suggesting that he was aware of the nature of the interest rate swap and prepared to go along with it, which would possibly be relevant therefore to the culpability of the representor in an action for breach of trust. Furthermore it was possible that cross-examination on these issues might strengthen the limitation defence which could be run against the first respondent. Thirdly, there might be difficulties in establishing that the loss for which compensation was sought was actually caused by the breach of trustee duty. That would require in this case an investigation into the ability of C Limited to implement its business strategy. It would also of course make the case expensive to run with expert evidence being necessary, compensation not being capable of being easily quantified

without examining hypothetical scenarios involving C Limited's performance in the difficult market for property development companies which has prevailed since 2008. In those circumstances, counsel concluded that a compromise agreement which reflected compensation of some 68% of the pleaded claim was not unreasonable.

14 Given that the further and better particulars asserted a loss closer to £3m, that last conclusion of counsel is one which needs to be examined rather more closely, and we come to that point shortly. However, counsel very properly pointed out that the first respondent could not be required to pursue the claim to trial, and if no beneficiary were willing to do so, the claim could not succeed. Counsel concluded in this way:-

> *"Put another way and taking a broad view of the dispute, if the question is whether it would be unreasonable for [the first respondent] not to proceed to trial, with the risks and uncertainties which that entails, in order to hope to recover for the trust fund significantly more than the amounts which the trustee has (conditionally) agreed to pay, then it seem to me that the answer is that it would not be unreasonable for him not to proceed to trial."*

15 We have included that alternative view because we are not sure that we would accept that it is the right way of looking at the problem. The question is not really an objective one as to whether it would be unreasonable for the first respondent not to proceed to trial. It is right that he cannot be required to pursue the claim to trial, and if he does not do so then there will be no recompense to the trust fund at all. What therefore the Court has to assess is not the reasonableness of not proceeding to trial but the likelihood of not proceeding to trial with the risks and uncertainties which are entailed, and it is in that context that an examination of the Calderbank offer and of the further and better particulars becomes relevant.

16 In effect, the Court is being asked to make an assessment on behalf of minor and unborn beneficiaries as to the merits of the first respondent's claim in circumstances where the first respondent is clearly satisfied with the outcome which is proposed, as are the other adult beneficiaries, and without the Court having the advantage of seeing the evidence in any detail. Any analysis of the merits of the claim and of the defences must therefore be of limited value, but we certainly can take into account the advice of chancery counsel whose opinion we have found to be of great assistance.

17 First of all, although Mr MacRae resolutely defended his pleading against any suggestion that the losses have been padded out, he did accept the maximum realistic value of the claim was in the region of £1.1m, notwithstanding those further and better particulars, and he did in his reply identify, no doubt to Advocate Lincoln's satisfaction, a number of difficult points which the first respondent would have to overcome if the matter went to trial. Taking matters in the round, the Court is of the view that the losses claimed in the further and better particulars look very marginal. We note that the decision taken in 2007 was taken in very different economic circumstances than those that apply today and it may well not have been unusual or unexpected to have a hedging arrangement made in that year.

Accordingly it would seem difficult to raise any criticism against the representor for the principle of making a hedging arrangement.

18 It was said to us that no sale of properties was possible as a result of the detailed terms of the swap agreement. The Court finds this to be surprising upon the basis that a swap deal is customarily separate from a security deal, but we recognise that these assumptions might have been changed had we heard evidence in detail.

19 We were of the view that there was a firm possible claim in negligence at the very least, and we concluded that given the extent of the difficulties in proving a loss, we could not be sure that the first respondent would have continued following receipt of the second Calderbank offer which would naturally expose him personally to costs in relation to the substantive proceedings if he did not beat the offer at trial.

20 In our view, therefore, subject to one further point to which we will come shortly, the settlement agreement marks a reasonable settlement and compromise of the claims which the first respondent, as a beneficiary, had against the representor and we are comforted in that conclusion by the fact that other adult beneficiaries have reached the same view. Given the terms of the opinion expressed by Mr Hochberg on behalf of the minor and unborn beneficiaries, and the comments which we have made already in this judgment, we accept the submission that this settlement agreement should be approved on behalf of minor and unborn beneficiaries, as we say subject to the matter to which we now come.

21 As we have mentioned earlier in this judgment, C Limited made an agreement with the first respondent by which the latter was appointed to provide services in locating residential or commercial properties available for purchase, procurement of finance or capital from third parties, and various other services which are not so relevant to the instant matter. In consideration of those services, C Limited was to pay the first respondent the sum of £80,000 per annum. The agreement provided this exculpation clause:-

> *"[The first respondent] shall not be responsible for any indirect or consequential loss or damage (with a loss of profit or otherwise) or any damage of any nature, costs or expenses, nor shall [the first respondent] be liable for any claims for consequential compensation which arise out of or in connection with any property introduced to [C Limited].* This paragraph does not affect claims in respect of death or personal injury caused by the negligence of [the first respondent] and does not limit or exclude any liability for fraudulent misrepresentation.
>
> *8. It is acknowledged that [the first respondent] has advised [C Limited] to take its own professional advice and to use the services of solicitors, surveyors, valuers, financial advisers or providers and other specialists as necessary, for those fees [C Limited] is solely responsible, even if such parties have been introduced by [the first respondent]. [The first respondent] accepts no liability for defects in relation to any property, availability of finance or advice received."*

22 We express no view as to the efficacy of these exculpation clauses but we have noted that in the answer filed by the representor in the substantive proceedings, assertions are made which could be said to attribute any losses sustained to the fault of the first respondent. We noted that the settlement agreement contains covenants which prevent other claims being brought against the representor, but it does not appear to exclude in terms the possibility of claims being brought against the first respondent. The identified minor beneficiary is a grandchild of the first respondent, and unborn and currently unascertained beneficiaries may well therefore also be children or grandchildren of the first respondent. We do not think that it is in the interests of the first respondent's children and grandchildren that the first respondent should be exposed to any potential claim of this kind.

23 We adjourned the hearing briefly for the parties to take instructions. On our return, Advocate Lincoln gave an undertaking to us on behalf of the representor, C Limited and C Limited's directors that to the extent that those parties might have claims available to them against the first respondent personally of any nature falling within paragraph 3.1 of the settlement agreement, as amended mutatis mutandis, they agreed not to bring any such claims. For reasons not relevant to the present case, that undertaking was conditional for a period of 14 days, and would become unconditional 14 days after 6 th June unless his clients applied to be released from the undertaking during the interval. As the 14 day period has now expired without any such application having been made, the undertaking is now unconditional and has been relied upon by the Court in reaching its conclusion that the settlement agreement can be sanctioned.