Re A and B Trusts

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Morgan, Newcombe
Judgment Date:	17 July 2007
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Text

[2007] JRC 138

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Morgan **and** Newcombe.

In the Matter of Article 51 of the Trusts (Jersey) Law 1984, as Amended.
In the Matter of the Representation of Lincoln Trust Company (Jersey) Limited.
And in the Matter of the A and B Trusts.

Advocate P. G. Nicholls **for Lincoln Trust Company (Jersey) Limited**.

Authorities

Trusts (Jersey) Law 1984.

Marley v Mutual Security Merchant Bank [1991] 3 All ER 198.

In the matter of the H Trust [2006] JRC 057.

THE COMMISSIONER:

1 This is an application for directions by Lincoln Trust Company (Jersey) Limited ("Lincoln") as trustee of two trusts which I will refer to as the "A" and "B" Trusts respectively, brought under Article 51 of the Trusts (Jersey) Law 1984 in relation to matrimonial proceedings in England between the settlor of the assets of the trusts, to whom I shall refer to as "C", and his wife, to whom I shall refer to as "D".

2 C has a number of wives including D under the tribal laws of the foreign jurisdiction in which he lives. However he was subsequently married to D under a civil ceremony in England, where D now lives with the children of the marriage. C is thought to have as many as 40 children by his various marriages and a number of grandchildren.

The Trusts

3 The A Trust is a Jersey Proper Law Discretionary Trust nominally settled on 14 th September 1989 by C's uncle, but funded by C. The original trustee was Allied Irish Trust Company (Jersey) Limited. It retired in favour of Lincoln on 11 th May 2000. The beneficial class comprises C's grandfather, the grandfather's brothers and sisters and the issue of the grandfather's brothers and sisters. It also includes the spouses of the grandfather and his brothers and sisters, but as a result of what appears to be a typographical error, spouses of the issue may not be included within the beneficial class. C comes within the beneficial class as issue, but for the reasons just mentioned it is not clear that D as his spouse is a beneficiary. C's children come within the definition of "issue" and are therefore beneficiaries. There is the usual power to add beneficiaries. A letter of wishes was executed by C on the 15 th September 1989 under which he expressed the wish that the trust fund should be applied firstly for his benefit within his lifetime, secondly for the benefit of D during her lifetime and thereafter for the benefit of his 4 children with D and 6 other named children.

4 The assets of the A Trust comprise an interest in a golf course with residential development potential situated in Ireland.

5 The B Trust is a Jersey Proper Law Discretionary Trust declared by Lincoln on 1 st October 1992 and funded by C. The beneficial class comprises of the grandchildren of C's father, their spouses and their issue. Accordingly neither C as a child nor D as his spouse are

within the beneficial class. There is the usual power to add beneficiaries. C executed a letter of wishes 2 nd October 1992 expressing the wish that the trust fund should be applied primarily for the benefit of his 4 children with D and 5 other named children.

6 The assets of the B Trust comprise the home in England in which D and her children (believed to be adults) live, a number of other properties situated in the UK and cash held in Guernsey.

The matrimonial proceedings

7 D commenced proceedings in the Family Division of the High Court on the 17 th June 2000 and on the same date obtained a worldwide freezing order in relation to C's assets, which included certain assets of the B Trust. On 7 th December 2000 Lincoln applied to intervene in those proceedings without the directions of this Court. The application does not specify the capacity in which Lincoln applied to intervene, but on 12 th December 2001 Hughes J made the following order *inter alia*:

> *"There be leave to the Trustees of the [B] Trust and of the [A] Trust to intervene for purposes limited to proceedings relating to ancillary relief.*
>
> *Any application the trustees are advised to make to vary the terms of the Freezing Order made by Mr Justice Johnson dated 17th July 2000 (as amended) shall be issued and served on the Petitioner and the Respondent by not later than 4.00pm on 21st January 2002.*
>
> *The Trustees shall file and serve on the Petitioner and the Respondent by not later than 4.00pm on 21st January 2002 an affidavit containing the best available information relating to each of the Trusts as to:-*
>
> *(i) its assets and income;*
>
> *(ii) its last two years trust accounts with copies;*
>
> *(iii) all payments currently being made detailing recipient, amount and the purpose of any such payment; and*
>
> *(iv) the extent to which the Respondent was directly or indirectly the source of the funds paid into the trust.*
>
> *And in relation to the [A] Trust shall produce by that date a copy of the Trust Deed."*

8 Pursuant to those orders Lincoln filed two affidavits part of one of which we have seen and to which we refer later.

9 C challenged the jurisdiction of the English Courts right up to the House of Lords, unsuccessfully and at great cost. Ancillary proceedings were therefore delayed until 2006. In the meantime in November 2004 Lincoln applied to the English Court to vary the Freezing Order in relation to certain bank accounts of the B Trust held in a bank in the Isle of Man that was closing. These monies, which D alleged belonged to C and not to the B Trust, were subsequently transferred by consent order of the English Court to accounts in Guernsey under the control of Lincoln.

10 There have been numerous hearings in 2006 before the High Court, at which Lincoln was represented. In September and October 2006, after consultation with C's English advisors, Lincoln made two open offers to C's legal advisors for transmission to D's English advisors and aimed at settling the matrimonial proceedings. In the second offer it proposed that the home occupied by D (an asset of the B Trust) should be sold and an alternative property acquired for a maximum of £850,000 in which D could live whilst her children occupied the property with her, following which (because she was not a beneficiary of the B Trust) she would then have to pay rent. It then went on to make proposals in relation to the A Trust which are worth setting out in full:

> *"Further the Trustee of the [A Trust] has also considered matters carefully and is prepared to exercise its discretion and release to [C] the following sums solely on the basis that the funds so released form part of a full and final settlement between your client and [D] of all litigation between them arising out of their marriage in any jurisdiction, to be embodied in the terms of a minutes of agreement and consent order.* The Trustees wish to make it quite clear that they will not make this distribution to [C] under any other circumstance. The funds which they propose making available to him are set out in two parts:
>
> *1. A lump sum of £3 million to be passed by him to [D] and used for no other purpose. It is obviously up to [D] how she utilizes this sum but the Trustee anticipates that part of the sum will be used to meet her reasonable legal costs whilst the remainder will form a Duxbury Fund to meet her living expenses for the rest of her life*.
>
> *2. The provision of an annuity to be purchased once [D's] children leave the property which has been purchased for the use of [D] by the [B] Trust and which has been detailed above. The annuity is to provide a sum equivalent to the rent required to be paid to the Trust*.
>
> *It is important that the parties quite clearly understand that the Trustee will only exercise its discretion in the manner above if the litigation between the parties comes to an end and both parties undertake to terminate (and not recommence) litigation against the other in any jurisdiction in the world.* To reiterate, this payment will be in final settlement of all claims between [C] and [D] and Trustee (and the Trust assets) including orders for costs in all proceedings around the world."

11 As will be seen later, the A Trust did not have £3 million to distribute - indeed it was

manifestly illiquid. We were informed that at that time negotiations were in progress for the sale of the golf course in which it had an interest which negotiations fell through, but even so the offer gave the misleading impression that the A Trust had access to substantial liquid funds which it was able to "release". The open offers were rejected by D.

12 On 17 th November 2006, after a hearing at which Lincoln was again represented, Baron J gave judicial encouragement to Lincoln to assist in a number of ways. Although, despite requests, we have not been shown a copy of her Judgment we understand that she was concerned at the apparent lack of funding available to D for legal fees and that she was not on a level playing field with C and Lincoln. She ordered *inter alia*:

> *"(E) The Husband will pay to the Wife 50% of any sum he receives from the trustees of the [A] Trust in respect of their costs as a result of the judicious encouragement given by Baron J on 17th November 2006 on the following basis:*
>
> *(i) both the husband and the Wife have identified an immediate need for the sum of £100,000 to be paid to their respective legal advisors, if possible, before 15 December 2006, to enable each of them to comply with the timetable within this order and an anticipated further need for an additional sum of £350,000 each, payable in regular instalments, to cover on going further costs up to and including the final hearing to be listed under paragraph 18 (below);*
>
> *(ii) all payments (to include any regular payments by instalment) made by the Husband and Wife in accordance with this paragraph shall be set off against the Husband's liability (to include any arrears) under paragraph 14(i) and (ii) below."*

13 It was also ordered that Lincoln as trustees of both the A and B Trusts be joined (again) as a party to the proceedings "for purposes limited to proceedings relating to ancillary relief" together with a third trust in respect of which no directions are being sought. This judicial encouragement was given, we understand, on the not unreasonable assumption on the part of Baron J based on Lincoln's open offers that Lincoln as trustee of the A Trust was in a position to assist the parties to the extent of at least £900,000. For such encouragement to be given, Lincoln who as we say was represented at the hearing, must have indicated to Baron J that assistance at that level was feasible and indeed this was Lincoln's opening position in this application. Baron J was informed that Lincoln would need to make an application to this Court for directions before providing such assistance.

14 The English Court was anticipating that this assistance would have been provided at least by a directions hearing scheduled for the 5 th and 6 th June this year. We will deal with the history of the Jersey application in a moment but it is worth setting out extensively the Judgment of Baron J, issued on 6 th June 2007 following a hearing, in private, at which again Lincoln was represented:-

"2. In order to put these issues into context, I feel it is important to outline the factual matrix. I do so particularly for the court in Jersey, which I understand is to make rulings on 28th June. It is, as I understand, for that court, in the context of a Beddoes application, to give its approval to the Trustee's proposals or make directions in relation to two or three specific trusts, being the [B] Trust, the [A] Trust and the [-] Trust, all of which have been joined to these proceedings by me. I have joined them because I consider that those trusts play a pivotal role in this case as holding of family assets and therefore in relation to the resolution of the claims which [D] makes against her former husband, [C]. This Court has not decided to join these entities on a whim. It has done so because, after careful consideration of the issues, the English court considers it to be vital .

3. On 17th November 2006, this case came before me on a five-day time estimate. It had originally envisaged that the time would be used as part of the final hearing. It is the wife's assertion that her former husband is a man of very substantial means. She has asserted that he is worth as much as £500 million or as little as £200. It is [C's] assertion that he is worth nothing. I think the figure given in his form E is "minus £4 million" or thereabouts .

4. During the course of these parties' marriage, the wife came into possession of a number of Hildebrand documents, some of which have been made available to me. Those documents show, at the very least, that this husband had, in the order of £30 million in the mid-1990s. At that stage his assets were under the auspices of a Mr [-]. It appears that the Trusts that I have outlined were set up in Jersey in the 1990s. The documents that I have seen indicate that the husband's assets were not placed into those Trusts immediately. It is the assertion of [D] that some, if not all, of those assets were placed into those Trusts in order to avoid her legitimate claims. Therefore there is a legitimate question which requires determination as to whether the assets belong to the Trust or should be regarded as the husband's. Accordingly those matters need to be clarified .

5. There are two separate strands to this litigation. The first relates to a possible mediated settlement. The court had ordered a Financial Dispute Resolution ("FDR") meeting. It is fixed before me in early September 2007. On that occasion, this court has ordered the attendance of [C] and [D]. The date has specifically been chosen because [C] is available. It has ordered the attendance of the relevant trustees, for they are a vital component in the settlement discussions. It is my hope that all of the parties in this case will co-operate and the Jersey court will ensure that the meeting is possible. If successful it will save substantial costs and will lead to a constructive settlement of this case. But if the FDR does not succeed then the second strand of the case is the contested hearing fixed for some 20 days in January 2008. That hearing will be extremely costly and will be disruptive. I note that this litigation has been ongoing since 2000, which

the husband chose (as was his right) to take a number of technical points in relation to this court's jurisdiction. He lost every round of that litigation from First Instance to the House of Lords. It was very expensive .

6. There is no doubt that this court has jurisdiction to deal with the wife's outstanding claims and it expects assistance from courts of competent jurisdiction to ensure a fair outcome to both husband and wife. The trustees need to participate to protect such assets as they can show legitimately belong to the trusts .

7. On 17th November 2006, the case lasted, from memory, some four days. The husband was represented by his usual team, namely, Mr Howard QC, Mr Marshall, and solicitors of utmost repute. The wife was represented by a team of equal distinction, in terms of Mr Crayford QC, his junior and Mr Osibanjo who has been the wife's solicitor since 2001. The Trustees had eminent counsel in the form of Mr Moylan QC, who has subsequently been elevated to the High Court Bench .

8. The order that I made, after lengthy submissions, is the encapsulation of the judgment that I gave on that occasion. It was agreed by the spouses that in order to progress matters, each of them required funding and that that funding could be made available from the [A] Trust, of which the husband was the noted principle beneficiary. The husband agreed that he would pay 50 per cent of any sum that he received from the trustees of the [A] Trust. It was agreed that the husband and wife had identified an immediate need for the sum of £100,000 to be paid to their respective legal advisors, if possible before 15th December 2006, to enable each of them to comply with the directions as timetabled within my order. They also anticipated a need for an additional £350,000 each, payable in regular instalment, to cover the ongoing, future costs up to and including a final hearing date, then anticipated to be some 12 months away. All of the payments to be made were to be set off against the husband's liability for arrears in relation to the wife's entitlement for maintenance pending suit .

9. On 13th December 2000 HHJ Judith Hughes, sitting as a High Court Judge, made an order that the husband pay substantial maintenance pending suit. This order may have been paid for a short period but the order was then put in abeyance. I varied that order in November 2006 on the basis that I was fully satisfied that the husband had sufficient resources to make the payments. My order was to the effect that he would pay £40,000 per annum, commencing on 1st November 2001, until 31st October 2006, and thereafter at the rate of £10,000 a month commencing on 1st November 2006 until further order. The arrears under that order are now in the order of £280,000. It was my expectation that the Trustees of the [A Trust] settlement would enable this money to be paid. I had confidence that this would be available because the Trustees had made it clear (in an earlier open offer) that they could raise substantial sums in order to settle

this case. Therefore, logically, there was no difficulty in obtaining capital/income with which to assist this husband to meet his undoubted obligation to his former spouse .

10. The Authorities in this jurisdiction are clear, that this court can expect trustees to comply with "such judicious encouragement" as the court feels is appropriate. I considered it was appropriate for the [A Trust] to assist this husband in the way the wife had not received for many years. I had every reason to expect the Trust to assist in respect of the costs which each of them required in order to fund their legal teams. Without guidance from professional advisers this case has no prospect of settling .

11. I expected, therefore, that the judicious encouragement that I gave to the Trustees, given they were so expertly represented, would result in compliance with my order and with the clear wishes of the husband (their principal beneficiary). That expectation was not met, for the Trustees have failed to produce any monies. Therefore, the husband has failed to comply with his obligations in respect of maintenance. The Trustees' position is, apparently, that they cannot produce any funds without specific permission being granted by the Jersey court, hence the issue of the Beddoes application. Of course, trustees have to act in accordance with their fiduciary duty, and in this case they have a clear letter of wishes. They have a discretion which they must, of course, exercise in a fiduciary manner, but they have a principal beneficiary .

...

14. To my mind, the Jersey Court will be assisting in the process, and will be assisting this family if the necessary directions are given on 28 th June 2007 to enable the husband to comply with my order. I look to my brother judge to assist this court and this family. The timetable set out so carefully in my order of 17th November 2006 was derailed by a lack of finance, nothing much has happened so far as that order is concerned. For the avoidance of doubt, I am clear that the joinder of the Trustees is valid and proper in accordance with English law."

The Jersey Application

15 Lincoln's representation was brought ex parte before the Royal Court on 30 th March 2007. There has been no explanation to us as to the delay in bringing that application bearing in mind the English Court gave its judicial encouragement on the 17 th November 2006 although we note that Mr Russell Homer of Lincoln has been ordered by the English Court to swear an affidavit explaining the delay. D's children with C, together with a number of other children of C, were convened for 27 th April 2007. C and D do not appear to have been convened although it is clear that their English legal advisors are aware of the

application. At that hearing, at which none of the convened parties appeared, the matter was further adjourned to a hearing before this Court on 11 th May 2007. A number of the children have written to Lincoln with D's children perhaps not surprisingly being in support of Lincoln giving effect to the judicial encouragement of the English Court and others being against.

16 The first time the Jersey Court was able to look at the substance of the matter was on 11 th May 2007 and it was immediately clear that there were difficulties in particular with the information then before the Court:-

(a) The representation had been brought by Lincoln in its capacity as trustee of the A Trust alone when it was clear from the supporting documentation that Lincoln was seeking directions in relation to both the A and B Trusts. There was also an issue as to whether directions should be sought in relation to the third trust.

(b) The representation sought directions as to whether Lincoln should submit to the jurisdiction of the English Courts. This surprised the Court as it seemed reasonably clear from the documentation, then in its possession, that Lincoln had already done so. The Court required clarification as to precisely what steps Lincoln had taken in the English proceedings and whether it had properly been joined thereto.

(c) A number of the children of C had been ordered to be convened by post but at unknown addresses. The Court requested clarification as to the identity and whereabouts of the children.

(d) In the supporting affidavit of Mr Homer, he indicated, in response to the judicial encouragement of the English Court, that although the value of the minority holding of the A Trust in the company which owned the golf course to which I will refer as "E" Limited was more than sufficient to enable Lincoln to raise £900,000, it proposed a distribution of £200,000 only to C to be utilised in the manner indicated by the English Court. No accounts of either the A Trust or E Limited had been provided. It was unclear to the Court how this or any sum was going to be raised on the security of a minority interest in a private company and serviced by a trust which was not apparently in receipt of any dividends or other regular income and the then counsel for Lincoln was unable to assist.

(e) The Court was conscious that Baron J had issued a Judgment with her order of 17 th November 2006 and it wished to see that Judgment and indeed any other Judgment which related to Lincoln. As it transpires the only Judgment that this Court has seen is the later judgement dated 6 th June 2007.

17 The matter was adjourned and brought back by Lincoln before the court on the 28 th June. The representation has now been amended to include the B Trust. No directions are being sought in relation to the third trust. Mr Homer had sworn a second affidavit. Exhibited to it were:-

(a) An unequivocal opinion from David Herbert of English Counsel that Lincoln has indeed, of its own volition, and in its capacity as trustee of the A and B Trusts submitted to the jurisdiction of the English Courts.

(b) A list of C's children and their addresses provided by C's UK Solicitor. There are 19 children on the list (some way short of the 40 children he is thought to have) and no indication is given as to the respective unions from which they have been born.

(c) The accounts of E Limited, for the period from 14 th June 2000 to 31 st March 2007 in which the A Trust has a 45% interest. Those accounts show the company as owning the golf course in Ireland, acquired at cost for £4.4 million and some £2.7 million in cash secured to AIB Bank CI Limited in respect of a loan in that amount. This loan is also secured over the rental income from the golf club. The accounts show a loan due to an unspecified shareholder in the sum of £4.7 million.

18 In his second affidavit Mr Homer deposed that the remaining 55% of E Limited was owned by an individual who was named and with whom there was apparently no shareholder or other agreement. The company leasing the golf club, to which I will refer to as "F" Limited, had not been required to pay the annual rental of 158,717 Euros due under the lease in order to facilitate its initial cash flow and that there were arrears of some £200,000 due to E Limited. We were not shown the lease. F Limited had limited cash reserves and was not in a position to discharge its rental obligations but it was apparently prepared to make arrangements to borrow the sum of £200,000 to repay the arrears albeit that it might take "a little while for this money to filter through". The other shareholder in E Limited had agreed that this money, once received, could be paid over to the A Trust which Lincoln would then use to make a distribution of £200,000. When we asked what security F Limited could offer any lender, we were told that it was in a position to borrow against its future income.

19 Shortly prior to the hearing on 28 th June 2007, Lincoln filed a third affidavit from Mr Homer in which he deposed that the A Trust had a 45% interest in another company, not previously mentioned, to which I will refer as "G" Limited. The majority shareholder was the same individual as that in respect of E Limited. G Limited owned F limited, the company that leased and operated the golf club. The A Trust had loaned G Limited £898,664 of which £553,485 had been on lent to F Limited. Mr Homer deposed that these loan accounts provided an alternative mechanism by which funds could be made available to the A Trust although it would not circumvent the problem that F Limited would still need to raise funds in order to make any payment. We were not shown the accounts of either F Limited or G Limited.

20 Mr Homer made no reference in his second or third affidavits to the identity of the shareholder to whom the loan of £4.7 million due by E Limited was owed. Upon inquiry we were told that was in fact due to the A Trust.

21 The picture which thus emerged was of an illiquid trust (the A Trust) whose principal asset

was an interest in a golf course in Ireland operated by a company which had difficulty in meeting its rental obligations. Although the trust only held a 45% interest in the equity of that asset it had the benefit of two substantial loans which, if called in, could only be met by the sale of the golf course. No valuations of the golf course had been obtained nor was any expert evidence filed as to its potential for development. Far from being able to raise £900,000 let alone £3,000,000 the A Trust was struggling to raise £200,000.

22 Originally the A Trust had owned 100% of the equity of the golf course and the Court was concerned as to how that interest had been reduced to that of a minority shareholder without the protection of an agreement with the majority shareholder as to how their respective shareholdings would be regulated. Mr Homer's first affidavit had exhibited a short extract from an affidavit of C dated 4 th April 2001 and filed in the English proceedings in which he purports to explain how the interest of the A Trust in this golf course had been reduced to what he now described as an interest which was "minimal". That explanation in our view raised more questions than it answered. Lincoln was unable to assist the court in this respect although to be fair to Lincoln these transactions had taken place prior to it becoming trustee.

23 As to the B Trust, although the representation had been amended to include it, the trust deed and letter of wishes had not been exhibited to the second affidavit of Mr Homer and were produced only at the request of the Court at the hearing. No accounts of the B Trust or any underlying company were provided though at the hearing we were shown an exhibit to an affidavit sworn by Mr Homer on the 20 th February 2002 in the English proceedings indicating that it had interest in a number of properties through some 6 underlying companies which properties, we were informed, were located in the United Kingdom.

Disclosure

24 The Court found the whole process by which some but not all of the relevant financial position of the A Trust was disclosed to it, piece by piece and often only in response to the Courts own questions, very unsatisfactory. The court should not find itself, as we did here, having to piece together its own corporate plan and having to probe counsel to try and understand the position. In *Marley v Mutual Security Merchant Bank* [1991] 3 All ER 198 at 201 PC, Lord Oliver stated:

> ***"...it is appropriate to state two general propositions.*** In the first place, there has always to be borne in mind the position and duties of a trustee who applies to the court for directions. A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put into possession of all the

material necessary to enable that discretion to be exercised. It follows that, if the discretion which the court is now called upon to exercise in place of the trustee is one which involves for its proper execution the obtaining of expert advice or valuation, it is the trustee's duty to obtain that advice and place it fully and fairly before the court, for it cannot be right to ask the judge in effect to assume the burdens of a trustee without the information which the ***trustee himself either has or ought to have to enable him to carry out his duties personally.*** The court ought not to be asked to act upon incomplete information and, if it is so asked, the proper course is either to dismiss the application or adjourn it until full and proper information is provided .

Secondly, it should be borne in mind that in exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. That is not always easy, particularly where, as in this case, the application has been conducted as if it were hostile litigation; but it is essential that the primary purpose of the application—indeed, its only legitimate purpose—be not lost sight of in academic discussion regarding the discharge of burdens of proof. Where beneficiaries oppose a proposal of a trustee with a host of objections of more or less weight, the court is, of course, inevitably concerned to see whether these objections are or are not well founded, but that must not be permitted to obscure the real questions at issue which are what directions ought to be given in the interests of the beneficiaries and whether the court has before it all the material appropriate to enable it to give those directions."

25 In this case Lincoln is seeking the approval only of the Court to the steps it intends to take in response to the judicial encouragement of the English Court and it has not surrendered its discretion. Even so in our view the requirement for full disclosure as enunciated by Lord Oliver applies to any application for directions whether or not the trustee is surrendering its discretion. It must follow as a matter of general principle that if a trustee wishes the court to approve a decision it proposes to make, it must provide the court with all of the information that the trustee has or ought to have in relation to that decision.

Judicial Encouragement

26 In this case Lincoln has received judicial encouragement from the English Court, to whose jurisdiction it has surrendered, to make available funding for the parties legal fees to the extent of £900,000 which it had been led to believe was available. As is clear from the judgment of Baron J of the 6 th June 2007, there is also an expectation on the part of the English Court that Lincoln as trustee of the A Trust will assist C in discharging his maintenance obligations to D, as requested by C in his letter to Lincoln of the 1 st February 2007 but which was not received by Lincoln until the hearing on the 6 th June 2007. Lincoln make no reference to this aspect of the English Court's expectation in their application. When asked how this could be the case, we were informed that there simply weren't

enough funds within the A Trust to contemplate such assistance.

27 Bearing in mind the expectations of the English Court, Lincoln proposes to make only £200.000 available. It does not apparently feel it appropriate to explain to this court fully or even adequately what its financial options are. We do not know whether this is the maximum amount that it can raise (which would appear to be the case) or whether this is the maximum amount it is prepared, in the interests of the trust estate, to raise. Many questions remain in the mind of the court—-for example on what basis did Lincoln feel able to inform this court and the English Court that it could raise £900,000 against the security of its minority holding in E Limited; what is the relationship with the majority shareholder; what are the prospects of the golf club as a going concern and in particular what effect will F Limited's proposed borrowing of £200,000 have on its already stretched cash flow and its ability to pay future rent; what are the terms of the lease of the golf club and course; what is the current value of the golf club and course; what advice has been taken on the prospects for development; what are the implications of the shareholder loans being called in; what are the terms of the loan from AIB and so on?. But for the time constraints, we would have given consideration to dismissing this application on the basis that we cannot be asked to give directions on incomplete information or to adjourning the application so that we can receive full information but have decided not to for three reasons:-

(a) It would appear that contrary to its earlier indications the ability of Lincoln to raise material funds out of the A Trust is limited;

(b) Apart from the issue of its surrender to the English Court, the only matter actually placed before the court by Lincoln is its proposal to make £200,000 available to the parties for the purposes of the mediation hearing set for early September 2007 and that assistance should not in our view be delayed;

(c) Lincoln has in fact surrendered to the jurisdiction of the English Court and is therefore amenable to any orders which the English Court may give for disclosure in relation to the assets of the A and B Trusts.

The Role of the Court

28 The role of the Court generally in an application for directions is set out in the judgement of Lord Oliver to which I have referred above and in the context of this kind of application has been set out in the Judgment of Birt, Deputy Bailiff, in the case of *In the matter of the H Trust* [2006] JRC 057, where he said at paragraphs 14:-

"14. In this respect it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this Court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the

English High Court. This Court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has therefore a very different focus from the Family Division."

Relief Sought

Distribution

29 Lincoln sought the approval of this Court to it resolving to raise and to distribute to C the sum of £200,000 ("the distribution"), the distribution to be made on the following terms:-

(a) The distribution is to be remitted to Lincoln's English solicitors.

(b) Within 7 days of receipt Lincoln's English solicitors will remit £100,000 to C's English solicitors on condition that the said sum is used explicitly in connection with C being represented by those solicitors and leading and junior counsel at the financial dispute resolution.

(c) Lincoln's English solicitors will retain the sum of £100,000, such sum to be used by means of the settlement of fee notes surrendered by D's leading and junior counsel in connection with D being represented by the same at the financial dispute resolution.

30 We understand Lincoln first became aware of the possibility of mediation when it was referred to at the hearing before Baron J on 6 th June 2007. In Lincoln's view it is in the interests of the beneficiaries of the A Trust as a whole to assist C and D in settling the English proceedings but not for the trust fund to be used to help discharge the very substantial existing liability for legal fees on both sides or to be used to prolong the ongoing litigation between the parties. It has a particular concern as to funding D in attacks which she may make against the trusts and their assets.

31 We can only give directions today on the information before us. Contrary to the impression given by Lincoln in its open offers and indeed in Mr Homer's first affidavit sworn in this application, it transpires that at this juncture only £200,000 is available from the A Trust to assist the parties. Neither party is a beneficiary of the B Trust and therefore its assets are not on the face of it available to be used for their benefit. In our view the proposal (which is the only one before us) to use these funds from the A Trust to assist the parties in relation to the mediation hearing is sensible and in the interests of the beneficiaries of the A Trust. We appreciate that it is not the assistance expected by the English Court but that expectation would appear, regretfully, to have been fuelled by the misleading impression given by Lincoln. If the mediation should fail, then we will hear any further application that Lincoln may make or may be encouraged to make in relation to the provision of further financial assistance to the parties but in any such further application we will expect to be provided with full information as to the financial position and to receive appropriate expert evidence

so that we can understand and properly assess the financial options.

32 Bearing in mind that Lincoln has been a party to the English proceedings since December 2001, it is a surprise to us that full disclosure of the position of both trusts has not already been required. The second exhibit to the affidavit of Mr Homer of 20 th February 2002 filed in the English proceedings does not constitute full disclosure in our view (but we have not seen the affidavit itself or its other exhibits); indeed we noted that the disclosure in relation to the A Trust made no reference to the substantial loan accounts due to Lincoln as trustee. In the case of *In the matter of the H Trust*, Birt, Deputy Bailiff, said at paragraph 18:-

> ***"We should add that a decision that the Trustee should not submit to the jurisdiction is separate from the question of provision of information.*** It seems to us important, in this case, that the husband and the wife should have the fullest information concerning the financial affairs of the Trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position. It is our understanding that the wife has received the necessary information, but if this understanding is incorrect and further information is requested, the Trustee should make the fullest information available to both parties and, through them, to the Family Division should this become necessary."

33 In this case Lincoln has submitted to the jurisdiction of the English Court and can therefore be required by the English Court to provide the fullest information available.

Participation in English Proceedings

34 Lincoln also sought the approval of this Court for it resolving "to participate in the English proceedings and to take such steps as Lincoln deem appropriate in connection therewith."Having voluntarily submitted to the jurisdiction of the English Court Lincoln is of course already participating in those proceedings. For this Court to give the approval sought would be to imply that Lincoln now has some choice in the matter. We cannot say whether this Court would have authorised Lincoln to voluntarily submit to the jurisdiction of the English Court if it had applied for directions before so doing. As Birt, Deputy Bailiff observed *In the matter of the H Trust* paragraph 15:-

> ***"...in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust."***

Where all the trust assets are in England it may well be in the interests of a trustee to appear before the English Courts and certainly in the case of the B Trust all of its assets (apart from the bank accounts) would appear to be in England. However having decided to submit to the jurisdiction of the English Court Lincoln now has no option other than to participate in the English proceedings. In the circumstances we decline to make an order in

the form requested, but will deal with Lincoln's on-going costs in respect of those proceedings separately.

Costs

35 It is the right of every trustee to seek the assistance and protection of this court and we do not want to discourage trustees from doing so but when an application is made the trustee must assist the court by placing before it all of the information that it has or ought to have in relation to the matter in respect of which it requires assistance. If, without good excuse, it fails to do so then in addition to facing the risk of having the application dismissed or adjourned, it may find that the court is not prepared to order that its costs be paid out of the trust fund. We will now hear Lincoln's application for its costs arising out of this application and in respect of its on-going involvement in the English proceedings.