Tanya Marya Dick Stock v Pantrust International SA and Richard George de Winton Wigley and James Richard de Winton Wigley and G.B. Trustees Ltd

Jurisdiction:	Jersey
Judge:	Matthew John Thomson
Judgment Date:	23 December 2015
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Text

[2015] JRC 268

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thomson, **Master of the Royal Court**

IN THE MATTER OF THE MANOR HOUSE TRUST AND IN THE MATTER OF THE RUSSIAN TRUST

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

Between
Tanya Marya Dick Stock

Representor
and
Pantrust International SA
First Respondent

and

Richard George de Winton Wigley
Second Respondent

and

James Richard de Winton Wigley
Third Respondent

and

G.B. Trustees Limited
Fourth Respondent

Advocate S. M. Thomas **for the Representor**

Advocate P. C. Sinel **for the First and Third Respondents**.

Advocate M. L. Preston **for the Fourth Respondent**.

Authorities

Public Services Committee v Maynard [1996] JLR 343.

Enhörning v Nordic Link [1996] JLR 37.

Berry v B.G. Trustees [2000] JLR 293.

Alhamrani v J P Morgan Trust Co. [2007] JLR 527.

Cunningham v Cunningham [2009] JLR 227.

Cummins v Howland [2014] JRC 242.

Representation of the Manor House Trust and the Russian Trust [2015] JRC 208.

Stock v Pantrust International & Ors [2015] JRC 223.

McLoughlin v Grovers [2001] EWCA Civ 1743.

Trust (Jersey) Law 1984 (as amended).

Trust — reasons in relation to refusal to order preliminary issue and 1st to 3rd Respondents

application to amend answer and counterclaim.

CONTENTS OF THE JUDGMENT

THE MASTER:

Introduction

1 This judgment represents my detailed written reasons in relation to my refusal to order a preliminary issue sought by the representor and in respect of the first to third respondents' application to amend its answer and counterclaim including issuing third party claims against other members of the representor's family and the fourth respondent. The application was heard on 2 nd December, 2015, and a decision given that day with detailed reasons to follow.

Background

2 The background to the present proceedings is set out in two judgments of Commissioner Clyde-Smith reported as *Representation of the Manor House Trust and the Russian Trust* [2015] JRC 208 dated 8 th October, 2015, and *Stock v Pantrust International & Ors* [2015] JRC 223 dated 6 th November, 2015, which background I adopt for the purposes of this judgment. Commissioner Clyde-Smith by paragraph 20 of his judgment of 6 th November, 2015, delegated to me ongoing case management issues.

3 Between the first and second judgments of Commissioner Clyde-Smith, the first to third respondents filed an answer. While these proceedings were commenced by way of representations, and no directions have been given for the filing of pleadings, no party made any challenge to the fact that the first to third respondents had filed an answer. Paragraphs 5 to 20 of the answer provides as follows:–

> *"Paragraph 1 of the Amended Representation is admitted.* It is however specifically denied that the Representor is a beneficiary of The Manor House

Trust or that she has locus to bring these proceedings.

Paragraph 2 of the Amended Representation is admitted, save that it is denied that the true nature of the legal relationships created was that of discretionary trusts for the reasons which follow.

The Settlor and sole beneficiary of "the Dick Trusts" was and is John W Dick Snr, a fact known to all those concerned with the formation and administration of "the Dick Trusts" over the years.

The true nature of the legal relationship comprising "the Dick Trusts" was a relationship of agency between John W Dick Snr (as principal) and the "trustee" of "the Dick Trusts" from time to time (as agent).

The reality of the situation throughout was that John W Dick Snr was Richard Wigley's client, a relationship being far more akin to that of principal and agent or of client and banker, than to ordinary notions of Anglo Saxon trusteeship. The Respondents did as they were told by John W Dick Snr.

John W Dick Snr personally and at all times controlled the affairs and the assets of his financial portfolio, including those contained in the "Dick Trusts". Over the course of their relationship, John W Dick Snr directed the Second Respondent, either directly, through the First Respondent or through one or more entities affiliated with the Second Respondent, to pay various expenditures on John W Dick Snr's behalf and / or on behalf of his various entities, using the assets of the "Dick Trusts".

Over the course of their thirty-year relationship, John W Dick Snr has directed, authorized or ratified, and in any event benefitted from, the actions taken by the Respondents on Mr Dick's behalf and for his personal benefit. Through his direction, authorization or ratification of the Respondents' actions, Mr Dick personally controlled and benefitted from the affairs of the "Dick Trusts".

John W Dick Snr has, by his direction and for his benefit, utilized the assets of the "Dick Trusts" in the course of real estate developments and other investments carried out by the Dick Family Trust 1 and Dick Family Trust 2 ("the Dick Family Trusts), notably by financing or procuring the financing of LSI, a Colorado company forming part of those latter trusts. In effect, John W Dick Snr has at all material times treated the entirety of the "Dick Trusts" and "Dick Family Trusts" as one financial portfolio to be controlled at the direction of John W Dick and for his benefit.

Various expenditures were paid for John W Dick Snr's benefit and / or that of his various entities, which monies were funded by way of loans from inter alia La Hougue Financial Management Services Limited ("LFMS") or Oxford Financial Services Limited ("Oxford").

John W Dick Snr's modus operandi in business was to borrow heavily in order to meet both his expensive lifestyle and to fund the various investments in which

he was involved. Throughout the lifetime of the "Dick Trusts", John W Dick has required the Respondents and their predecessors to arrange such borrowing on a near constant cycle. By way of illustration, the Respondents have records of *arranging borrowing for John W Dick Snr and his related entities from 78 private loans through 157 lenders.*

For many years Mr Dick directed the Respondents to pay various expenditures on his behalf and / or on behalf of his various entities such as: (1) payment of personal credit card bills of Mr Dick; (2) the expenses of St John's Manor; and (3) to meet expenditure arising in the course of various real estate developments with which Mr Dick was involved. Mr Dick converted some personal debts into loans arranged through LFMS; other loans were arranged by the Respondents at Mr Dick's behest and for the benefit of Mr Dick and the "Dick Trusts" (collectively "the Pantrust Loans"). Mr Dick directed, authorized or ratified, and in any event enjoyed the benefit of, all of the Pantrust Loans.

The lenders of the Pantrust Loans were entities affiliated with the Respondents and included LFMS and Oxford. The Pantrust Loans and the amounts still outstanding in respect of the same are detailed in Schedule 1 to this pleading. As at 30 June 2015, the outstanding balance totalled USD $29,559,317.

LFMS and Oxford have since assigned their interest in the Pantrust Loans and associated loan documentation to the First Respondent.

In the premises, the true analysis of the relationship between the Respondents and John W Dick Snr is that of agency, the former being agents for the latter principal.

Further or alternatively, there existed between the Respondents and John W Dick Snr a contractual relationship, whereby the Respondents agreed to act in accordance with John W Dick Snr's instructions in exchange for which they were remunerated for their services in carrying out those instructions and administering the assets of the "Dick Trusts".

The following were express or implied terms of that contractual relationship:

The Respondents would at all times act in accordance with John W Dick Snr's instructions insofar as it was able to do so.

John W Dick Snr would indemnify the Respondents in respect of any loss, damage or liability incurred as a result of acting upon his instructions.

John W Dick Snr would in reality remain the sole party beneficially entitled to the assets of the "Dick Trusts".

John W Dick Snr would assume liability in respect of and repay all lending procured by the Respondents for his benefit and / or for the benefit of the "Dick Trusts"."

4 As a result of the decisions of Commissioner Clyde-Smith, (subject to the first to third respondents' appeal to the Court of Appeal in respect of the first judgment), the only issue raised by the representation that remains concerns whether the proper law of the Trusts was altered from Jersey to Panama as pleaded at paragraphs 23A to 23T of the amended representation.

5 However, the first to third respondents' answer and counterclaim went much further, as summarised by Commissioner Clyde-Smith at paragraphs 2 and 3 of his judgment of 6 th November, 2015, as follows:–

> ***"2. The Panamanian Trustee and the first and second directors (together "the respondents") resist the applications for their removal because by their answer, counterclaim and third party claims, filed on 16 th October, 2015, in respect of the two representations, they deny that the true nature of the legal relationships created was that of discretionary trusts. The true nature of the legal relationship, they say, is that of agency between the Settlor as principal and respondents as agents. The relationship was more akin to that of a client and banker than to ordinary notions of Anglo-Saxon trusteeship and so the idea of the Court having a supervisory role has no relevance. The trusts were not in truth discretionary settlements established by declaration of trust by Barclaytrust. Alternatively, they plead that the terms of the deeds of trust have been overridden, varied and/or surpassed by agreement between the Settlor and the respondents*** .
>
> ***The respondents assert that over many years they arranged loans at the Settlor's direction and for his benefit through entities affiliated with the respondents ("the Pantrust loans") of which the balance outstanding is some $29.5M.*** The Pantrust loans have now been assigned to the Panamanian Trustee, it would seem in its personal capacity. It was an express or implied term of the contractual relationship between the Settlor and the respondents, they say, that he would assume liability for the repayment of the Pantrust loans. The respondents allege a conspiracy by the Settlor, the representor, her brother and her husband ("the family") to defraud the respondents by denying ***the existence of the Pantrust loans and counterclaim against the family for damages in the amount of the outstanding balance."***

6 The Royal Court also proceeded on the basis that the Trusts were validly constituted as set out at paragraphs 5 to 7 of the 6 th November, judgment as follows:–

> ***"5. The Court has made it clear that it cannot proceed on the basis that the respondents' claims as to the true nature of the relationship have been proved. In Paragraphs 50 and 51 of its judgment the Court said this:–***
>
> ***"50 Whether or not the trusts and subsequent deeds, up to and including the 2007 DORAS are shams would be a matter governed by Jersey law as the Trusts were governed by Jersey law at the time they were entered into.***

As it was held in the case of *In the matter of the Fountain Trust* [2005] JLR 359 ***at paragraph 14, in order for the Court to conclude that a document or transaction was a sham it is necessary that all the parties to it should have a common intention, that "documents are not to create the legal rights and obligations which they give the appearance of creating."***

51 We venture to suggest that there would be considerable hurdles to overcome in proving that Barclaytrust were a party to any such common intention when the Trusts were established. Even so, there has been no finding by any court that the trust and subsequent deeds are shams. They are valid on their face and we must at this stage proceed on the basis that it was the intention to create valid trusts and treat them as valid, unless and until a court of competent jurisdiction determines otherwise; notwithstanding that, as alleged by the first director, for many years the trustee may have disregarded the trust and subsequent deeds and simply done as it was directed to do so."

6. The Court notes in this context that whilst now claiming a sham, the respondents have been parties to numerous deeds executed on the basis that the Trusts are genuine, up to and including the 2015 DORAS.

7. Unless and until the Court determines otherwise following a full hearing, we must proceed on the basis that these are validly constituted trusts, which on their face they appear to be, and on that basis, the position of the respondents as trustees of the Trusts is untenable."""

The application for a preliminary issue

7 The preliminary issues sought by the representor were:–

(i) The issues set out in paragraphs 5 to 20 of the first to third respondents' answer, counterclaim and third party claim namely the true nature of the Russia Trust and the Manor House Trust;

(ii) The issues set out in paragraph 23A–23T of the amended representations, namely the proper law of the Russian Trust and the Manor House Trust.

8 Advocate Thomas in his skeleton argument contended that what was required was early determination of the allegation raised in the answers of the first to third respondents namely what was the true nature of the Trusts from which the first to third respondents had been removed as trustee. He argued that it was expedient and logical to deal with the true nature of the structure and the proper law of such an arrangement in that order as preliminary issues. This was because before the court could grapple with the other issues raised in the answer in particular claims and counterclaims for repayment of loans, it was in the interests of both parties and the Royal Court at an early stage to know the nature of the structure the Royal Court was dealing with and whether there was a trust or agency relationship. He

further submitted that this issue would have a significant impact. If the Trusts were not true trusts the representor's case would collapse in its entirety. If the Trusts were true Trusts then the complexion of the respondent's case changed to suggest *"malfeasance by the Trustee and/or a breach of trust"*. These issues were said to be relatively discrete and could be dealt with by a short trial.

9 In the course of his oral submissions Advocate Thomas suggested all that was required to be considered was the nature of the structures at the time they were created, i.e. at the time they were entered into by Barclaytrust as noted by Commissioner Clyde-Smith in paragraphs 50 and 51 of the 8 th October, 2015, judgment set out above.

10 Advocate Preston for the fourth respondent supported the application because it was in his client's interest to know whether or not it was a trustee.

11 Advocate Sinel, firstly reminded me of when it was appropriate to order preliminary issues. In particular he referred to *Enhörning v Nordic Link* [1996] JLR 37 and paragraph 2 of the head note as follows:–

> ***"However, it would only be appropriate to determine the question whether the share transfer had been at an under-value as a preliminary issue if it were shown that there were exceptional circumstances or special grounds for doing so.*** Although it was sometimes advantageous to determine an issue of liability separately from the question of the quantum of damages (e.g. if deciding the matter one way would dispose of the entire litigation, if hearing the preliminary issue would expedite the subsequent hearing of other major issues or if it would eliminate the need for discovery of documents or the hearing of evidence in relation to other matters, thus saving costs), it was only rarely appropriate to divide the question of liability itself into preliminary and subsequent issues, which was proposed here. While the normal approach was to hold a single trial of all the issues between the parties, the court nevertheless had a wide discretion to order a separate trial of preliminary issues and it would do so more readily than would English courts because of the small size of the Jersey judiciary. In deciding whether to make such an order, it was important to ensure that neither party would be advantaged or disadvantaged thereby (page 41, line 4 — page 43, line 24)."

12 He also referred me to *Berry v B.G. Trustees* [2000] JLR 293. Paragraph 1 of the head note is as follows:–

> ***"This is an application by the Plaintiffs for an order that there be a trial of a preliminary issue in the following terms:–***
>
> > ***"That the following questions or issue of fact and law be heard as a preliminary issue in this action before the hearing of the action and that until the determination of the preliminary issue***

all further proceedings in the action be stayed, namely:

> ***(i) Whether the provisions of Article 28 (1) of the Trusts (Jersey) Law 1984 (as amended) are available to protect the First and/or Second Defendants against claims made by the Plaintiffs under a contract made between the said Defendants and the Plaintiffs and governed by English law; and***
>
> ***(ii) If they are so available, on what date the "trust property" is to be ascertained for the purposes of the said Article 28 (1).***""

13 I was also reminded of the words of Southwell J.A. in *Public Services Committee v Maynard* [1996] JLR 343 at page 360 lines 11 to 19 as follows:–

> ***"However, in our judgment, the Royal Court should consider its current practice.*** To single out bare points of law in this way (which might, when the facts are found, prove to be hypothetical) is likely to increase costs and to extend the time before the plaintiff knows whether he or she is to receive damages for his or her injury and receives the damages awarded. Justice delayed is usually justice denied, particularly in personal injury cases, in which the normal approach should be to fix as early a date as possible for the trial of all issues."

14 He also referred me to a decision of the English Court of Appeal reported at *McLoughlin v Grovers* [2001] EWCA Civ 1743. In setting aside a first instance judgment where a preliminary issue had been ordered and had taken place, the English Court of Appeal were critical of a trial on the issue of foreseeability of damage only. Mr Justice David Steel at paragraph 65 of the decision stated:–

> ***"No attempt was made to distinguish between the factual investigation required for the purposes of the limitation plea as opposed to the issue of foreseeability.*** It was wholly impracticable for there to have a full trial of the factual issues pertinent to foreseeability. It was an issue that should have presented on agreed or assumed facts. If this was not a practical proposition, the issue of foreseeability should never have been taken separately .
>
> ***In my judgment, the right approach to preliminary issues should be as follows:–***
>
> > ***a. Only issues which are decisive or potentially decisive should be identified;***
> >
> > ***b. The questions should usually be questions of law;***
> >
> > ***c. They should be decided on the basis of a schedule of agreed***

or assumed facts;

d. They should be triable without significant delay, making full allowance for the implications of a possible appeal;

e. Any order should be made by the court following a case management conference."

Decision

15 In respect of the applicable legal principles to be followed I agree these are as set out by Advocate Sinel by reference to the Jersey authorities he cited. To be fair to Advocate Thomas he did not dispute those principles. The approach in *McLoughlin v Grovers* is consistent with these decisions and is a useful summary of the factors I should consider although it may also be possible to have a preliminary issue where there are limited disputed facts in issue not requiring significant evidence.

16 The problem with the representor's application in respect of whether there is a trust or agency relationship is that the representor's summons required the preliminary issue to consider the full history of the relationship between the representor, other members of the Dick Family and the respondents. This is clear from a consideration of paragraphs 5 to 20 itself. By way of illustration paragraph 11 stated:–

> *"Over the course of their thirty-year relationship, John W Dick Snr has directed, authorized or ratified, and in any event benefitted from, the actions taken by the Respondents on Mr Dick's behalf …."*(underlining added).

17 No doubt in anticipation of a challenge to his application because the paragraphs of the answer referred to in the representor's summons covered a wide range of factual issues, Advocate Thomas' oral submissions focused on establishing whether there was a trust when the structures were first established.

18 The difficulty with this approach is that it is an approach that involves dividing the issue of liability into a series of issues. Answering the question whether or not a valid trust was set up when trust deeds were first executed is not determinative of the real dispute between the parties. While the proceedings were brought in summary to wrest control of assets away from the first to third respondents, the nature of the proceedings has now developed. As noted by Commissioner Clyde-Smith at paragraphs 2 and 3 of the 6 th November judgment set out above, the first to third respondents now seek to claim significant sums, either out of trust assets, or if they are found to have acted in breach of trust, from the representor and other members of the Dick Family whom the first to third respondents wished to add as third parties.

19 Within this dispute in my judgment there are two significant issues. Firstly, what was the

nature of the relationship between the first to third respondents on the one hand and the Dick Family on the other and secondly, whether the first to third respondents should be able to recover loans made or receive indemnities from any member of the Dick Family. While the burden of proving that the structures were not trusts is a high one as noted by Commissioner Clyde-Smith at paragraphs 5 to 7 of the 6 th November judgment, the first to third respondents are entitled to challenge how the structure appeared to have operated. Their claim is not one that would be struck out as showing no reasonable cause of action. The first to third respondents, as part of their argument are entitled to assert, even if the Trusts were valid when established, that they were treated as a sham once the trusteeship ceased to be held by Barclaytrust. They are further entitled to seek an indemnity in the alternative if the trusts are valid and therefore they may have acted in breach of trust, by reference to the conduct of Mr Dick. The underlining factual matrix in relation to these arguments and when and how loans came to be made, is undoubtedly complex, covers a significant period and cannot be separated easily if at all into separate issues. Both issues cover the same 30 year period and in my judgment are likely to involve significant areas of overlap in terms of the parties' dealings with each other. I therefore concluded that this was a case that cried out for a single trial on the issues as they now stand between the parties.

20 I appreciate that the trustee wants to know whether it is a trustee but its position is protected. It is required by an act of court of 6 th November, 2015, to hold the assets and maintain and preserve them “for the purpose of meeting any orders the court might ultimately make in relation to the trusts in the substantive proceedings, and only the entities comprised within the trusts' funds.” In other words the fourth respondent is holding the ring until trial. It is of course open to the fourth respondent to seek directions from the Royal Court, where necessary to do so, in respect of the assets it is holding. Such an application does not require a determination as to whether the assets are held on an express trust for members of the Dick Family or whether they are held to the order of the Court and potentially for the first to third respondents. In either case the assets are being held by the fourth respondent as a form of trustee which would justify an exercise of the court's jurisdiction under Article 51 of the Trust (Jersey) Law 1984 (as amended) if appropriate.

21 For all these reasons I therefore refused to order a preliminary issue.

The first to third respondents' application to issue third party claims

22 In relation to the application to amend the answer and counterclaim it was accepted by the parties that the draft amended answer and counterclaim fell within the usual principles on an application to amend (see *Cunningham v Cunningham* [2009] JLR 227 paragraphs 19 to 21). There was also no issue in relation to the third party claim seeking indemnities from other members of the Dick family.

23 The issue of contention in relation to the third party claims concerned whether there was a *prima facie* case of a claim against the fourth respondent (see *Cummins v Howland* [2014] JRC 242 at paragraphs 10–13). This claim was set out at paragraphs 92 to 101 of the draft

amended and answer and counterclaim and in effect sought an order to enforce any judgment against assets held by the fourth respondent. However, as noted above, the fourth respondent is presently holding assets to the order of the Royal Court for the purposes of meeting any orders the Royal Court might ultimately make.

24 In my judgment the position is already addressed by an existing order of the Royal Court and does not need a third party claim. The matters raised are already complex enough without requiring further pleadings from the fourth respondent. This would just lead to additional cost and unnecessary complications. I did indicate however to Advocate Sinel that if the position changed and the fourth respondent was no longer willing or was no longer holding assets for the purposes of meeting any orders the Royal Court might make following trial then he had liberty to revisit this issue.

25 In giving leave to pursue a third party claim against other members of the Dick family I made it clear to Advocate Sinel that I was only giving leave to pursue the third parties within Jersey. If they were not in Jersey he would have to make an application in the usual way for leave to serve out of the jurisdiction.

26 I was also informed during the course of argument that there were proceedings in Colorado involving the same parties and where the Colorado courts would determine whether the relationship was a trust or as an agency relationship. I was further informed that a trial was likely to take place in March 2016 as presently scheduled. I indicated that I wanted to be kept informed of the status of the Colorado proceedings at any future directions hearings so I could consider what discovery as well as whether any other directions were necessary in light of what was taking place in Colorado.

27 Finally, in terms of costs, as the representor had argued unsuccessfully for a preliminary issue and I had found in favour of the first to third respondents I ordered the representor to pay the costs of the first to third respondents in respect of this argument on the standard basis, such costs to be summarily assessed by me if not agreed. I further ordered that the fourth respondent's costs were to be paid out of the assets it was holding on the trustee basis by reference to *Alhamrani v J P Morgan Trust Co.* [2007] JLR 527. It was understandable and not unreasonable for the trustee to want its status determined even though I have found as matters stand that at present such a determination is not necessary.