

Volaw v Trustcorp

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	04 February 2013
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Text

[2013] JRC 28

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **and** Jurats Le Cornu **and** Olsen.

Between
Volaw Trustee Limited
Representor
and
Trustcorp (Jersey) Limited
Respondent

Advocate N. G. A. Pearmain for the Representor.

Advocate M. H. Temple for the Respondent.**Authorities**

Equity Trust (Bahamas) Limited -v- Basel Trust Corporation (Channel Islands) Limited
[\[2012\] JRC 006](#).

Lewin on Trusts (18th edition).

Trust — application by the trustee for disclosure of certain documentation.

Bailiff

THE

- 1 This is an application by the trustee of a trust for an order that the former trustee of the trust disclose to it certain documents concerning the trust. At the conclusion of the hearing the Court made an order requiring certain disclosure. We now give the reasons for our decision.

Factual background

- 2 The trust in question (“the Trust”) was established by deed dated 17th February, 1989. It was a discretionary trust in conventional form. The original trustees were St Helier Trust Company Limited and an employee of that company. St Helier Trust Company Limited in due course changed its name to Ansbacher Trustees (Jersey) Limited and subsequently to Trustcorp (Jersey) Limited. We shall refer to the company as Trustcorp. Trustcorp has therefore been a trustee of the Trust since inception and sole trustee since July 2002 when the individual trustee retired.
- 3 The settlor was one of three brothers although it seems that the funds may in fact have been provided by their father. Although there was a wider class of beneficiaries, Trustcorp has always regarded the three brothers as the principal beneficiaries. We propose to refer to them respectively as the “settlor”, the “claimant brother”, and the “third brother”.
- 4 Unfortunately, a family dispute arose between the three brothers. Taking account of that dispute, of certain proposed tax changes and of the difficulty which Trustcorp had in obtaining information about the trust assets, Trustcorp decided that the trust assets should be appointed between the three brothers with a view to achieving broad equality, taking account *inter alia* of earlier capital distributions which had been made to the brothers or to members of their respective families.

- 5 Despite prolonged negotiations, it proved impossible to reach an agreed solution. Trustcorp brought an application to the Royal Court in 2008 seeking approval of its proposed course of action and on 13th February, 2009, ("the 2009 hearing") the Court approved the various appointments suggested by Trustcorp. At this stage it is not necessary to go into any detail but in broad outline, certain assets were appointed out of the Trust to the settlor and to the third brother respectively. Although it had originally been intended to bring the Trust to an end by appointing out all the assets, those assets intended for the claimant brother in fact remained in the Trust and the class of beneficiaries was amended so as to be confined to the claimant brother and his immediate family. The claimant brother was also appointed protector of the Trust.
- 6 Subsequently, on 5th February, 2010, Volaw was appointed as trustee of the Trust in place of Trustcorp. Volaw has been placed on notice by the claimant brother that he considers that the Court was given incomplete information at the time of the 2009 hearing and that there was a lack of equality between the three brothers in relation to the appointments. He therefore wishes Volaw to consider whether there are grounds for bringing an action for breach of trust against Trustcorp. It appears that the claimant brother feels extremely strongly about this and has given Volaw certain information to support his concerns.

The nature of the dispute

- 7 Given that the facts have not been definitively established and that this is a matter which may be the subject of litigation in due course, we do not propose to go into any detail concerning the exact nature of the claimant brother's allegations despite the detail contained in the affidavits before us. We propose only to say sufficient to explain why we have made the order which we have.
- 8 At the time of the creation of the Trust, its main asset was a Liberian company called Chalais Holdings Limited ("Chalais"). Chalais in turn owned a company called Elkay Finance Limited ("Elkay Finance"). Outside the trust structure, certain family interests owned a company ("the Hotel Company") which in turn owned a hotel in Canada ("the Hotel").
- 9 It appears that the Hotel Company had borrowed funds by way of a mortgage from BCCI Canada ("BCCI") which was secured on the Hotel. Elkay Finance had also loaned money to the Hotel Company and had taken a second charge over the Hotel. This was the position prior to 1993, at which time BCCI was in liquidation. At that time Chalais had a deposit with BCCI.
- 10 It is said by the claimant brother that in 1993 an agreement was reached with BCCI concerning these various debts. It is said that the objective was that Elkay Finance would acquire the mortgage from BCCI, although for some reason it could not be done by Elkay Finance itself and instead a company called Kansu Corporation Limited ("Kansu") was

incorporated to act as Elkay Finance's "designee" (this was the expression used in the agreement). Kansu was not owned by the Trust or any company within the trust structure. Its ownership does not appear to be entirely clear although there is some suggestion that it was later owned by a sister of the three brothers. Kansu agreed to purchase from BCCI the mortgage owed by the Hotel Company for a discounted price which would be payable in tranches.

- 11 At about the same time, an agreement was reached between Chalais and BCCI in respect of Chalais' deposit with BCCI. It was agreed that Chalais would be repaid a discounted proportion of its deposit by instalments and that these would be paid to Chalais by BCCI at the same time as the tranches were due to be paid by Kansu to BCCI in respect of the purchase of the mortgage debt.
- 12 At some point thereafter, Elkay Finance enforced its second charge and acquired the freehold of the Hotel in the name of a wholly owned subsidiary ("Elkay Quebec"). It appears that Elkay Quebec agreed to pay the interest on the mortgage (now owned by Kansu) but that the principal amount of the mortgage debt remained as an obligation of the Hotel Company and was not treated as a debt of Elkay Quebec. It is said by the claimant brother that the total interest paid by Elkay Quebec to Kansu in respect of the mortgage up to January 2009 was C\$7,932,595.82. The principal amount of the mortgage at the time it was acquired by Kansu from BCCI was C\$8,544,256.
- 13 Because Kansu was not owned by the Trust, the amount of the mortgage and the interest paid thereon were not shown as assets of any of the companies within the trust structure. However, a letter from Credit Suisse obtained after the 2009 hearing is said to show that the monies used by Kansu to purchase the mortgage from BCCI were in fact provided by Chalais. If correct, that would suggest that Kansu became indebted to Chalais in the relevant sum.
- 14 As part of the proposal approved by the Royal Court at the 2009 hearing, the shares in Chalais were to be appointed equally between the three brothers. However, there was a provision in the Act of the Court to the effect that, should any beneficiary not accept appointment of any asset from the Trust, that asset should then be shared between the other brothers. Apparently the claimant brother refused to accept his one third shareholding in Chalais because he believed it to be worthless. It therefore passed to the settlor and the third brother. The claimant brother contends that, in fact, Chalais owned an asset equivalent in value to the principal amount of the mortgage, because it had provided the necessary monies for Kansu and was therefore a creditor of Kansu in that sum. Furthermore, he contends that the interest payable on the mortgage should have been accounted for into the trust structure because Kansu was only acting as the designee of Elkay Finance and in any event had not produced the capital monies out of its own resources, but had rather received these from Chalais. He says, in effect, that he has lost out to the extent of one third of the capital value of the mortgage debt and one third of the aggregate interest paid on that debt.

- 15 It is in these circumstances that the claimant brother alleges that there may be a claim for breach of trust against Trustcorp because these details were not disclosed to the Royal Court. This means that there was not a fair and equitable distribution of assets between the three brothers in 2009. Trustcorp's position is that the claimant brother was broadly aware of the position and in any event it was the fault of the three brothers that Trustcorp did not have full details of the position. Trustcorp had been trying to ascertain the exact financial position of the various subsidiary companies for some time but had been unable to obtain the necessary information from the three brothers.

Decision

- 16 In *Equity Trust (Bahamas) Limited -v- Basel Trust Corporation (Channel Islands) Limited* [2012] JRC 006 the Court explained the nature of an outgoing trustee's responsibility to provide documents and information to an incoming trustee. It summarised the position at paragraph 29 as follows:—

“In summary, an outgoing trustee will normally be under a duty to hand over to an incoming trustee all documents and information which relate to the administration of the trust so as to enable the incoming trustee to fulfil his duties. However, the Court has a discretion to direct that documents or information not be supplied where satisfied, in its supervisory role, that this is the appropriate course. The onus lies on the outgoing trustee to show why the normal rule should not be followed.”

- 17 In this case, Volaw essentially sought all documents in the possession of Trustcorp relating to the Trust or to Chalais, Elkay Finance and any other underlying company of the Trust, together with all correspondence, legal advice obtained and file notes etc with respect to the matters raised in the Representation.
- 18 The other brothers and certain other former beneficiaries of the Trust were notified of Volaw's application. They elected not to take part in the proceedings but the Court has read the correspondence received from them. Trustcorp stated that it remained neutral but put forward some of the concerns expressed by the other members of the family and certain considerations which might be said to point against the disclosure sought by Volaw. These are summarised in a letter dated 29th May, 2012, from Mourant Ozannes and we have carefully considered all the points made in that letter.
- 19 We would summarise very briefly the main points made by Trustcorp as follows:—
- (i) There had been a profound family dispute which the 2009 hearing had attempted to settle by distributing the trust assets between the three brothers. It was merely for tax reasons that the claimant brother's share had remained in the Trust, with the other two brothers' interests being appointed out. It would not be in the interests of any of

the members of the family to seek to re-open matters at this late stage. It might lead to further expensive and bitter litigation which would benefit no-one.

(ii) So far as the various companies were concerned, they were now owned by family members other than the claimant brother. They were no longer assets of the Trust. Although one of the companies happened to be administered by Trustcorp for their new owners, it would be quite wrong to order disclosure about the affairs of a company which was no longer a trust asset.

(iii) The circumstances surrounding the alleged Kansu loan were placed before the Court at the 2009 hearing to the extent that they were known to Trustcorp; and the Court was told about the lack of full information and documentation in the affidavit of Mr Paul Monks sworn for those proceedings. Furthermore, the claimant brother had himself raised the existence of the alleged loan in late December 2008 in an e-mail to Trustcorp stating “ *You are fully aware of the fact that funds to provide Kansu mortgage to the Hotel has come from Chalais*”. Following this, Trustcorp had made enquiries of the other brothers which seemed to confirm that Chalais had made a loan to Kansu in or around 1993 but the accounts of Kansu did not reflect any loan due to Chalais and neither the correspondence files nor the minute books of Chalais made any reference to the alleged loan.

- 20 As to the first point, we do not think that this is sufficient reason to refuse disclosure. If it be the case that the value of assets belonging to Kansu should in reality have been attributed to Chalais or some other company in the trust structure, this would suggest that equity between the three brothers may not have been achieved by the 2009 hearing despite the intention that this should be the case. It may give rise to a claim against Trustcorp in this respect. Any re-ignition of the family dispute seems possibly to have already occurred and the risk of further dispute is not sufficient reason to refuse to order disclosure so that the true position can be known and Volaw can be advised whether there is any claim which can properly be brought.
- 21 As to the second point, we entirely accept that it would be wrong to order disclosure about the affairs of any of the companies for any period after they ceased to be assets of the Trust. However, the fact that the companies are now owned by other family members cannot remove the obligation of Trustcorp to account for its trusteeship and therefore to provide information about those companies for the period when they were owned by the Trust. Even if the original records had been passed across to a new owner or company administrator (which is not in fact the case), Trustcorp would have been under an obligation to keep copies of its records and those could be made the subject of an order for disclosure. We will therefore confine our order to the period prior to the appointment of the companies out of the Trust.
- 22 As to the third point, if it turns out to be the case that the claimant brother was fully aware of the position prior to the decision of the Court in the 2009 proceedings, that may affect the validity of any claim. But it would be wrong to pre-judge the position. On the case as put forward by Volaw, full details of the fact that Chalais had funded Kansu only emerged on

receipt of a letter dated 11th September, 2009, from UBS disclosing various payments concerning those two companies.

23 As Lewin on Trusts (18th edition) states at 23/100, a new trustee is not required to hunt for breaches of trust committed by his predecessors as he is entitled to assume that they have behaved properly. But if a possible breach comes to his notice, he should investigate it. In our judgment, given that the claimant brother, in his capacity as a beneficiary and protector of the Trust, has brought to the attention of Volaw that there are reasonable grounds for believing that there may not have been full disclosure of the position at the time of the 2009 proceedings and that there may consequentially have been a breach of trust on the part of Trustcorp resulting in an inequitable distribution of assets, it is reasonable for Volaw to seek the necessary information with a view either to supporting the concerns of the claimant brother or showing that they are ill-founded.

24 Accordingly we made an order in the following terms:—

“1. Subject to the receipt by Trustcorp (Jersey) Limited of the agreement and undertakings referred to in paragraphs 2. and 3. below, Trustcorp (Jersey) Limited shall within twenty-one days of the date of this order permit the Representor, its servants or agents to inspect all trust records in its possession, custody or control including, without prejudice to the generality of the foregoing, those relating to not only the Trust but Chalais Holdings Limited, Elkay Finance Limited and Akashi Investments S.A (collectively the “Trust Records” but which expression shall not include, for the avoidance of doubt;—

(a) any legal advice paid for by Trustcorp (Jersey) Limited at its own expense; or

(b) corporate records of any former underlying company of the Trust for any period after the time that the shares of such company ceased to form part of the Trust Fund of the Trust

and to receive as soon as reasonably practicable thereafter copies of any documents requested by the Representor in writing following such inspection of the Trust Records and in any event within seven days of such request, provided that the Representor shall pay Trustcorp (Jersey) Limited's costs of providing such copy documents as set out in paragraph 4. below;

2. The Representor shall enter into a non-disclosure agreement in favour of Trustcorp (Jersey) Limited for the purpose of maintaining client privacy with respect to any misfiled documents that may have erroneously been filed amongst the Trust Records and which relate to the affairs of third parties unconnected with the affairs otherwise disclosed in the Trust Records;

3. The Representor provides a written undertaking to Trustcorp (Jersey) Limited and to the Royal Court not to disclose directly or indirectly to [the claimant brother] or any other current, former or future beneficiary of the Trust from amongst the Trust Records, without further order of the Royal Court or the written consent of Trustcorp (Jersey) Limited:–

(a) confidential Exhibit 13 of the affidavit of Paul Monks dated 9 February 2009 filed in connection with legal proceedings 2008/58 instituted by Trustcorp (Jersey) Limited with respect to directions concerning the Trust (the “2008 Proceedings”);

(b) confidential communications from former beneficiaries of the Trust other than [the claimant brother] in connection with the 2008 Proceedings (the information captured by the terms of (a) and (b) of this Order is referred to collectively hereinafter as the “Confidential Material”); and

(c) any legal or accounting advice given to Trustcorp (Jersey) Limited in connection with the Trust and/ or the 2008 Proceedings to the extent only that it discloses any Confidential Material (it being understood that such advice, subject to suitable redaction, may otherwise be disclosed to a beneficiary of the Trust in accordance with the exercise, if any, of the Representor’s powers of disclosure in that regard).

4. That in connection with the disclosure of the Trust Records arising hereunder, Trustcorp (Jersey) Limited shall be entitled to be reimbursed their reasonable costs, disbursements and legal expenses arising from compliance with the orders herein;”

25 We also ordered that the costs of Volaw and Trustcorp in connection with this Representation should be paid out of the trust fund on the usual indemnity basis.