

Deutsche Bank International Ltd v HM Receiver General

Jurisdiction:	Jersey
Judge:	Jurats Austin-Vautier, J. A. Clyde-Smith O.B.E., Hughes
Judgment Date:	07 April 2020
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Text

[2020] JRC 57

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., **Commissioner, and** Jurats Austin-Vautier **and** Hughes

In the Matter of the Representation of Deutsche Bank International Limited

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984 (As Amended)

Between
Deutsche Bank International Limited
Representor
and
Her Majesty's Receiver General
First Respondent

and

Advocate Robert Gardner, representing the lost shareholders
Second Respondent

Advocate N. F. Journeaux for the Representor

The Receiver General appeared in person.

Authorities

Re HSBC Global Asset Management (International) Limited (in liquidation)
[\[2019\] JRC 148](#).

Companies (Jersey) Law, 1991.

Trusts (Jersey) Law 1984.

Re S Settlement [\[2001\] JRC 154](#).

Trusts — reasons for blessing the decision for the transfer of the Custody Assets to the Receiver General

THE COMMISSIONER:

- 1 On 18th March, 2020, the Court blessed the decision of the Representor to transfer certain assets it was holding on trust for a number of ex-employees to the Receiver General and we now set out our reasons.
- 2 The Representor was incorporated in Jersey and up until early 2018, provided a range of financial services to clients, including custodian services, i.e. the service of holding and safeguarding a client's financial assets.
- 3 In 2017, and following a wide ranging review of the group's activities across multiple jurisdictions and business lines, a decision was taken to cease all regulated financial services activities in the Channel Islands; in effect, to exit the Channel Islands.
- 4 Since 1998, the Representor had acted as the custodian of shares awarded under the Deutsche Bank Group's Employee Share Scheme ("the Scheme"). Under the Scheme, a committee of Deutsche Bank AG, the ultimate parent company of the group that includes the Representor, awarded group employees with shares in Deutsche Bank AG by way of remuneration and as a performance incentive.

- 5 The assets that the Representor holds in this capacity are the shares in Deutsche Bank AG and cash which had been received by the Representor as a result of rights attaching to those shares, (e.g. dividend payments). We refer to the shares and cash as the “Custody Assets”.
- 6 The Representor is recorded in the share register of Deutsche Bank AG as the registered (i.e. legal) owner of the shares awarded under the scheme. However, it is not the beneficial owner of those shares, which it holds not for its own benefit, but as trustee for the shareholders to whom they were awarded.
- 7 A number of steps have been taken to give effect to the group's decision to exit the Channel Islands, including, amongst other things, an agreement in February 2018 whereby the Representor agreed to transfer to Butterfield Bank the business of the large majority of its banking and custody clients in Jersey and Guernsey.
- 8 As at January 2019, 546 ex-employees for whom Custody Assets were held had been flagged on the Register's computer system as “lost contact”, because the Representor had been unable to contact them. From January 2019 to date, the Representor has therefore undertaken an exercise to identify contact details for those ex-employees from whom it has not received an instruction in relation to their Custody Assets, with a view to obtaining instructions from them as to how to proceed in relation to their Custody Assets. This exercise has reduced the number of ex-employees whose custody accounts with the Representor remain open to 274 as at 12th March 2020 (the “Lost Shareholders”).
- 9 Given that the winding down of the Representor's business is at an advanced stage, and it will shortly not be able to continue servicing the custody accounts of the Lost Shareholders, the Representor has decided to transfer the Custody Assets of the Lost Shareholders to Her Majesty's Receiver General.
- 10 The Receiver General has agreed to hold the Custody Assets in the form transferred for 15 years following the expiration of which they will become *bona vacantia* and pass to the Ancient Domain of the Crown in Jersey. The Receiver General informed the Court that these assets would then be invested with the other assets of the Crown estate, the profits of which are paid annually to the States of Jersey.
- 11 During that period of 15 years, the Lost Shareholders may reclaim their respective Custody Assets from the Receiver General, who, in consideration of receiving an upfront payment of £75,000 from the Representor, would charge them no fee.
- 12 There would be two routes by which a Lost Shareholder could claim his or her Custody Assets within the 15 year period, either by contacting the Receiver General directly, or by contacting any group entity. The Receiver General had agreed to include a statement in his

official website confirming that he held Custody Assets awarded to former Deutsche Bank Group Employees under the Scheme and that any individual who considers they are entitled to those assets may contact him to assert their claim. That statement would remain on his official website for the duration of the 15 year period. A similar statement will also be included on the Deutsche Bank Group's website.

13 The Representor had undertaken extensive efforts to locate the Lost Shareholders, including by way of overview:-

- (i) searching its files in January 2019 for any contact details to identify any additional contact information it might use;
- (ii) if those searches did not result in contact being made, searching 192.com, (an online directory) for any additional contact details;
- (iii) establishing a dedicated team in May 2019 to progress this contact exercise;
- (iv) from June 2019 seeking to identify possible matches for the Lost Shareholders on LinkedIn;
- (v) from September 2019 repeating the above searches alongside searches on Google, UK Companies House and the Register of UK's Financial Conduct Authority; and
- (vi) adopting a proportionate approach, instructing a tracing agent (Kroll) to search for contact details for those Lost Shareholders whose Custody Assets had a value in excess of €15,000.

14 Where the Representor identified potential contact details at any stage of the above process, it sought to make contact by letter, e-mail or telephone, explaining that the Representor was closing down in the Channel Islands and needed instructions in relation to the Lost Shareholders' Custody Assets.

15 Under the contractual arrangements between the Representor and the employees, which changed over the years, the following can be said to apply:-

- (i) The Representor would hold the Custody Assets as custodian for the employee.
- (ii) The agreement with the employee was either expressly or by necessary implication governed by Jersey law.
- (iii) The employee was under an obligation, either expressly or by necessary implication, to keep the Representor informed of any changes to his or her contact details or address.

- 16 The total value of the Custody Assets is £1.74 million, with 191 Lost Shareholders having Custody Assets valued at less than €5,000 and the remaining Lost Shareholders having Custody Assets valued at between €5,000 and €50,000.

The applicable law

- 17 The application was similar to that made in the case of *Re HSBC Global Asset Management (International) Limited (in liquidation)* [2019] JRC 148. In that case, however, the company had been placed in liquidation to be wound up summarily, and the application was made through the Joint Liquidators who had been appointed to conduct the liquidation. It was made under Article 186A of the Companies (Jersey) Law, 1991 which permits a company in a summary winding-up to apply to the Court for the determination of a question arising in the winding-up. The company had provided discretionary wealth management services and the majority of client assets had been transferred by agreement with the client concerned, but the Joint Liquidators had been unable to contact a small number of clients for whom it was holding limited assets. The Court authorised the payment of these assets to the Receiver General, who had agreed to hold them for 10 years, under an agreed procedure to deal with claims that may be made during that period, following which the assets would pass to the Crown.
- 18 The Representor is not in a summary winding-up and this application was made under Article 51 of the Trusts (Jersey) Law 1984 ("the Trusts Law") on the basis, which we accept, that the Representor is a trustee of the Custody Assets on bare trust for the Lost Shareholders pursuant to Article 2 of the Trusts Law. The Court has jurisdiction under Article 5 of the Trusts Law on the basis that these are trusts governed by Jersey law, the administration of which is carried on here.
- 19 The application was made and accepted on the basis that the decision to transfer the Custody Assets to the Receiver General was a momentous or significant decision in which, following the case of *Re S Settlement* [2001/154], there was no real doubt as to the power of the Representor to terminate each trust in favour of each Lost Shareholder, but because the Lost Shareholders could not be located, the Representor sought the blessing of the Court to its decision to transfer the Custody Assets to the Receiver General on the terms agreed. Pursuant to the decision in *Re S Settlement*, three questions fell to be considered:-
- (i) Is the Court satisfied that the Representor has in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out each of the steps proposed?
 - (ii) Is the Court satisfied that the opinion that the Representor has formed is one at which a reasonable trustee properly instructed could have arrived?
 - (iii) Is the Court satisfied that the opinion at which the Representor has arrived has not been vitiated by any actual potential conflict of interest which has or might have

affected its decision?

Decision

- 20 In the context of the Lost Shareholders all being ex-employees of the Group under an obligation to keep the Representor informed as to their contact details and addresses, we agreed that there was no reasonable alternative to the proposed transfer to the Receiver General, other than to pay these assets into Court, an option not explored at the hearing, but an inferior option to that of the Receiver General in that he is better equipped to hold and deal with these assets over this period of 15 years than the Court, which is not there to fulfil that kind of long term function.
- 21 On the termination of each trust, Article 43(1) of the Trusts Law provides that it is the duty of the Representor to distribute the Custody Assets to each Lost Shareholder. The difficulty in this case is that the Lost Shareholders cannot be located to receive the distribution and the Representor cannot be expected to continue holding the Custody Assets as trustee, in particular when it is ceasing to carry on business. It would not be reasonable or indeed possible to require the shareholders of the Representor to maintain it in existence simply to hold the Custody Assets for an indefinite period, offering minimal, if any, benefits to the Lost Shareholders relative to the proposed transfer to the Receiver General. The transfer of the Custody Assets to another group entity, if it would agree to take on the role, would again mean that entity holding the same for an indefinite period for unlocatable beneficiaries and could give rise to adverse tax consequences for those beneficiaries, bearing in mind their location is unknown. No other service provider in the Island could be expected, if one could be found, to take on the Custody Assets without being remunerated from them and that would result in the value of the Custody Assets depleting over time.
- 22 The Court had appointed Advocate Gardner to represent the interests of the Lost Shareholders. From his helpful skeleton argument, it was clear that he had considered the proposals carefully and following correspondence with Advocate Journeaux, for the Representor, some beneficial adjustments to the proposal had been made. No issue as to the legal basis upon which the application was made was raised by Advocate Gardner and in his view, the proposals were satisfactory from the points of view of the Lost Shareholders. He had taken into account in particular:-
- (i) The period of time during which the Receiver General would hold the assets before passing them to the Crown, namely 15 years, which is longer than the usual 10 year period associated with the holding of assets by the Receiver General before they pass *bona vacantia*. In the case of *Re HSBC*, it was 10 years.
 - (ii) The Representor's website will be kept alive until it surrenders all of its JFSC licences, whereupon reference will be made to the transfer of the Custody Assets to the Receiver General on both the Deutsche Bank Group's website and the Receiver General's website until all the Lost Shareholders have reclaimed their assets or the expiration of 15 years.

(iii) Considerable efforts have been made to contact the Lost Shareholders.

(iv) The transfer will take place in two tranches, with the transfer of 71 Lost Shareholders being held back under an agreed mechanism that will allow Advocate Gardner to review the position and, if necessary, bring the transfer of their assets back before the Court.

(v) The upfront payment now being made by the Representor to the Receiver General means that there will be no cost to the Lost Shareholders.

(vi) Because the Receiver General will hold the Custody Assets in the form transferred, any further interest or dividends will accrue for the benefit of each Lost Shareholder.

23 None of the alternatives appeared to Advocate Gardner to be materially more beneficial to the Lost Shareholders than the proposed transfer to the Receiver General.

24 The Court noted that if, as might be expected, the Representor was placed into a summary winding-up in due course, then a similar application by the liquidators appointed to conduct that winding-up would no doubt follow, so the end result would in all probability be the same.

25 The Representor had taken extensive steps to locate the Lost Shareholders and, in the view of the Court, it had reached the decision to transfer the Custody Assets to the Receiver General in good faith. It was a reasonable decision which a trustee properly instructed could have arrived at and we were satisfied that the decision had not been vitiated by any actual or potential conflict of interest which had or might have affected the decision. We therefore blessed the decision for the transfer of the Custody Assets to the Receiver General.