A v B

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	23 November 2018
Neutral Citation:	[2018] JRC 214
Reported In:	[2018] JRC 214
Court:	Royal Court
Date:	23 November 2018

Text

[2018] JRC 214

Royal Court

(Samedi)

Before:

Sir William Bailhache, Bailiff, **sitting alone**.

Between:
A
B
C
D
Representors
and
HSBC Trustee (CI) Limited
Respondent

In The Matter of the I Trust, the J Trust, the K Trust and the L Trust

And In The matter of Article 51 of the Trusts (Jersey) Law 1984

And In The Matter of Section 26 of the Trusts (guernsey) Law 2007

Advocate C. F. D. Sorensen **for the Representors**.

Advocate A Kistler **for the Respondent**.

Authorities

Schmidt v Rosewood Trust Limited [2003] 2 AC 709

re Rabaiotti 1989 Settlement [2000] JLR 173.

re Y Trust [2011] JRC 155A

Crociani v Crociani [2018] JRC 013

Ogier Trustee (Jersey) Limited v CI Law Trustees Limited [2006] JRC 158

Re the Den Haag Trust 1997 – 98 1 OFLR 495

Bhander v Barclays Bank and Trust Co Limited 1997 – 98 1 OFLR 497

Bertrand des Pallières v JP Morgan Chase & Co [2013] (2) JLR 239

Re Buckton [1907] 2 Ch 406

Lewin on Trusts (19th edition)

Re Londonderry Settlement (1964) 3 All ER 855

M v W Limited [2017] JRC 168A

Trusts (Jersey) Law 1984

Trust —costs application made by the Representors.

The Bailiff :

Introduction

1 This is the judgment of the Court in respect of a costs application made by the Representors. The application in more detail is for an award of indemnity costs and an order that would deny the trustee payment of its own costs out of the trust funds.

2 The Representors are the settlors and beneficiaries of four trusts, namely the I Trust, the J Trust, the K Trust and the L Trust. By their representation, commenced *ex parte* on 23 rd June, 2017, they sought disclosure from the Respondent, the trustee, of a wide range of documents. These were:-

> (i) The constitutive documents for each of the trusts, including all instruments of additions, advancement, appointment and variation;
>
> (ii) The accounts for each of the trusts for the last five years;
>
> (iii) An inventory of all the trust assets and their location for each of the trusts since they were settled;
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> (iv) A printed statement of all liabilities attaching to each of the trusts or to any of the trusts' assets, their amount and to whom such liabilities are owed;
>
> (v) A printed statement and current valuation of the share portfolios (if any) of each of the trusts;
>
> (vi) A printed statement of the current bank balances and accounts (if any) held by each of the trusts for the last five years;
>
> (vii) Printed timesheets for all work the current trustee has undertaken and charged to the trusts in the last five years;
>
> (viii) A printed statement of all the receipts for each of the trusts in the last five years;
>
> (ix) A printed statement of all the distributions, expenses, costs and outgoings from each trust in the last five years;
>
> (x) All correspondence from the last five years relation (sic) to the administration of the trust funds;
>
> (xi) Copies of any and all documents signed by the Settlors and/or beneficiaries of the trusts in relation to the administration of the trust funds.

Pre-proceedings

3 The four trusts are all expressed to be governed by Guernsey law. Before August 2016, the representors discussed with the Respondent, apparently at some length, the transfer of the assets of the trusts to new trustees, which would be four private trust companies in the Bahamas. The consequence of the transfer of those assets would be the retirement of the Respondent as trustee. It appears that there was no objection on the Respondent's part to that course of action, but by August 2016, as appears in a letter from the Representors' New York lawyers to this effect, there was an impasse. The New York lawyers for the

Representors described the impasse as arising out of two causes:-

> *"First you have purported to require our clients to provide what appears to be an extraordinary amount of information.* Second, you seek in the draft Deeds of Retirement and Appointment that you have sent to the Clairmont Trust Company extremely wide-ranging indemnities, including indemnities to be obtained by the new trustees in your favour from any transferee in respect of any distribution of capital from the respective Trust Funds made at any time in the future without limitation."

4 The lawyers sought a meeting between members of their firm and the relevant trust officers.

5 In the reply dated 14 th September, 2016, the Respondent indicated that it saw no merit in a meeting. The request for documentation and process for the transfer to the new trustee was subject to discussion and mutual agreement but it was said that it was industry practice in Guernsey for incoming trustees to undertake to obtain replacement indemnification for the retiring trustees should the incoming trustee lose control of any part of the trust fund. The letter of response raised other matters in relation to trading directly on the accounts under a power of attorney, but the letter concluded:-

> *"With regard to matters going forward, we must inform you that the States of Jersey Police are not allowing HSBC to operate the accounts normally.* This means that no transfers out of the accounts are permitted, including distributions, although the accounts can be investment managed as per normal."

6 The response to this letter was a request from the Representors dated 19 th September, 2016, for information about the accounts, namely a record of deposits and withdrawals occurring from 2005 to the present day. The request was made that the information be provided by 21 st September, 2016.

7 7. It does not appear that the Representors' New York lawyers received any response to their letter, and on 6 th October, 2016, they wrote again seeking certification of information about the accounts, the facilitation of which was to be achieved by enclosing digital copies of the HSBC statement summaries obtained directly from HSBC Private Bank for the accounts in question for the period from 2006 to 2016. On this occasion, the lawyers asked for the certification to be provided by 13 th October 2016. Again there appears to have been no reply, but I have been shown in the court papers a copy of a file note of a meeting held with the Respondent on 3 rd November, 2016. The file note discloses a background of the family's central business interests in Central America, including a trading business between the countries primarily in textiles and food distribution. The family business is substantial, and now focusses on energy and food. Indeed the energy business is said to produce some 30% of Central Americas' energy, a total of 394 Mw of power from a number of power plants.

8 The family representatives then went on to make disclosures in relation to the food businesses owned by the family, one in relation to the manufacture of a leading brand of orange juice, and the other dealing with the dairy arm of the group. As to the latter, there were approximately 250 products, some 250 people employed directly and 50,000 indirectly, particularly in the farming sector. Milk was purchased at a stable price – approximately 120 million litres of milk each year. Some 70 tonnes of oranges were purchased each year, and there was a partnership with tetra Pak.

9 The family, like many very wealthy families, also had a charitable project, running projects in education and healthcare and building churches in rural areas. The family generally was very cautious about security when it came to overseas assets. Wealth could be a source of great envy, which might lead to their personal security being risked. Members of the family kept a low profile and did not appear in magazines or make public speeches. Certainly they did not publicise their assets abroad. Further details were then given to the Respondent about energy projects in Central America, including wind farms, power plants and solar energy projects.

10 In other words the information provided to the Respondent, which it was said had already been provided to HSBC in Miami, was extensive. In particular, the family representatives referred to various political pressures to which the family was subject in Central America. It is apparent from the file note that there was a dispute between the Central America authorities, which claimed that there had been criminal activity by the family, and the family which contended that there was simply a commercial dispute.

11 Through their lawyers, the Representors indicated that it was plain there was no correlation between the disputed contract arrangements, whether they be criminal or commercial, and the funds which were settled in trust. In other words, it was said that the funds in trust could not sensibly be viewed as the proceeds of crime.

12 At the meeting, the Respondent provided very little information. Its approach was that it would take away the information provided by the Representors, and any questions which they had, and would consider them. Family members emphasised what damage this was all causing to the family's reputation. Furthermore there was a risk that banks would change the terms of financing arrangements, credit would be pulled and people might get laid off. The family had been judged as criminals and it was like a witch hunt. The Respondent did confirm that it had not been provided with or reviewed the material given to HSBC in Miami, but there is no evidence in what has been shown to me of any denial that the material was provided to HSBC in Miami.

13 By a letter dated 4 th November, 2016, from Messrs Baker and Partners to the Respondent, the request was made that the Respondent's records would be available for inspection in accordance with its legal duties. It was said that serious errors had been made both in term of the regulatory obligations and the Respondent's duties as a trustee, the result of which had been an unfortunate and baseless *“no consent”* direction from the Jersey Police. It

appears that a copy of the file note of the 3rd November meeting was later transmitted to Messrs Carey Olsen, acting for the Respondent. It was not suggested that the note was privileged, nor was it suggested that if the officers of the Respondent heard anything they were obliged to report to the relevant authorities as a matter of law, they should not do so. It was a non-verbatim note of the meeting and nothing else. Privilege was not waived in so far as lawyers for the Representors had made any contribution to the meeting.

14 Unfortunately, it appears that Messrs Carey Olsen did not regard these comments by Messrs Baker and Partners as providing sufficient clarity as to what their position was. It appears that Advocate Sorensen must have requested a confirmation that the note would not be provided to any third party. Without reviewing the note in detail, Advocate Kistler noted that if the trustee was served with a production order or other legal process which required disclosure of the note, it would have no option other than to comply regardless of any undertaking given, and therefore the confirmation requested would not be given. Advocate Kistler sought confirmation himself that no conditions were attached to the disclosure of the note if the Respondent should think that was appropriate.

15 I am not clear whether I have been provided with all the correspondence passing between the parties, or merely those parts upon which the parties wish to rely. I am left with the slightly unsatisfactory position that it is unclear whether the note of the meeting of 3rd November, 2016, is agreed as accurate. However, given that nothing has been put before me to suggest it is inaccurate, I am proceeding on the basis that there is no substantial dispute about it. I take therefore from the note of the meeting in question that there was full and open disclosure by the Representors to the Respondent of material which might be relevant to the *"no consent"* direction given by the States of Jersey Police.

16 On 4th November, 2016, Messrs Baker and Partners had said this:-

> *"We further understand that you have not maintained electronic files prior to 2013.* Please confirm that you will make the records available for our inspection in accordance with your legal duties."

17 In the correspondence which followed immediately thereafter, this request was not answered. Accordingly on 2nd December, 2016, Advocate Baker posed the question again, and on 9th December received this response:-

> *"Finally, we did not understand the paragraphs [in question] … to itself have been a request for disclosure, not least because beneficiaries of a trust have no right to wholesale inspection of records of a trustee.* We anticipated a specific request to be made in due course for individual documents or categories of documents together with an explanation of the purpose for which disclosure is sought. Upon receipt of such a request, the Trustee will consider it in accordance with the principles that govern such requests and its duties as trustee."

18 Immediately before Christmas 2016, the Respondent wrote to the E family c/o Messrs Baker and Partners with further requests for information with regard to the flow of funds arising out of the disputed contract in Central America. There was a detailed response given on 20 th February, 2017. The same month, Advocate Baker wrote to Advocate Kistler to indicate that the beneficiaries of these trusts wanted to review all the documentation to which they were entitled. The response was that the beneficiaries had no entitlement *per se* to trust documents, and Advocate Kistler referred to *Schmidt v Rosewood Trust Limited* [2003] 2 AC 709 in support of his statement that disclosure to a beneficiary was a matter for the trustee's discretion which would depend on all the circumstances of the request including the ambit of the request and the purpose for which disclosure is sought. By his response of 7 th March, 2017, Advocate Baker expressed disappointment with the position adopted by the Respondent. He accepted the authority of *Schmidt v Rosewood* to the effect that the beneficiaries entitlement to inspect trust documentation was an aspect of the inherent supervisory jurisdiction of the Court, and he referred to Article 29(d) of the *Trusts Law and the Jersey case of re Rabaiotti 1989 Settlement* [2000] JLR 173. Advocate Baker continued:-

> *"Such disclosure is routine in order for the beneficiaries to understand the relationship between themselves and their trustee and to understand the nature and extent of the trust property, what the trustee has done with it, how the trustee has preserved and enhanced the funds' value and what it is charging for its services."*

19 Advocate Baker then went on to request the same documents which ultimately were the subject of the request as contained in the representation which his clients brought. He concluded:-

> *"We trust your client will accede to our clients' reasonable request.* It would be regrettable if our clients were forced to vindicate their position by bringing proceedings before the court. Given the long established and strong presumption in favour of disclosure of such documentation, we would seek indemnity costs against your client's unreasonable refusal to cooperate."

20 On 22 nd May, 2017, (two and a half months later), the Respondent sent copies of the financial statements for each of the trusts and underlying company for the years 2012 to 2015. It was said that the 2016 statements were imminent and would be sent as soon as available. Copies of the deeds and supplemental deeds for each trust were also enclosed and it was said that the Respondent hoped to deliver the remainder of the request within the next 10 days.

21 The Respondent did not however deliver any further material during that ten day period, nor was there any further communication with the Representors through Messrs Baker and Partners. As a result, on 21 st June, 2017, Messrs Baker and Partners wrote again seeking the relevant material. The letter in its material parts said this:-

> *"You have delivered nothing since then and we have not heard further from you.* This lack of engagement has characterised your dealings with us to date.
>
> Our letter of 31st May 2017 mentions the lack of options which you have left us. Accordingly we shall bring proceedings by way of representation forthwith seeking an order for the relevant disclosure."

Proceedings

22 By email of 22 nd June, 2017, Messrs Carey Olsen indicated that the Respondent would be writing to Baker and Partners the following day to send copies of further information in connection with the request which had been made. Carey Olsen suggested it was not necessary for its clients to seek an order for disclosure from the Court. I note that once again there was no objection to the request for information itself. The Representors responded the same day by email to say that the Respondent had a history of not making good its promised intentions, and there was no sensible recourse for the Representors other than to seek the assistance of the Court. In any event, even if satisfactory disclosure were to be provided prior to the return date, the issue of costs would remain outstanding. The following day, 23 rd June, 2017 at 10:43, Messrs Carey Olsen emailed Advocate Sorensen to indicate that it was incorrect to say that the Representors had been left with no sensible recourse other than to seek the assistance of the Court, because the information would be provided. It was contended that the application to the Court was premature given the confirmation that the information was being collated and costs incurred with any Court application were entirely unnecessary and a matter for them. The same day, 23 rd June, 2017, the Representors presented a representation to the Royal Court *ex parte*. The Court ordered that the Respondent be served and convened to appear before Court on the return date of 7 th July.

23 On 30 th June, financial statements for the trusts for the year ended 30 th September, 2016, were provided (other than the J statements which were not yet available).

24 On 30 th June, Messrs Baker and Partners proposed directions for the Royal Court to make on the return date in relation to its representation, and on 4 th July Advocate Kistler wrote to Advocate Sorensen criticising the issue of the representation upon the basis that it had always been made plain that the Respondent intended to provide the information in question and that in effect the Representors had been unreasonable in bringing the representation when they did. He proposed that there should be a three week adjournment at the return date so that the remaining issues could be addressed in correspondence. Interestingly, although Advocate Kistler referred to substantial disclosure having already been given and the remaining requests were being dealt with, he also added that the trustee ought not to have to incur the costs of seeking its own expert evidence on Guernsey law. It might seem inconsistent to assert on the one hand that there was a commitment to give the information requested and on the other that Guernsey legal advice was necessary.

25 The proceedings were then adjourned by consent until 1 st August. During July there were further exchanges of correspondence between Messrs Carey Olsen and Messrs Baker and Partners, and further documentation was disclosed. It is clear that there remained some outstanding disclosure requested when the Court sat on 1 st August to give a number of directions in relation to the representation. On 9 th August, the J Trust financial statements for the year ended 30 th September, 2016, were delivered.

26 On 15 th August, 2017, Advocate Sorensen wrote to Advocate Kistler to indicate that the Representors on that date had considered letters from Advocate Kistler and the trustee of 8 th and 9 th August and was then able to accept that the Respondent had substantially complied with the request for disclosure contained in the representation, and that where it had declined to disclose material, an explanation had been provided which his clients were prepared to accept.

27 Advocate Sorensen noted his clients' surprise and disappointment that the material provided to HSBC in Miami on 8 th July 2015, for the attention of the trustee had never been provided to it. The material was said to be highly relevant and obviously important and Advocate Sorensen expressed a lack of comprehension as to how there was not better communication between entities within the same worldwide corporate group. He made an application for costs which, he said, if conceded could be paid on the standard basis. If a contested hearing were necessary, the Representors would reserve the right to seek their costs on an indemnity basis. He noted that the trustee had charged US$574,960.08 for its services over the five year period.

28 Following this request, there were exchanges of correspondence between the two firms over quantum. The first claim was for the sum of £140,000, a discount from fees actually incurred with US, UK and Jersey lawyers in the total sum of £193,516. Advocate Kistler responded to describe this as a *"staggering level of costs of have incurred"*. He was given a summary of the costs charged by reference to the fee earners in question, by email from Advocate Sorensen on 12 th September. There was no reply. Advocate Sorensen sent a further email on 27 th September, seeking a response. There was no reply.

29 On 6 th October Advocate Sorensen pressed Advocate Kistler again, and received the response that the information provided did not allow Messrs Carey Olsen to understand the work which had been undertaken to support the claim for costs. He expressed the view that the costs claimed could not be regarded as of and incidental to the proceedings. He thought there must have been duplication. He noted that no attempt was made to justify the claim for the fees of the New York lawyers.

30 A redacted set of invoices was sent to Advocate Kistler on 17 th November. At that point, Messrs Baker and Partners indicated that the Representors would accept the sum of

£118,000 in full and final settlement, that offer being open until 1 st December, 2017. No reply was received until 7 th December and the offer thus had lapsed. The response went on to contend as to quantum that there was no sufficient meaningful information to assess the amount claimed, and that the costs appeared to be not of and incidental to the representation in any event. It was said that the amount recoverable was limited to a Jersey lawyer's fees and therefore Factor A and Factor B rates would apply. It was said that the quantum was “astonishing and entirely disproportionate to the work undertaken”. Finally, it was said that there was no basis for any award to costs in favour of the Representors in any event.

31 31. Thus it was that the parties appeared before me on 29 th March, 2018, for the claim for costs to be made. Argument could not be completed during the time then allocated, and it continued on 17 th May. Judgment was reserved.

The rival contentions

32 The Representors acknowledged that they did not have an absolute entitlement to disclosure of information, but they did contend that unless there was some special reason why the information should not be disclosed, and subject to safeguards for the protection of confidential information, the starting point was that they did have the right to ask the trustee to provide accurate information about the state of the trusts (in *re Y Trust* [2011] JRC 155A). This was a case where it was said there was no reasonable doubt that the material should have been disclosed to them. If there had been any doubt, the trustee should have sought the advice of the Court. This would have saved costs.

33 It was contended that the key dates were 4 th November, 2016, when the Representors sought a general disclosure, repeated on 9 th February, 2017, and then set out in detail with a specific disclosure request on 7 th March, 2017. The Representors set a number of timetable limits, and in most of these the proposed limits were disregarded without any response from the trustee. By way of example, the trustee responded to the request dated 7 th March, 2017, and even then the reply was not particularly detailed, but emphasised how careful the trustee had to be with regard to what was disclosed in view of the circumstances giving rise to the *“no consent”* direction of the States of Jersey Police.

34 This latter explanation was said to be no proper explanation for why routine documentation such as the constitutive documents of the trust, trust accounts and inventory of trust assets should not have been made available immediately. It was said that the trustee had through its lack of communication acted in a way which was unprofessional and discourteous.

35 Despite the lack of engagement by the trustee with the beneficiaries, the trustee had not been reluctant to charge very extensive fees for its services. Ultimately, with a communication on 31 st May, 2017, unable to see any reasonable alternative, the

Representors had put the trustee on notice they would not wait longer. Again the communication from the Representors was disregarded and in the event, the lawyers were instructed to commence proceedings.

36 The Representors also asserted that at no point between 15 th August and 7 th December, 2017, during which period there was discussion about the level of costs being claimed, did the trustee inform the Representors that it disputed its liability to pay costs. If, as the trustee now contended, this was adopting a commercial approach, the Representors thought it telling that no commercial step of making an offer had been made.

37 In summary, it was said that the conduct of the trustee fell short of the standards which the Representors were entitled to expect. The fact that the unsuccessful defendant was a defaulting trustee was not of itself a good reason for an award on an indemnity basis (see *Crociani v Crociani* [2018] JRC 013 at paragraph 429), but similarly in Jersey costs are normally awarded against a defaulting trustee on the indemnity and not the standard basis (see *Ogier Trustee (Jersey) Limited v CI Law Trustees Limited* [2006] JRC 158 and *Re the Den Haag Trust* 1997 – 98 1 OFLR 495 and *Bhander v Barclays Bank and Trust Co Limited* 1997 – 98 1 OFLR 497).

38 In particular reliance was placed on the comment of Birt DB, as he then was, in the *Ogier Trustee* case when he said at paragraph 21:-

> *"What the latter two cases show [Bhander and Den Haag], in my view, is that in Jersey, where a trustee or former trustee fails to comply with its obligations for no good reason, forcing the beneficiaries or the new trustee to go to the cost of issuing proceedings, which should not have been needed, in order to enforce compliance, then such conduct, effectively misconduct, will be met with an order for indemnity costs.* The position of the defaulting trustee in these situations is essentially indefensible and therefore indemnity costs are justified …"

39 Birt DB continued that that approach was not relevant to a case where the trustee had a defence to allegations of a breach of trust, and in those circumstances the trustee was perfectly entitled to defend the proceedings and to do so robustly.

40 The argument in relation to the trustee's right of indemnity was framed in this way. Misconduct here included unreasonable conduct and dishonesty is not required. While a trustee, acting reasonably and in the exercise of its duties, powers and discretions, is entitled to an indemnity from the trust fund in relation to costs and expenses properly incurred, that entitlement lapsed where there had been misconduct. Here it was said for similar reasons as set out above, there had been misconduct and therefore the right order was that the trustee was not entitled to an indemnity from the trust fund in relation to the costs which it had incurred.

41 The trustee's contentions were these.

42 42. The trustee pointed out that it had administered through its different entities these particular trusts for some 18 years, the trusts having been declared on 12 th October, 1999. Originally the administering trustees had been Guernsey companies because the governing law of the trusts was Guernsey law. When an impasse arose in 2015/2016 over the replacement of the Respondent with private trust companies to be set up in the Bahamas it became apparent that the Representors were anxious to ascertain the basis of the trustee's suspicion which led to the suspicious activity report. This coloured the trustee's response to the initial request for information.

43 This initial response was also affected by the nature of the requests which had been put. They were extensive and initially were not particularised. In response, the trustee had confirmed unequivocally that it was compiling the information requested and it would be disclosed without the need for any application to the Court. By the time the representation was served, the trustee had already disclosed substantial information and records, had confirmed that it would supply the balance, and once the representation had been adjourned by agreement, the trustee did in fact then comply voluntarily with the remaining requests for trust information, indeed going beyond the scope of the representation in providing other material. The substantive relief in the representation had never been pursued, and no order in favour of the representors was either necessary or in fact made.

44 Accordingly, the trustee had faithfully applied the test of *Schmidt v Rosewood Trust Limited*. When for the first time the detail of the documents sought was set out on 7 th March, 2017, the purpose for which disclosure was sought was not given and a short timetable for the disclosure of these documents was imposed. The trustee therefore took a cautious approach, and collated and reviewed the relevant material, providing it to the representors only after satisfying itself that what it was providing was consistent with its obligations under law. In the light of the overall suspicion which had existed, this was not an unreasonable approach to take. The trustee considered that the Representor started the preparation of the representation some months before the proceedings were actually started, and this at a time when the trustee was in the process of providing disclosure voluntarily. The time entries disclosed by Messrs Baker and Partners in their costs sheets supplied in support of their claim for costs in November 2017 demonstrated that this assertion was correct.

45 It was contended by Advocate Kistler that this was an application for disclosure of trust information which differed from a situation where a beneficiary made a hostile claim against a trustee. In the latter case the claim would be treated as common law litigation and costs would usually follow the event – see *Bertrand des Pallières v JP Morgan Chase & Co* [2013] (2) JLR 239. By contrast with that case, the Court had not been required to rule on whether the application for disclosure was well founded and there was not event in respect of which an award of costs should or could follow.

46 Although this is a Guernsey proper law trust, the trustee contended that the law of Guernsey and the law of Jersey in respect of the trustee's right to an indemnity from the trust property for all expenses and liabilities properly incurred in connection with the trust was the same.

47 In summary, the trustee contended that it was right to approach a wide ranging and extensive disclosure request with care and caution, particularly given the no consent advice which had been handed to the trustee by the States of Jersey Police. The trustee had in fact provided the information requested to the Representors as and when it had collated and reviewed the relevant material, and was in the process of providing further information prior to the issue of the representation, and indeed had informed the Representors that this was so. Following service of the representation, proceedings were adjourned on the return date and subsequently there had been voluntary compliance with all the requests for information without the need for any court order.

48 In those circumstances the worst the Representors could say was that the trustee had not provided disclosure soon enough. The answer to that allegation however was that disclosure had been provided on a rolling basis as and when information had been prepared and finalised (in the case of accounting information) or collated and reviewed (in the case of correspondence and related documentation). This was not a case where any urgency existed for disclosure – the fact that nothing has happened in relation to the disclosures in the following six months shows that that is so.

49 Accordingly the trustee is not in any sense guilty of misconduct, giving that word the wide sense of unreasonable conduct and there was nothing the trustee had done which should deprive it of its costs. Accordingly it was said that the trustee should be indemnified in respect of its properly and reasonably incurred costs of and incidental to the representation on the trustee basis and it should not be liable for the Representor's costs. Whether the Representors should have their costs out of the trust fund was a matter for the Court, but the trustee noted it could not make any payment of costs without the consent of the States of Jersey Police.

Discussion

50 The parties are agreed that these were administrative proceedings concerning a trust and it follows that the starting point is that both parties would get their costs of the proceedings from the trust fund. There is very little significant dispute between the parties over the law. It really is a question for me to assess the extent to which the conduct of the trustee was unreasonable so as to justify an order that not only should it bear its own costs, but also that it should bear the costs of the Representors.

51 During the course of the hearing on 29 th March, I asked the parties to take instructions as to whether any correspondence between the States of Jersey Police and the trustee from 7

th March 2017 might be disclosed to me. This would be on the basis that the material would not be disclosed to the Representors. The Representors subsequently confirmed that they had no objection to the material being so disclosed. Although it has been confirmed that it is available, I have not reviewed it. Both parties considered that it was not directly relevant to the questions I had to consider, and I have accepted that to be the position. The Respondent did however contend that the fact of a suspicious activity report and the *"no consent"* from the States of Jersey Police did have an impact on the Respondent in that it made it more cautious in dealing with the requests which the Representors put to it. I am asked to take that into account as part of the overall context of the case. Indeed, the Respondents contended that the request for information was not bourne out of any genuine request to obtain the information in fact requested, but rather to enable the Representors to understand what gave rise to the *"no consent"* direction from the States of Jersey Police. The Respondent suggested that the fact that no action had been taken by the Representors in consequence of the disclosure given by the Respondent indicated that the request was merely a tactic to ascertain from the Respondent the basis upon which it had made its suspicious activity report in the first place.

52 I do not find as a matter of fact that the Representors were seeking the disclosure they did seek in order to ascertain the basis of the suspicious activity report. I accept that that information (the basis of the suspicious activity report) was probably information which the Representors wanted to obtain, but I do not find on the paperwork that has been put before me that there is any support for the suggestion that that was the purpose of the application.

53 There is I think nothing further to examine in so far as concerns the law – both parties agree that although it is strictly a matter of Guernsey law, Jersey law is for these purposes the same as Guernsey law.

54 For administrative proceedings of this kind, the starting point is probably to look at the different Buckton categories, so named after *Re Buckton* [1907] 2 Ch 406. Lewin on Trusts (19th edition) describes the approach in this way:-

> *"27–137 … conventionally these kinds of proceedings are treated as being divisible into three categories following the classification in the leading case re Buckton:-*
>
> > *(i) Proceedings brought by the trustee to have the guidance of the court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held.* In such cases, the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. But a trustee is at risk as to costs if he commences a construction claim unnecessarily, though will be given credit if he does so on advice …
> >
> > *(ii) Proceedings in which the application is made by someone other than the trustee, but raises the same kind of point as in the first category and*

would have justified an application by the trustee. Such proceedings differ in form but not in substance from the first category and similar considerations apply as to costs. Where the application is made by someone other than the trustee, however, it may be less easy to show than in the case of a trustee that the applicant was acting reasonably in making the application and doing so for the benefit of the fund.

(iii) Proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. The distinction, though one not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant and is resisted for a similar reason. A case which falls clearly within the third category is where the whole of the trust fund has been distributed to a supposed beneficiary in reliance on some construction of the trust instrument or view of the law and another person claiming to be the true beneficiary brings proceedings against the recipient or the trustee in reliance on a rival construction, or a rival view of the law. Here the general principles as to the costs of hostile litigation apply between the claimant and the party against whom the claim is directed …"

55 As is recognised by Lewin, the categories of proceedings enumerated in re Buckton are not closed. Lewin continues:-

"27–145 A fourth category has been recognised where proceedings are commenced by a trustee but have the characteristics of category (3). For not all proceedings commenced by a trustee for the determination of some question affecting entitlement to the trust fund are within Buckton Category (1), particularly in a case which does not involve the construction of the trust instrument but rather a dispute over the beneficial ownership of the trust fund …

27–146 A further category is where an issue of construction is pursued by a third party acting in the dual capacity in part for the benefit of beneficiaries (whom he is ordered to represent for the purpose of the issue) and in part for his own benefit by way of defence to a hostile claim against him. This category falls neither within Buckton Category (2) nor within Buckton Category (3) …"

56 This action was not brought by the trustee, and clearly does not fall under Buckton Category 1; not indeed does it fall under Buckton Categories 4 and 5. The action, if commenced by the trustee, could have fallen within Buckton Category 1 although the question would be whether the application was necessary. It seems to me that the application did not fall under Buckton Category 3. Accordingly the only one which is left, if

the Buckton Categories are to be applied, is Buckton Category 2, namely these are proceedings commenced by someone other than the trustee but which raises the same kind of point as could have been raised under Category 1 and justified an application by the trustee.

57 Although there is some reason for concluding that the present case falls outside any of the Buckton categories, in my judgment the application does *prima facie* fall within Category 2, and if the trustee had brought the proceedings with a view to seeking directions as to what information should have been shared with the Representors, then that might well have been justified under Category 1. The heart of the matter is this. The Representors had no absolute right to the documents in question. (see *Rabaiotti 1989 Settlement* [2000] JLR 173 at page 180, approving dicta from Danckwerts LJ in *Re Londonderry Settlement* (1964) 3 All ER 855 but the request for documents made in February 2017 was not at all unreasonable. As was said in *Schmidt v Rosewood Trust Limited* [2003] 2 AC 709 by Lord Walker at paragraph 66:-

> ***"Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the Court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts.*** There is therefore in their Lordships' view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character) …
>
> ***67. However the recent cases also confirm … that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the Court may have to balance the competing interests of different beneficiaries, the trustees themselves, and their parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of discretionary object) may be an important part of the balancing exercise which the Court has to perform on the materials placed before it. …"***

58 A full review of the different approaches to disclosure of trust documents can be found in *M v W Limited* [2017] JRC 168A at paragraphs 21 to 66.

59 A consequence of *Schmidt v Rosewood* is that there is scope for a trustee to contend that trust documents should not be disclosed to beneficiaries in some cases. It seems to me to be clear that where a trustee reasonably takes that view, whether the court ultimately orders disclosure or not, the trustee should not have to face a potential liability for costs, whether in terms of having to meet its own costs or having to meet the costs incurred by the beneficiaries in an application for disclosure. Under Article 29 of the Trusts (Jersey) Law

1984 (“the Law”) there is a starting point that documents which relate to or form part of the accounts of the trust are disclosable, and therefore at least in part, the starting point for the Respondent should have been that disclosure would be made, at least in relation to those documents. It seems that some of those documents were not available, when perhaps one might have expected for a competent and efficient trustee that they were. Thus, for example, the accounts for the trust for the year 2016 were not available until August 2017; but I do not regard that sort of delay as being sufficient to found an order for costs against the Respondent. The costs order ought not, without more, to be used as a form of punishment for standards of administration by a trustee which fall below the proper standards. In my judgment, there has to be some form of misconduct on the part of the trustee which would justify an award of costs, and sloppy administration is not necessarily sufficient to constitute misconduct, although it may do so in some cases.

60 Furthermore, moving outside the issue of documents which relate to or form part of the accounts of the Trust, *M v W Limited* and the cases reviewed there show that trustees are not to respond to a beneficiary's request for information paternalistically or over-cautiously. It is part of the overall arrangements to ensure that trustees are held to account for their trusteeship that the Courts ensure that beneficiaries do have access to trust information. This does not gainsay the point already made that sometimes there are good reasons why trust documents should not be disclosed. This is particularly likely if the loss of confidentiality will adversely affect the corpus of the trust fund or the other beneficiaries or if the documents which are sought are documents which go to the exercise of a dispositive discretion. In these latter cases, there is probably a distinction between a document which indicates how much of the trust property has been appointed and to whom, and a document indicating why that discretion has been exercised.

61 Having reviewed all the documents which have been put before me, I have taken the following points into account:-

(i) The Respondent has in my judgment been distinctly unhelpful to the Representors in response to the requests for information which have been made. Without a contested fact find hearing, it is difficult to assess the reasons for this, but my impression is that, as a result of the suspicious activity report filed and the no consent advice received from the States of Jersey Police, the Respondent has acted with an over-abundance of caution. There is nothing to indicate that the police prohibited any notifications by the Respondent to the Representors about the trust administration – the only caveat which the States of Jersey Police applied was that there should be no dispositive distributions of trust funds. In those circumstances, it is hard to see why the vast majority of the documentation which was requested should not have been provided at a much earlier stage.

(ii) It appears to me that in the exercise of my discretion, I can and should take into account that the Representors have provided a great deal of information to the Respondent through the branch of HSBC in Miami. That

branch may be theoretically of a different company, a matter on which I have no direct information, but it is unquestionably the same group and for these purposes i.e. a determination of costs I do not think that the group should have the advantages both of claiming the advantages of a world-wide presence and at the same time asserting a separate corporate identity of one of its members. Certainly Advocate Kistler advanced no submissions that I was not able to take into account the disclosure of information to HSBC Miami. Although this is not central to my decision, it has influenced my assessment of the reasonableness of the Respondent's approach in relation to the giving of information having regard to the SAR and the notification from the States of Jersey Police.

(iii) On the other hand, I recognise that the anti-money laundering legislation has undoubtedly presented new challenges for banks and other financial institutions going about their legitimate business. Courts are – and I am – sympathetic to the potential difficulties which the legislation presents for these service providers.

(iv) I also note that much of the correspondence between Messrs Baker and Partners and Messrs Carey Olsen has been prickly in nature. This may well have exacerbated what was already a difficult situation. I was reminded of the old adage that one catches more flies with honey than with water.

(v) There are clearly within these trusts very substantial assets, hence the trustee's fees over the relevant period. The Representors are quite obviously a wealthy family as well, as is shown by the level of fees which they have allegedly incurred in respect of the claim for information. Fees at this level, both for the Respondent and for the Representors, require to be justified by high standards.

(vi) Notwithstanding the above, I am not a taxing master and I have not reached my conclusions on the basis of the quantum of fees claimed.

(vii) My overall conclusion is that these Representors have been driven to expend sums of money which they ought not to have had to spend. In the circumstances, I order that the Respondent pay personally the costs of the Representors of and incidental to the Representation. Although it will be a matter for the Judicial Greffier on taxation, the information which has been provided to me suggests that it will be difficult to claim costs of and incidental to the representation if they were incurred prior to 7 th March, 2017.

(viii) I do not regard the conduct of the Respondent as being so bad as to justify an order for indemnity costs. I take into account in particular the difficulties which trustees face when there has been a suspicious activity report. The order therefore is for standard costs to the Representors of and incidental to the representation.

(ix) In my judgment, the misconduct of the Respondent which I have identified also leads to the conclusion in this case that the Respondent should not have its costs of and incidental to the representation out of the trust fund. For the avoidance of doubt, that order does not go to the costs incurred in providing the documents and information to the Representors. Those documents would have been supplied at the expense of the Trusts, whether the proceedings were taken or not. The costs in respect of which the Respondent has been disentitled by this order are limited to those of and incidental to the representation i.e. the proceedings in the Royal Court.

62 I will hear argument as to the costs of the costs application if necessary, but it may assist the parties if I give my preliminary view that the Respondent should pay the Representors' costs on the standard basis. I recognise that the Representors have not been entirely successful, but on the information provided to me, there has been no offer to pay standard costs, no doubt because the figures raised were thought to be unreasonable. However, until taxation takes place, it is impossible to know what was or was not a reasonable figure, and therefore I have not taken the quantum of costs claimed into account for the purposes of reaching this preliminary view. The fact is that the Respondent could have agreed to pay costs on a standard basis and leave the substantive argument to taxation, but instead chose to argue the point on which it has lost.