Barclays Private Bank and Trust Ltd v Advocate Chiddicks in his capacity as representative for the minor beneficiaries of the Trust namely A and B and Volaw Corporate Trustees Ltd as Trustee of the D Trust and Equity Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	23 January 2014
Neutral Citation:	[2014] JRC 19
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Court:	Royal Court
Date:	23 January 2014

Text

[2014] JRC 19

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone**

Between

IN THE MATTER OF THE REPRESENTATION OF BARCLAYS PRIVATE BANK AND TRUST

LIMITED IN ITS CAPACITY AS TRUSTEE OF THE Z TRUST

AND IN THE MATTER OF ARTICLES 51 AND 53 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED)

Barclays Private Bank and Trust Limited
Representor
and
Advocate Chiddicks in his capacity as representative for the minor beneficiaries of the Trust namely A and B
First Respondent

and

C
Second Respondent

and

Volaw Corporate Trustees Limited as Trustee of the D Trust
Third Respondent

and

Equity Trust
Fourth Respondent

Advocate N. A. K. Williams **for the Fourth Respondent**.

Authorities

Westbond v Cantrust [2004] JRC 111 .

In the matter of M and other trusts [2012] JRC 127 .

S. Marett v J. Marett and O'Brien [2008] JLR 384 .

Mayo Associates S.A. and others v Anagram (Bermuda) Ltd. and others [1998] JLR N 4c .

Trust — application to be released from express and implied undertakings.

THE COMMISSIONER:

1 On 18 th September, 2013, the Court granted the application of the fourth respondent ("Equity Trust") to be released from its express and implied undertaking to use three documents disclosed by the representor ("Barclays") in these private administrative

proceedings for the purpose of separate hostile proceedings under Court File No. 2009/396 and for no other purpose.

2 Equity Trust seek the use of these documents to support arguments it may wish to deploy in the hostile proceedings in relation to the extent of the discovery made by the plaintiffs in those proceedings, some of whom are respondents in these proceedings. I accepted that Equity Trust requires to use these documents in the hostile proceedings for *bona fide* reasons as set out in Mr Williams' letter of 13 th September, 2013, to this Court which it is not necessary to rehearse here. It is not, of course, for me to comment on the merits of the arguments he may wish to deploy assisted by those documents in the hostile proceedings.

3 Equity Trust's summons seeking leave to use these documents was served upon Barclays, whose documents they are, and Barclays have in turn informed the second and third respondents. Advocate G Robinson, acting for Barclays, had written to the Court by letter dated 16 th September, 2013, indicating that it rested on the wisdom of the Court and would not be appearing. Notwithstanding certain unspecified reservations, it raised no concerns as to the sensitivity of these three documents.

4 Advocate J Renouf, acting for the second and third respondents wrote to the Court by letter dated 17 th September, 2013, indicating that they too would not be appearing and accusing Equity Trust of tactical games. They were concerned about the costs involved in Equity Trust's application and the precedent it might set as between the two sets of proceedings, but raised no concerns as to the sensitivity of the three documents.

5 The use of these documents in the hostile proceedings without leave would be a contempt of Court. As Birt, then Deputy Bailiff, said in *Westbond v Cantrust* [2004] JRC 111 at paragraph 3:–

> ***"In our judgment it would amount to a contempt of court deliberately to place in the public domain the contents of a private hearing.*** By definition the Court, when deciding to sit in private, has decided that the interests of justice require this to be done and it would therefore amount to a contempt of court deliberately to flout this avowed purpose."

6 He went on to say at paragraph 7:–

> ***"We think that the best we can do at this stage is simply to remind parties of the need to consider carefully whether they can safely refer to material used in a private hearing in any subsequent public proceedings.*** If they are in any doubt, they should seek the leave of the Court to use the private material in the public proceedings. We would imagine that there would ***usually be little difficulty in obtaining such consent provided that the application was made for bona fide purposes."***

7 In the case of *In the matter of M and other trusts* [2012] JRC 127, which concerned disclosure of documents from administrative proceedings involving the *M and other trusts* into proceedings in the Family Division of the High Court, the Court divided the documents into three categories, namely privileged, sensitive and other material. None of the documents sought here are privileged and I had my doubts as to their sensitivity, both from their contents and from the lack of any concern in that respect from either Barclays or the respondents.

8 However, Mr Williams indicated that Equity Trust needed these documents, not for their contents but for the company information, date and parties as shown in that correspondence. He therefore produced redacted copies of the documents and, notwithstanding the lack of any apparent concern on the part of Barclays or the respondents, it seemed appropriate, in the interests of confidentiality, to restrict disclosure to that which was actually required.

9 Mr Williams raised a point in relation to the express undertaking given by Equity Trust in the consent order of the 6 th March, 2013, when it was made a party to the representation and which is in these terms:–

> *"3. Equity Trust (Jersey) Limited undertakes that it will at all times keep the Documents confidential and that it will not copy or otherwise disseminate the Documents to any third parties, save for the purpose of obtaining legal advice in connection with the Representor's Representation and/or for the purpose of ensuring regulatory compliance."*

10 The undertaking was not made expressly subject to the leave of the Court and was it therefore absolutely binding on Equity Trust as between the parties? Mr Williams drew to my attention the judgment of the Jersey Court of Appeal in *S. Marett v J. Marett and O'Brien* [2008] JLR 384 where it was held that a consent order could be varied or set aside only in exceptional cases in which (a) the order was made on an error of fact (e.g. misrepresentation or misunderstanding as to the position or in relation to the assets); or (b) a supervening event undermined or invalidated the basis of the order. A consent order was interpreted as if it were a contract (although its legal effect was derived from the court order and did not depend on the parties' agreement.) It could, therefore, be set aside if there were grounds that invalidated the underlying contract.

11 In this case the only underlying contract between the parties was that they would request the Court to make an order which, inter alia, contained this undertaking. The undertaking was given therefore to the Court and the Court can release Equity Trust from the whole or any part of it. If I am wrong in this respect and there is an underlying contract by which the undertaking is enforceable as between the parties, then neither Barclays nor the respondents had sought to hold Equity Trust to it or to argue that the Court could not release Equity Trust from it. In any event the undertaking must, by necessary implication, be subject to the overriding power of the Court to order disclosure if it was in the interests of

justice to do so.

12 Mr Williams also drew my attention to the note contained in the Jersey Law Reports for 1998 in relation to *Mayo Associates S.A. and others v Anagram (Bermuda) Ltd. and others* [1998] JLR N4c) which states that:–

> **"Any party who obtains a list of documents or to whom documents are produced on discovery under an order of the court, including an Anton Piller order, impliedly undertakes not to use them or information obtained from them for any collateral or ulterior purpose without the leave of the court and the consent of the party providing them (Matthews & Malek, Discovery, para. 12.01, at 252; para. 12.04, at 253 (1992) applied;** *Horman v Home Secy.* , [1983] 1 A.C. 280**considered)."** (my emphasis)

13 if this was correct then the party providing the documents would have an absolute veto on their use elsewhere, even if the Court was minded to grant leave. On referring to the passage in Matthews & Malek relied upon, it actually reads:–

> ***"Any party on whom a list of documents is served or to whom documents are produced on discovery or pursuant to an order of the Court impliedly undertakes to the Court that he will not use them or any information derived from them for a collateral or ulterior purpose, without the leave of the Court or consent of the party providing such discovery."*** (my emphasis)

It would seem clear that the use of the word ***"and"*** in Note 4c (and indeed in the report of the underlying case) is an error — it should read ***"…without the leave of the court or the consent of the party providing them."***