RBC Trustees (C.I.) Ltd v Bisson

Jurisdiction:	Jersey
Judge:	Bailiff, The Deputy Bailiff
Judgment Date:	13 November 2009
Neutral Citation:	[2004] JRC 219, [2009] JRC 215
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Court:	Royal Court
Date:	13 November 2009

Text

[2004] JRC 219

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq., Deputy** Bailiff, **and** Jurats Le Brocq **and** Newcombe.

In The Matter of the Representation of Abacus (C.I.) Limited
And In The Matter of the Peach and Dolphin Trust (1988)

Advocate T. J. Le Cocq **for the Representor**.

The First, Second, Third and Fourth Respondents did not appear and were not represented.

Advocate L.J. Springate **on behalf of the Fifth Respondent**.

Authorities

Abacus (C.I.) Limited as Trustee of the T & S Settlement (11th October, 2002) Jersey Unreported; [2002/194C].

In re Royal Bank of Canada Trust Company (Jersey) Limited and In re the Williams Jersey 1994 Trust (20th December 2002) Jersey Unreported: [2002] 244.

Jersey Evening Post Limited v Al Thani & Others [2002] JLR 542.

In Re the M M Patel Settlement and In re Abacus (C.I.) Limited [2003] JRC 096.

HSBC Trustees v Edwards [2004] JRC 114.

Representation of Channel House Trustees [2003] JRC 098.

AIB Worthy Trust Limited v Fallon & Others [2004] JRC 025.

C I Law Trustees Limited v Wooster & A G of Jersey [2004] 144.

Application by the Representor to rectify the terms of the Trust Deed.

Bailiff

THE DEPUTY

1 This is an application for rectification of a trust known as the “Peach and Dolphin Trust”. The Trust is governed by the law of Jersey and Abacus (C.I.) Limited is the current trustee and brings the representation.

2 The test for rectification is well established and the Court has to be satisfied of three matters:

(i) that a genuine mistake has been made so that the Trust does not reflect the true intention of the settlor;

(ii) there must be full and frank disclosure; and

(iii) there must no other practical remedy.

3 The Court has received affidavit evidence from several of those involved in the creation of the Trust. The original deed was declared as a conventional discretionary trust by Lazard Trustee Company (C.I.) Limited on 6 th September, 1988. However, it appears to have been

completely dormant until 22 nd August, 1996, when by deed of appointment, the Trust was put into its present form and at about the same time the settlor contributed the trust property to the Trust.

4 The key provisions are as follows. We should add that the term “Principal Beneficiary” referred to in the deed is a reference to the settlor, and the “Initial Period” referred to is the lifetime of the settlor or any earlier date which she may declare.

5 The relevant provisions are as follows:

> *“3. During the Trust Period, and subject to the Overriding Powers below:–*
>
> *(1) The Trustees shall pay the income of the Trust Fund to the Principal Beneficiary during the Initial Period.*
>
> *4. The Trustees shall have the following powers during the Trust Period with the consent in writing of the Protector:–*
>
> *(1) Power of Appointment*
>
> > *(a) The Principal Beneficiary may appoint that the Trustees shall hold the Trust Fund for the benefit of any Beneficiaries, on such terms as the Principal Beneficiary thinks fit……”.*

6 What is said is that these provisions do not reflect the intentions of the settlor in the following respects:

The application asks the Court to rectify the trust in these two respects.

> (i) The power of the principal beneficiary in clause 4 may be exercised without reference to the protector and may be exercised in favour of the principal beneficiary herself, whereas the intention was that the power of appointment of the principal beneficiary should not be exercisable in her own favour and should in any event, when exercised in favour of another beneficiary, only be exercisable with the written consent of the protector of the Trust.
>
> (ii) Clause 3 confers a right on the principal beneficiary to receive the income of the Trust whereas the intention was that there should merely be a power to pay the income to the principal beneficiary with any amount not paid out being accumulated.

7 We deal first with clause 4. It is clear from the evidence produced to us how this error arose. In the first draft prepared by the Jersey advocates instructed by the original trustees, there was a power in the trustees to appoint capital to the principal beneficiary or any other beneficiary, but this was subject to the prior written consent of the protector. However, the draft at that stage did not include the power of the principal beneficiary to appoint capital

amongst the beneficiaries as instructed.

8 This error was realised fairly promptly by the advocates and they supplied an amended draft, which included a power of appointment in the hands of the principal beneficiary. However, the draft failed to extend the requirement for the protector's written consent to such an appointment and did not confine the power of appointment to the beneficiaries other than the principal beneficiary.

9 We are satisfied from the evidence before us that the intention of the settlor was that any exercise of her power of appointment should be subject to the written consent of the protector and should not be exercisable in her own favour, only in favour of other beneficiaries. The provisions were therefore included in their present form by mistake.

10 We turn now to Clause 3 of the trust deed. The instructions to the original trustee were given on behalf of the settlor by the firm of Coopers and Lybrand, as it was, now Price Waterhouse Coopers, in the Netherlands. They were the advisers to the family generally. The instructions were that the Trust should contain a life interest of which the principal beneficiary (in other words the settlor) would be the life tenant and pursuant to which she would have the right to income during her life. The trust deed was prepared in accordance with those instructions.

11 However, Mr Xavier Auerbach, the partner of Price Waterhouse Coopers concerned, has asserted in his affidavit that, although he sees now that the wording used both in the letter of instruction and in clause 3 itself are unambiguous, they do not reflect what was intended at the time. What was intended was that during her lifetime the settlor would be the only person capable of benefiting as to income or indeed capital, to the exclusion of the other beneficiaries; but that these benefits should still be at the trustees' discretion.

12 Mr Auerbach's evidence is supported by the settlor herself, who has confirmed in her affidavit that her understanding had always been that all payments out of the Trust would be at the trustees' discretion.

13 Apart from the letter of instruction from Price Waterhouse Coopers there is no contemporary evidence of what was intended save for the letter of wishes of the 22 nd August, 1996, which the settlor signed. It is correct to say that this does suggest that the settlor regarded the trustees as having a discretion as to whether to make any payments to her out of the trust fund.

14 In this state of the evidence the Court felt that it ought to hear from Mr Auerbach as it felt there were certain questions it wished to investigate. Mr Auerbach has, therefore, given evidence on oath in the witness box before us. He was able to provide considerable additional detail. He explained that the creation of the Trust was part of a plan whereby assets were to be put into three trusts, one for the settlor, and one for each of her brother

and sister.

15 At the time the children were not very old. The settlor was only 26 and their father did not wish any of them to have a legal right to the trust assets. Payments were to be at the discretion of the trustees and to require the consent of the protector, who was to be the father himself. That was therefore the first objective of the trusts.

16 The second objective was that assets should be dealt with so as not to be treated as belonging or attributable to the children for tax purposes. This would enable them to move more freely around Europe without adverse tax consequences.

17 It was therefore in pursuance of these two objectives that the plan was developed to create these three trusts. The ideal method of fulfilling these two objectives was to create a discretionary trust in conventional form. This is what was done for the brother and sister. However, it was not possible to do this in respect of the settlor because, unlike her brother and sister, she had not been non-resident of the Netherlands for a full 10 years prior to the creation of the trusts.

18 This therefore, meant that there would be a charge to gift tax on any transfer of assets, if certain criteria were met. These were given to us in fairly short form by Mr Auerbach and we may not be describing them wholly accurately, but in essence there would be a charge to gift tax if there were a transfer of assets and if the donor was left the poorer as a result and the recipient was left the richer as a result.

19 In order to ensure that this was not so, it was essential, therefore, that the settlor should be the sole person who could benefit from the trust during her lifetime unless she agreed otherwise. The creation of a discretionary trust would have resulted in a charge to gift tax but it was felt that if she remained the sole person who could benefit from the trust then the requirements for gift tax would not necessarily be satisfied.

20 This was the key requirement, and it was in this context that reference was made to a life interest because of the point that the settlor should be the only person who would benefit from the trust during her lifetime.

21 Mr Auerbach and his colleagues were not trust lawyers and, as he has stated, although they now have very considerable experience of Anglo Saxon trusts, this was not the case back in 1996 when such matters were only beginning to be thought of by continental tax advisers.

22 They did not appreciate that a life interest in a trust was a technical term which conferred a right to the income *vis-à-vis* the trustees. Furthermore, when. in the letter of instructions, reference was made by a partner of Mr Auerbach to the settlor having the right to receive

income, this was meant in the sense of a right as against anyone else; in other words no other person could receive the income. It was not meant to suggest that the settlor had to receive the income; on the contrary any such provision would have completely defeated the two objectives which we have described.

23 In summary Mr Auerbach gave evidence that the last thing that the family or the advisers intended was that the settlor should have a legal right to receive the income of the Trust. They certainly did not appreciate that this was the affect of their instructions. Although, as Mr Auerbach accepted, when you look at it now, the wording of clause 3 is unambiguous and might have been picked up at the time, the whole transaction had to be undertaken at some speed and it simply was not noticed or appreciated at the time.

24 We have considered carefully the evidence of Mr Auerbach. We found him to be an impressive and truthful witness and we accept his evidence. It is also consistent with that of the settlor. In the circumstances we do find that the provisions of clause 3 creating a mandatory right to income in the settlor do not reflect the true intentions of the settlor and those advising her, but most particularly the settlor, and that the intention was that this should simply be an ability to pay income to the settlor. The key requirement was that there should not be a power to pay it to anyone else.

25 We are therefore satisfied that the first requirement that we have mentioned for rectification is satisfied in relation to Clause 3 as well as Clause 4.

26 We are also satisfied that there has been full and frank disclosure. In particular the Court has had drawn to its attention the fact that there may be possible adverse tax consequences as a result of the mistakes made in the drafting of the deed.

27 We are also satisfied that there is no other practical remedy to put the parties in the position which they should have been if the deed had reflected the true intentions. Rectification is a discretionary remedy, but in our discretion we agree to make an order in this case. We, therefore, rectify the deed as requested in the representation. For the avoidance of any doubt that is therefore as follows: That Clause 3 (1) of the Trust Deed should be rectified so that it reads:

> *“3. During the Trust Period and subject to the Overriding Powers below:*
>
> *(1) During the Initial Period the Trustees may pay or apply the whole or any part of the income of the Trust Fund to the Principal Beneficiary and subject to that the Trustees shall accumulate the whole or part of the income of the Trust Fund….”*
>
> *And Clause 3 (2) begins by inserting the words “After the Initial Period the Trustees may…”.*

28 In relation to Clause 4 the words *"and the Principal Beneficiary"* should be added at the beginning so that it reads now as follows:

> *"4 Overriding Powers*
>
> *The Trustees and the Principal Beneficiary shall have the following powers during the Trust Period with the consent in writing of the Protector…".*

29 In relation to Clause 4 (1) (a) the words " *save for the Principal Beneficiary*" should be added so that it will now read as follows:

> *"(a) the Principal Beneficiary may appoint that the Trustees shall hold the Trust Fund for the benefit of any Beneficiaries save for the Principal Beneficiary on such terms as the Principal Beneficiary thinks fit".*

30 Finally we consider the question of costs. It is often the case that errors which require rectification arise by reason of the actions of professional advisors. In those circumstances it is not usually appropriate to order that the costs of applying for the rectification be borne out of the trust fund, because that means that they will in fact be borne by the beneficiaries. In this case we are satisfied for the reasons that we have given that the errors were those of the professional advisors and in one sense the normal consequence should follow. However, the present trustee has brought this representation and incurred the costs. We think, therefore, that it is right to allow the trustee its costs out of the trust fund and we make it clear that the trustee must give consideration as to whether these should be recovered from one or more of the advisors. It will need to do that in order to fulfil its duty to the beneficiaries.

31 We similarly order that the costs of Advocate Robinson, who has been appointed to represent the interests of the unborn and minor beneficiaries, should be paid out of the trust fund on an indemnity basis.

[2009] JRC 215

ROYAL COURT

(Samedi Division)

Before:

W. J. Bailhache, **Q. C.**, Deputy Bailiff, **sitting alone**.

In the Matter of The Representation of CI Trustees And Executors Limited

Niall Iain Macfirbhisigh (as curator of Barry Lionel Ching

Plaintiffs
Barbara Mary Marvell Ching
and
CI Trustees and Executors Limited
Defendants
Beresford Secretaries Limited
Corporate Nominees Limited
Beresford Nominees Limited
Sean O'Sullivan
Russell Birrell
Desmond De Freitas
Norman Yeo
Jonathan Crawshay

Advocate P. C. Sinel **for the Plaintiffs**.

Advocate C. J. Scholefield **for the Defendants**.

Authorities

Saunders -v- Vautier (1841) CR and PH 240.

The Deputy Bailiff

1 This is an application for an extension of time within which to comply with orders which the Court made ex-parte for the service by Mr Killmister of an affidavit, the details of which are set out at page 23 of the Order of Justice at paragraph (b). The application is to have an extension of time to 28 days after the date of service or, in the event that the First Defendant proceeds with the *forum non conveniens* application, 28 days after a final decision that the Royal Court is the correct forum to hear the plaintiffs' case.

2 I have in the exercise of my discretion considered carefully the submissions which have been made by both parties today and will order an extension of time until close of business on Thursday next, which is the 19 th November.

3 I would like to take the opportunity of saying these things, which are directed particularly at the trustee, although they are also directed at the plaintiffs. Any court is likely to pay particular attention to the type of documents which the plaintiffs have annexed to the affidavits which indicate that the trustee has a £2 share capital and that the trustee has one director and one share holder, namely Mr Killmister; that the accounts of the trustee are presented by a company called CI Accountancy Limited which also appears to be beneficially owned by Mr Killmister. He is the only director of it and the officers of that company appear to be CI Trustees and Executors Limited. Thus the accounts of CI

Trustees and Executors Limited are prepared by CI Accountancy Limited and that company is itself administered apparently by CI Trustees and Executors Limited; there is a 360 degree nature to that organisation which all ends up with Mr Killmister. I make that comment because it emphasises the need, where there is any uncertainty as to the transactions which have taken place so far, to ensure that that uncertainty is removed as quickly as possible and the orders which have been made, have been very firmly based with that in mind; and having in mind also the letter which I asked Mr Sinel to refer to me which is that of 14 th May 2009 in which the purported trustee certainly has indicated that any pressing of him for further information will lead the trust fund to being dissipated in costs. The curator, as I mentioned to Mr Scholefield earlier, has a duty under Jersey law to gather in the estate of this interdict and is certainly entitled to ask the Royal Court for its assistance in gathering information for this purpose. There is no doubt at all that this is a hostile action in which he is joined by the wife of the interdict but the fact that it is a hostile action does not make it unimportant that he is nonetheless, as curator appointed by this Court, entitled to come to this Court for help in identifying the extent of the interdict's estate.

4 I recognise that the proper law of the trust is English law and that that is agreed and I make these comments because I take into account Mr Scholefield's submission that it is possible that a Beddoe application would be made to an English court. Of course it would be appropriate for the comments of this Court to be brought to the attention of the English Court should any such application be made. I would quite understand that as it is an English trust law-governed settlement it may seem on the face of it, to be appropriate to apply to the English Court for directions but nonetheless, there are a plethora of Jersey, and important Jersey, connections which make, in my view, the orders which have been made for service out of the jurisdiction absolutely appropriate to be made and I have no doubt at all that the Royal Court has got jurisdiction to deal with this particular series of claims as they stand at the moment.

5 I also add this, that there is absolutely no reason, in my view, why the trustee should not make a Beddoe application if so minded to the Royal Court; the differences between English and Jersey trust law are not enormous in this area and the Royal Court would be perfectly well able to apply English trust law to the trust application if it were appropriate to do so. I make no finding that it is because that is a matter on which it may be necessary for the Court to be addressed by the trustee if such an application were made. While not in any way pre-judging that Beddoe application, it is apparent to me from reading all the papers which have been provided to me, and I note that Mr Scholefield now has a copy of the affidavit and the exhibits, that there are a number of questions which the trustee would have to answer before gaining any permission to defend this action at the expense of the trust. It does, on the face of it, seem to be a hostile action which is brought by the only two beneficiaries of the settlement and certainly, and so far as parts of the claim are concerned, it is a little difficult at the moment to see that it is a claim which ought not to have been brought at all, I am thinking of the *Saunders -v- Vautier* (1841) CR and PH 240 part of the claim where it would be interesting to hear in due course what the trustee has to say about that. If the trustees contention is that there is property which is held by the trustee but which is not in fact trust property, that would lead to a form of interpleading proceeding which the trustee is perfectly able to bring to this Court separately from the trust actions directly. So I

hope it is helpful to make those comments to ensure that if an application is made to an English court —and it is not out of any disrespect to that court that I make the comments I have —that this Court seems to me to be the right place, as at present advised, to deal with the matters which are before it and when I say that I'm talking about the leave to serve out of the jurisdiction and not of course, pre-judging any *forum non conveniens* application which it is open to the trustee to bring if so advised in due course.

6 An extension of time is ordered until close of business next Thursday and costs will be in the cause.