Cunningham v Cunningham

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	23 June 2009
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Text

[2009] JRC 124

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq**., Deputy Bailiff, **sitting alone**.

Between
Jack Cunningham
Plaintiff
and
Andrew Cunningham
First Defendant
Sovereign Trust International Limited
Second Defendant

and

CI Law Trustees Limited
Third Defendant

Advocate P. M. T. Tracey **for the Plaintiff**.

The First Defendant did not appear and was not represented.

Advocate A. D. Hoy **for the Second Defendant and for the proposed Fourth and Fifth Defendants**.

Advocate L. J. L. Buckley **for the Third Defendant**

Authorities

Royal Court Rules.

Brown -v- Barclays Bank Plc 2001/241.

Charlesworth -v- Relay Roads Limited (in liquidation) [1999] 4 All ER 397 at 401.

Lewin on Trusts (18th Edition).

The Law of Trusts.

Law Relating to Trusts and Trustees (17th Edition).

Dubai Aluminium Co Limited -v- Salaam [2003] 2 AC 366 at 402.

Mara -v- Browne [1896] 1 Ch 199.

Royal Brunei Airlines -v- Tan [1995] 2 AC 378.

Twinsectra Limited -v- Yardley [2002] 2 All ER 377.

Barlow Clowes International Limited -v- Eurotrust International Limited [2006] 1 All ER 333.

Three Rivers District Council -v- the Governor and Company of the Bank of England [2003] 2 AC 1.

The Deputy Bailiff

1 This is an application by the plaintiff to amend its order of justice and to join Sovereign Trust (Gibraltar) Limited ("Sovereign Gibraltar") as fourth defendant, Mr John Lyndon Hodgson as fifth defendant and Meridian Trustees Limited as party cited.

Background to the proceedings

2 The plaintiff is the elder brother of the first defendant. According to the order of justice, back in 1978 the plaintiff established an aircraft broking business and in 1984 he gave 45% of the shares in the business to his younger brother, the first defendant. Over the years both brothers worked in the business and it expanded greatly. A holding company in the Netherlands Antilles was formed and a number of subsidiary companies operated various parts of the business. It is claimed by the plaintiff that, no matter whose name particular shares were held in, the business was ultimately owned as to 55% by him and 45% by the first defendant.

3 On professional advice, a number of trusts were created. The trust with which we are concerned was established on 27th September, 1991, by way of declaration of trust made by the original trustees, namely the third defendant ("CI Law"), Mr David Morgan and Mr Nicholas Morgan. It was known as the A Cunningham No 2 Settlement ("the Trust"). The shares in the holding company were contributed to the Trust. CI Law is incorporated in Jersey and both individual trustees were resident here.

4 According to the order of justice, the first defendant indicated at the end of 2000 that he wished to leave the business. Thereafter there were discussions about the terms on which this might occur but these were unsuccessful and eventually the first defendant started litigation against the plaintiff in various jurisdictions concerning the business.

5 The Trust was established under the law of Jersey. It was a discretionary settlement in fairly conventional form. The beneficiaries included the plaintiff and the first defendant together with their children and remoter issue. Under the terms of the trust deed, the original trustees were given power to designate the settlor and the first protector. By deed dated 30th September, 1991, they designated the first defendant as both the settlor and the first protector of the Trust. According to the plaintiff, this was because the first defendant was not resident in the United Kingdom. The power of appointing new or additional trustees was vested in the protector. Under Clause 14(F), the protector also had power to remove any trustee by instrument in writing.

6 According to the plaintiff, his Jersey solicitor wrote to CI Law on 23rd June, 2003, expressing concern as to the security of some of the trust assets in view of the litigation between the brothers. He received no reply. On 29th September, 2003, he discovered during the course of correspondence in relation to the litigation between the brothers in England, that trusteeship of the Trust had been transferred to the second defendant ("Sovereign International"), a company incorporated in Gibraltar. On 3rd October, 2003, his solicitors wrote seeking confirmation as to the position and asking for 14 days prior notice of any proposal to dispose of any of the trust assets. On 8th October, 2003, under the hand of Mr Hodgson as group legal director of the Sovereign Group, Sovereign International replied confirming that it had replaced CI Law as trustee of the Trust but refusing to comment further on the letter other than to say that the plaintiff was not a beneficiary of the Trust. In the latter part of 2004, Sinels entered correspondence with CI Law and eventually they received a copy of what was described as an 'instrument of retirement and

appointment' dated 1st September, 2003. The deed purported to be an exercise by the first defendant of his power as Protector to remove CI Law as trustee and to appoint Sovereign International in its place. CI Law also confirmed that, as at the date of its removal, the plaintiff had remained as a beneficiary of the Trust.

The proceedings

7 On 26th April, 2006, the plaintiff issued an order of justice against the three defendants. In briefest summary he sought a declaration that the exercise by the first defendant as protector of his power to remove CI Law as trustee and appoint Sovereign International in its place was void as being a fraud on a power or for other reason; that any purported exercise by Sovereign International of its power to remove the plaintiff as a beneficiary of the Trust was void as being a fraud on a power or otherwise a breach of trust; and finally he sought the appointment of a new trustee and other consequential relief.

8 Since then there have been a substantial number of interlocutory battles between the parties which I do not need to describe. Suffice it to say for present purposes that by Act dated 21st November, 2006, the plaintiff was given leave to amend his order of justice. This consisted largely of pleading facts which were said to relate to the knowledge of CI Law before it was removed as trustee in order to support an allegation that CI Law should not have unquestioningly complied with the decision of the first defendant to remove it and should also have kept the plaintiff informed of what was proposed.

9 On 30th May, 2008, following failure on his part to comply with an 'unless' order made by the Master, the first defendant's answer was struck out and judgment in default was granted against him. The Court ordered his removal as Protector of the Trust and declared that he was liable to account to the trustees for the trust property and adjourned all questions of equitable compensation, the taking of an account etc.

10 Discovery was completed in June 2008, and directions were given to bring the matter to trial. It was originally due to be heard in March but is now due to begin on 24th August, and is listed for 5 days.

11 The plaintiff alleges that, now he has reviewed all the documents made available on discovery, he has become aware of further causes of action of which he was not previously aware. He therefore applies for leave to file a re-amended order of justice.

The proposed amendments

12 The proposed amendments fall into the following broad categories:-

(i) It appears that by deed dated 22nd June, 2005, between the first defendant, Sovereign International and Meridian Trustees Limited ("Meridian"), Meridian was

appointed as trustee of the Trust in place of Sovereign International. The plaintiff now seeks to add Meridian as a Party Cited. No relief is sought against Meridian but it is said that the present trustee of the Trust ought to be party to the proceedings so that it is bound by any order which the Court may make in relation to the Trust.

(ii) As against CI Law, the plaintiff says that it has now discovered that, on 1st August, 2003, CI Law purported to lend the sum of US$1million to the first defendant. The plaintiff alleges that this is void as being a fraud on a power or *ultra vires*; alternatively it is a breach of trust for which CI Law is liable to account.

(iii) As against Sovereign International, the plaintiff has ascertained that, by written resolutions dated 20th May, 2004, 21st March, 2005, 29th January, 2005, and 24th February, 2005, Sovereign International resolved to make payments to the first defendant or his wife, as a result of which, between 20th May, 2004, and 24th February, 2005, sums totalling US$3,352,914 were advanced to them. It is pleaded in the re-amended order of justice that the decision to make these payments was void as being a fraud on a power or *ultra vires*; alternatively they were in breach of trust for which Sovereign International is liable to account.

(iv) As against Sovereign Gibraltar, it is alleged that it acted as a *'trustee de son tort'* because it in fact undertook all the work on behalf of Sovereign International and sent out invoices in its name. The re-amended order of justice pleads therefore that Sovereign Gibraltar is in breach of trust by excluding the plaintiff as a beneficiary and for making the payments referred to at sub-paragraph (iii) above; alternatively that the decisions on these two aspects are void as being *ultra vires* or a fraud on a power. Application is therefore made to join Sovereign Gibraltar as fourth defendant.

(v) Finally, the re-amended order of justice introduces a claim of dishonest assistance against Sovereign International, Sovereign Gibraltar and Mr Hodgson. It is pleaded that they assisted the first defendant to act in breach of his fiduciary duty as protector by taking steps to exclude the plaintiff as a beneficiary of the Trust and to pay out the $3.35m (referred to earlier) to the first defendant or his wife. Application is made to join Mr Hodgson as fifth defendant.

13 As to the amendment referred to at (i), it seems sensible to include Meridian as a party cited for the reason given by the plaintiff and I so order.

14 As to (ii), Mr Buckley, on behalf of CI Law, did not oppose the application to amend in this respect and I therefore grant leave for the order of justice to be re-amended to make these additional claims against CI Law.

15 As to (iii), very little was said about this proposed amendment during the hearing, which concentrated entirely on the issues of *trustee de son tort* and dishonest assistance. I do not consider that, if these amendments stood alone, they would lead to loss of the trial date. Furthermore, they are very much of a kind with the amendments made in respect of CI Law. The general position is that all matters in dispute between parties should be resolved so far

as possible and leave to amend should be given if there is no prejudice to the other side which cannot be compensated for by costs. In my judgment the interests of justice suggest that the plaintiff should be allowed to amend so as to deal with the question of the payments made to the first defendant or his wife by Sovereign International and I therefore grant leave for these amendments.

Principles of amendment

16 Before turning to consider the final two sets of amendments, I should remind myself of the applicable principles.

17 Although this application was made some four months before trial, it is nevertheless made comparatively late and the parties were agreed that allowing the amendment would almost certainly lead to the vacating of the trial date in August and its substitution by a date later in the year. In the context of late applications to amend, the Court of Appeal said the following in *Brown -v- Barclays Bank Plc 2001/241*, a case where the application was made as late as the morning of the trial:-

> ***"18 The view in the earlier part of the twentieth century in England and Wales was that, in general, pleading amendments should be allowed, however late, provided that (1) allowing the amendment would not cause undue prejudice to the other party, and (2) such prejudice as would be caused could reasonably be remedied by payment of the other party's costs and by appropriate adjournment.***
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> ***19. This approach had begun to disappear in the latter part of the twentieth century (see eg*** *Ketterman v Hansel Properties* [1987] AC 189 ***per Lord Griffiths at p.220), and was largely changed in the reforms to English civil procedure embodied in the new Civil Procedure Rules (CPR). Today in England and Wales the Courts will take account of the following (amongst other) factors – the strains which litigation imposes on personal litigants, and on particular individuals in litigating companies and other bodies; the expectation that all the issues have already been fully defined; the efficient disposal of the particular case in ways proportionate to the sums involved, its importance, its complexity, and the parties' respective financial positions; the effects on the efficient disposal of other cases; the use of an appropriate share of the Court's resources; and similar matters covered by Part 1 of the CPR, in which an "overriding objective" is encapsulated.***
>
> ***20. Jersey civil procedure has not been taken down the same route as the CPR. But the statement of principle in Esteem Settlement quoted in paragraph 4 above and the other observations in that and subsequent Jersey cases show that by judicial decisions rather than wholesale rewriting of rules, Jersey civil procedure is moving in a similar direction, though with material differences. For example, in a smaller jurisdiction such as Jersey with a relatively small number of fought civil actions, and a reasonable number of permanent Judges and part-***

time Commissioners, it is less likely that any impact on the progress of other actions will prove to be strongly relevant in a case such as the present.

21. Where there is a late application for an amendment to the Order of Justice (or to the answer or reply) the Jersey courts have to strike a balance which is primarily between the parties to the instant case. The burden on the applicant is a heavy one to show, for example, (1) why the matters now sought to be pleaded were not pleaded before, (2) why is the strength of the new case, (3) why an adjournment should be granted, if one is necessary, (4) how any adverse effects on the other party including the effects of any adjournment, any additional discovery, witness statements or experts reports, or other preparation for trial can be remedied, and (5) why the balance of justice should come down in favour of the party seeking to change its case at a late stage of the proceedings."

18 Another convenient summary of the relevant considerations can be found in *Charlesworth -v- Relay Roads Limited (in liquidation)* [1999] 4 All ER 397 at 401 where Neuberger J said this:-

> ***"As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors.*** The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired; a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted……
>
> ***On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question, and the interest of other litigants whose cases are waiting to be heard, if such an application succeeds."***

The application in that case was made after the hearing and after judgment had been handed down although before the order had been drawn up.

19 It is furthermore well established that the Court will not permit amendments which infringe the rules of pleading or which introduce a claim which is so hopeless that it would be liable to be struck out under RCR 6/13.

20 In this case Mr Hoy argues that the amendments at (iv) and (v) of para 12 would be liable to be struck out on this basis. I therefore propose to consider this aspect first before turning to consider the exercise of discretion.

Trustee de son tort

21 The plaintiff alleges that, by its actions, Sovereign Gibraltar constituted itself a trustee de son tort. Mr Hoy, on behalf of Sovereign Gibraltar, argues that such an allegation is without foundation and doomed to failure. The amendment should not therefore be allowed. In order to consider the rival submissions, I must remind myself of what is meant by the expression *'trustee de son tort'*, or, as it is sometimes known, *'de facto trustee'*.

22 In a chapter entitled 'Personal Remedies Against Recipients' Lewin on Trusts (18th Edition) says this at 42–74:-

> ***"If a person by mistake or otherwise assumes the character of trustee when it does not really belong to him, he becomes a trustee de son tort and he may be called to account by the beneficiaries*** *for the money he has received under the colour of the trust.* ***A trustee de son tort closely resembles an express trustee.*** The principle is that a person who assumes an office ought not to be in any better position than if he were what he pretends; he is accountable as if he had the authority which has been assumed. While it is essential, if a person is to become a trustee de son tort, that he consciously takes the office of trustee, it does not matter whether he knows all the trusts or the extent of his powers……
>
> ***A person may not only act from the best of motives in assuming trusteeship, he may be quite unaware, perhaps without even carelessness on his part, that he has not been duly appointed to office.*** Yet he will be a trustee because he has in fact acted as one and the court cannot regard the defect in his appointment in determining his accountability: it is no answer to show that he was not legally a trustee. A trustee de son tort is liable to account for profits, like an express trustee. If he has acted in good faith, he is entitled to indemnity in respect of costs and expenses.
>
> ***Liability limited to property received***
>
> ***42–76 The accountability of a trustee de son tort is limited to property which he has received.*** In general receipt means acquisition of legal ownership or the right to obtain legal ownership, and lesser forms of control are insufficient……"

23 Thomas and Hudson, The Law of Trusts says this at para 30.03:-

> ***"The liability of trustees de son tort as constructive trustees***

The doctrine is comparatively straightforward to state. Where a person who has not been officially appointed as a trustee of an express trust interferes with or involves himself in the business of the trust so as to appear to be acting as a trustee, then that person shall be construed to be a trustee of that trust. On the basis that trustees de son tort are not expressly declared by the settlor to be trustees but rather are deemed to be constructive trustees by operation of law, due to their meddling with trust affairs, they are therefore constructive trustees. Smith LJ [in *Mara v Browne* [1896] 1 Ch 199 at 209] ***stated the nature of this form of constructive trust in the following way:***

"…… if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may therefore make himself what is called in law, trustee of his own wrong – i.e. a trustee de son tort, or, as it is also termed, a constructive trustee."

Therefore, a trustee de son tort is a trustee who intermeddles with trust business. What does not emerge from this formulation set out by Smith LJ is the usual prerequisite that **the trustee de son tort must have trust property in his possession or control** before this form of constructive trust will obtain. If the property were not vested in the defendant then the appropriate form of liability would be that of a dishonest assistant and not a constructive trustee bearing proprietary obligations. ….." [Emphasis added]

Underhill and Hayton, Law Relating to Trusts and Trustees (17th Edition) also cites the dictum of Smith LJ at paras 100.1 and 100.2.

24 The most authoritative recent statement of the position is to be found in the speech of Lord Millett in *Dubai Aluminium Co Limited -v- Salaam* [2003] 2 AC 366 at 402 where he says the following:-

"135. But every statement in a judgment must be understood in the context in which it is made, and this is particularly the case if it employs expressions such as "constructive trust" or "constructive trustee", for they have more than one meaning, and meanings have changed over time. Mara v Browne [1896] 1 Ch 199 cannot be understood unless the sense in which Lord Herschell and Rigby LJ were using the expression "constructive trustee" is appreciated .

136. The case concerned a marriage settlement. The first defendant, whom I shall HB, was a solicitor. He advised the persons who were acting as trustees, though not yet formally appointed as such. He suggested a series of investments for the trust funds. They were not proper investments for trustees to make. The money was to be lent on building property of a speculative character and the margin was unsatisfactory. The investments were made and the money was lost. Lord Herschell considered that, if the claimants had charged HB with negligence as a solicitor and brought the action in time, they

might well have succeeded, in which case both HB and his partner would have been liable. But any such action was barred by the Statute of Limitations. Accordingly the claimants alleged that HB had intermeddled with the trust and was liable as a trustee de son tort. They alleged that he had laid out the trust moneys at a time when there were no trustees, and therefore must be taken to have acted as a principal in the matter and not as a mere agent for the trustees. Such a claim was not statute-barred. The judge agreed with this analysis and held that both HB and his partner were liable.

137. The Court of Appeal took a different view of the facts. They held that it was not correct to say that at the relevant dates there were no trustees. But even if there had been none HB would not have been liable. He did not intend or purport to act as a trustee, and no one supposed that he was so acting. He purported to act throughout only as solicitor to the trustees and was understood by all concerned to be acting as such.

138. This summary is sufficient to show what Lord Herschell and Rigby LJ meant by "constructive trustee". They meant "trustee de son tort"; that is to say, a person who, though not appointed to be a trustee, nevertheless takes it upon himself to act as such and to discharge the duties of a trustee on behalf of others. In *Taylor v Davies* [1920] AC 636, 651, ***Viscount Cave described such persons as follows:-***

"though not originally trustees, [they] had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named."

Substituting dog Latin for bastard French, we would do better today to describe such persons as de facto trustees. In their relations with the beneficiaries they are treated in every respect as if they had been duly appointed. They are true trustees and are fully subject to fiduciary obligations. Their liability is strict; it does not depend on dishonesty. Like express trustees they could not plead the Limitation Acts as a defence to a claim for breach of trust. Indeed, for the purposes of the relevant provision (section 25(3) of the Supreme Court of Judicature Act 1873 (36 and 37 Vict c66)), which distinguished between property held on express trusts and other trusts, they were treated by the courts as express trustees. That is why the action in *Mara v Browne* ***was not statute-barred.***

……

140. Referring to these cases in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 408–409 ***in the Court of Appeal, I drew attention to the fact, which was becoming increasingly overlooked, that the expressions "constructive trust" and "constructive trustee" were used by equity lawyers to describe two entirely different situations. One was the situation which the claimants unsuccessfully contended had arisen in*** *Mara v Browne*. ***The other is the situation which arose in present case***.

141. Unlike HB in Mara v Browne [1896] 1 Ch 199, Mr Amhurst did not assume the position of a trustee on behalf of others. He never had title to the trust funds or claimed the right to deal with them on behalf of those properly entitled to them."

25 What seems to me of critical importance in these formulations is that, to be a " *trustee de son tort"*, a person who intermeddles in a trust must be one *"…… not having authority from a trustee" or* who *'takes it upon himself'* to act as a trustee. If a duly appointed trustee delegates functions to a person, that person derives his authority from the trustee and is entitled to act within the confines of the authority conferred on him by the trustee without himself becoming a trustee. He has in those circumstances committed no 'wrong' which constitutes him a trustee as envisaged by Smith LJ in the passage quoted above. Indeed in *Mara -v- Browne* [1896] 1 Ch 199 itself, the alleged " *trustee de son tort"* was found to have been acting as a solicitor to the trustees because he was acting at their request and therefore did not become a " *trustee de son tort"*.

26 One can see why this approach is taken. If there is no trustee and a person intermeddles and starts acting as a trustee, the only person against whom the beneficiaries would have a remedy will be the intermeddler. He should therefore be liable as if he were a trustee. However, where a duly constituted trustee appoints a person to act as his agent but such actions cause loss to the trust fund, the beneficiaries will have a remedy for breach of trust against the trustee, who may or may not in turn have a remedy against the agent for any wrongdoing. However, the interests of the beneficiaries are protected because of the strict liability of the trustee for breach of trust. In those circumstances there is no justification for imposing the liability of a trustee upon an agent or deeming him to be a trustee.

27 In this case it is alleged that the deed appointing Sovereign International as trustee in place of CI Law should be declared void. If this were to occur, then Sovereign International would undoubtedly be a " *trustee de son tort"*. It would have been acting as trustee without any authority, albeit in good faith, and would have intermeddled in the Trust.

28 However the plaintiff alleges that Sovereign Gibraltar is a " *trustee de son tort"* or a " *de facto trustee"*. Para 155 of the draft re-amended order of justice sets out 13 matters upon which it relies in support of that allegation. I have considered them all, together with the responses. The more significant matters include:-

(i) Invoices for trust services were sent out in the name of Sovereign Gibraltar rather than Sovereign International.

(ii) The first defendant and his wife sent e-mails which referred to monies for the Trust being paid into an account in the name of Sovereign Gibraltar.

(iii) Advocate Begg, who acted for the Sovereign Group in relation to certain proceedings in Jersey, referred in an e-mail to Sovereign Gibraltar as being the trustee of the Trust.

(iv) The plaintiff pleads in para 155 of the re-amended order of justice that he reserves the right to refer to further letters and e-mails which are too great to particularise. The pleading does not give any further detail but in his skeleton argument Mr Tracey said that these would show that the vast majority of the e-mails and letters which had emerged on discovery were sent by or on a letterhead of Sovereign Gibraltar rather than sovereign International.

29 The response of Sovereign Gibraltar was straightforward. It filed affidavits from Mr Hodgson and Mr Gerard Kelly, the finance director. The affidavits explained that Sovereign International is licensed by the Financial Services Commission of Gibraltar as a professional trustee and that is that company's sole activity. Sovereign Gibraltar is also licensed by the Financial Services Commission, but as a company manager as well as a professional trustee, although Mr Kelly asserts that it has never been appointed trustee of any trust. Sovereign Gibraltar is the main trading or operational company in Gibraltar of the group. It rents office premises and employs over 50 people. It is the service company within the Sovereign Group which provides various services, such as preparing accounts and financial statements, opening bank accounts, legal and documentary services and administrative services, to other entities within the Sovereign Group which act as trustees of trusts. There is power under the trust deed of the Trust to delegate and in effect Sovereign International as trustee delegated many of its functions to Sovereign Gibraltar. In relation to the four matters referred to above, the response of Sovereign Gibraltar is as follows:-

(i) It is accepted that invoices were sent out by Sovereign Gibraltar. That was because it was the company which was in fact undertaking the work and employing the staff.

(ii) It is accepted that the first defendant and his wife referred to accounts in the name of Sovereign Gibraltar. However these references were erroneous. Mr Hodgson exhibited bank statements showing that the account referred to was in fact in the name of Sovereign International and the monies referred to were received into that account. In relation to the second occasion there is an e-mail reply of the same date from Mr Goncalves at Sovereign specifically correcting the information and stating that the relevant account was in the name of Sovereign International.

(iii) It is accepted that Advocate Begg made the statement but this was simply an error on his part. The deed of appointment clearly appointed Sovereign International as trustee; it made no mention of Sovereign Gibraltar.

(iv) It is accepted that much of the correspondence is by Sovereign Gibraltar but this was pursuant to its function as the administrative arm of Sovereign International.

30 Mr Hoy submitted that it was commonplace in the trust industry for the administration of a trust to be carried out largely by another company within the same group of companies as the corporate trustee. He said that it would be very surprising and cause considerable surprise in the industry if such a company were to find itself designated as a " *trustee de son tort"*. Mr Tracey, on the other hand, said that, because it was common practice, it was

important that an authoritative decision be given as to whether such an administrative company should be treated as a " *trustee de son tort".*

31 I return to the guidance referred to earlier as to what constitutes a " *trustee de son tort"* or " *de facto trustee"*. The essence is that a person takes it upon himself to intermeddle and act as trustee without the authority of the real trustee (if there is one). In my judgment, an agent or delegate acting with the authority of a duly appointed trustee is not committing any 'wrong' by acting within the scope of his delegation and is not 'intermeddling' in the trust so as to constitute him a " *trustee de son tort"*. He is acting in the capacity in which he has been authorised to act. In those circumstances it is the trustee who has made the delegation that is acting as trustee of the Trust, not the agent or delegate.

32 Furthermore, one must have regard to what is alleged here. The only two relevant complaints are that, after the purported appointed of Sovereign International as trustee on 1stSeptember, 2003, the plaintiff was wrongly excluded as a beneficiary of the Trust and that some $3.35m was wrongly advanced to the first defendant and/or his wife. As to the latter allegation, it is expressly pleaded in para 163 of the re-amended order of justice that these advances were made by Sovereign International during its trusteeship of the Trust pursuant to written resolutions of Sovereign International. There is no allegation that Sovereign Gibraltar made the advances or passed any resolutions. As to the former, there is no allegation in the re-amended order of justice that the declaration dated 15th September, 2003, excluding the plaintiff (amongst others) as a beneficiary of the Trust was made by anyone other than Sovereign International as trustee of the Trust.

33 In the circumstances I do not consider that, if Sovereign International was validly appointed as trustee of the Trust on 1st September, 2003, there is an arguable case that Sovereign Gibraltar was acting thereafter at any time as a " *trustee de son tort"* or " *de facto trustee"*. I therefore refuse leave to amend to make such an allegation.

34 However, if the plaintiff is successful in his claim that the purported appointment of Sovereign International as trustee on 1st September, 2003, is void, Sovereign Gibraltar will not have been acting under the authority of the trustee, because Sovereign International itself will not have been the duly appointed trustee of the Trust. In these circumstances, given the degree of involvement alleged by the plaintiff, it does not seem to me that the claim that Sovereign Gibraltar was acting as a " *trustee de son tort"* is so hopeless as to be doomed to failure and therefore liable to be struck out. There will still be a number of hurdles for the plaintiff to surmount, including whether, as suggested in some of the texts above, Sovereign Gibraltar can only be treated as a " *trustee de son tort"* if it has taken possession of the trust fund and whether, if so, it did in fact take such possession. But, on the basis that such an allegation would not be struck out, it justifies leave to amend being granted to make this more limited allegation, subject to the discretion point to which I shall refer shortly.

Dishonest assistance

35 Category (v) relates to amendments which introduce a claim at paras 179–182 of the re-amended order of justice alleging that Sovereign International and/or Sovereign Gibraltar and/or Mr Hodgson dishonestly assisted the first defendant's breach of fiduciary duty as Protector.

36 The requirements for dishonest assistance were authoritatively established in *Royal Brunei Airlines -v- Tan* [1995] 2 AC 378 and subject to further refinement in *Twinsectra Limited -v- Yardley* [2002] 2 All ER 377 and *Barlow Clowes International Limited -v- Eurotrust International Limited* [2006] 1 All ER 333. The matter is conveniently summarised in the head note of the latter case which reads as follows:-

> ***"In considering whether a defendant's state of mind was dishonest an enquiry into the defendant's view about standards of honesty was not required.*** A defendant's knowledge of a transaction had to be such as to render his participation contrary to normally accepted standards of honest conduct. There was no requirement that he should have had reflections about what those normally acceptable standards were. Consciousness of the dishonesty required consciousness of those elements of the transaction which made participation transgress ordinary standards of honest behaviour; it did not also require the defendant to have thought about what those standards were. ……..."

It is therefore an objective test of dishonesty.

37 The re-amended order of justice alleges at para 154 that, prior to the purported appointment of Sovereign International as trustee of the Trust on 1st September, 2003, Sovereign International and/or Sovereign Gibraltar and/or Mr Hodgson entered into a plan with the first defendant to urgently undertake a course of action following the appointment of Sovereign International as trustee of the Trust. It is pleaded that the nature of that action is as set out in the succeeding paragraphs. The key allegation for these purposes is that contained at 158 which alleges that, notwithstanding that there was uncertainty as whether the plaintiff had been lawfully or effectively removed as beneficiary of the Trust, Sovereign International and/or Sovereign Gibraltar and/or Mr Hodgson sought to assist the first defendant in his breach of fiduciary duty by appointing the entirety of the capital of the Trust for the benefit of the first defendant and/or his wife. It is then alleged at para 163 that the advances of $3.35m to the first defendant and his wife were made in pursuance of this plan.

38 Paragraph 181 is the key paragraph which sets out the facts and matters relied upon to prove dishonesty. It begins as follows:-

> ***"The dishonesty of the second and/or fourth and/or fifth defendant(s) is apparent or alternatively is to be inferred from the following facts and matters:—…..***"

There then follow seven sub-paragraphs.

39 Mr Hoy is very critical of the plaintiff's pleading. He argues (correctly) that proper particulars of dishonesty must always be given. He referred me to the observation of Lord Millett in *Three Rivers District Council -v- the Governor and Company of the Bank of England* [2003] 2 AC 1 at para 184:-

> ***"It is well established that fraud or dishonesty must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence……"***

He argues that a compendium set of sub-paragraphs which make allegations indiscriminately against three different parties on the back of an and/or formulation does not comply with the requirements for proper pleading. Furthermore, he argues that, in any event, the seven sub-paragraphs outline matters which are as consistent with negligence as with dishonesty and therefore do not raise an arguable case.

40 It has to be borne in mind that 'dishonesty' for the purposes of dishonest assistance is not the same as fraud or dishonesty in the criminal field. It is a wholly objective test. Nevertheless, it is still a serious allegation to make and full and proper particulars in respect of any person against whom such dishonesty is alleged must be provided. Each defendant is entitled to know exactly what is relied upon so as to suggest dishonesty on his part.

41 I agree with Mr Hoy that the present pleading is deficient in this respect. The and/or formulation as to who was party to the plan referred to in para 154 and who has been guilty of dishonesty in para 181 is not appropriate. Either there is an allegation of dishonesty on the part of a particular defendant or there is not. If the plaintiff wishes to allege that each of Sovereign International, Sovereign Gibraltar and Mr Hodgson has been dishonest for the purposes of dishonest assistance, he must plead the facts and matters relied upon against each defendant individually. It is by no means clear which of the various sub-paragraphs at para 181 can be related to which defendant. I am not therefore willing to grant leave for the order of justice to be amended in the form of the draft presented to me.

42 However, I do not agree with Mr Hoy that any allegation of dishonest assistance is necessarily doomed to failure. The plaintiff alleges that there was a plan hatched prior to 1stSeptember, 2003, whereby the plaintiff would be wrongly excluded as a beneficiary of the Trust and the trust assets would be wrongly paid to or for the benefit of the first defendant or his wife. If that is proved, it must also be arguable that anyone who assisted in putting that plan into effect with the requisite state of mind would be guilty of giving dishonest assistance to the breach of fiduciary duty on the part of the first defendant in his capacity as Protector.

43 Just as a court will not normally strike out a claim if it can be rescued by an amendment to the pleading, it is not right to refuse leave to amend altogether if the draft submitted to the court is deficient, but such deficiencies can be cured by further change. I propose therefore

to adjourn my decision in respect of the dishonest assistance claim so as to give the plaintiff's advocates an opportunity of putting their house in order by preparing a further pleading which eschews the and/or formulation where it is inappropriate, specifies the facts and matters relied upon against each proposed defendant to show dishonesty on the part of that defendant and pleads exactly what assistance each defendant is alleged to have given. Only when the matter is properly pleaded individually against each of the proposed defendants will I be in a position to determine whether the plaintiff has in fact shown an arguable case against that defendant, so that it would be proper to give leave to amend to include that allegation.

Discretion

44 In relation to the amendments concerning " *trustee de son tort"* and dishonest assistance, Mr Hoy argues that the plaintiff has delayed too long. The information which he uses to support these two new causes of action has been available to him since inspection in June 2008, following discovery. Even as late as January 2009, the plaintiff only indicated that he proposed to amend to include Meridian, which was agreed to by the defendants on 3rd February. It is only since then that the plaintiff has sought to introduce these further amendments which will have the effect of causing the trial date to be vacated.

45 Were it not for the matter which I shall mention in the next paragraph, I would in my discretion have refused leave to introduce the amendments at (iv) and (v) and to add Sovereign Gibraltar and Mr Hodgson as additional defendants. The essence of the plaintiff's claim is threefold. Firstly, there is a claim that Sovereign International was not duly appointed as trustee. A declaration that that appointment was invalid would suffice to deal with that point and Sovereign International is the only defendant necessary for that purpose. The second aspect of the claim is that the plaintiff was wrongly excluded as a beneficiary. Again, a declaration that the deed of exclusion executed by Sovereign International was invalid would give an adequate remedy and the addition of Sovereign Gibraltar and Mr Hodgson adds nothing to that remedy. The third aspect is that the plaintiff wishes the trust fund to be compensated for any losses caused during the time that Sovereign International was acting or purporting to act as a trustee. Sovereign International would be strictly liable for any breach of trust which it has committed. As at presently advised, I cannot envisage any circumstances in which Sovereign International would not be liable to reimburse the trust fund or the plaintiff but Sovereign Gibraltar or Mr Hodgson would be so liable. Accordingly, if there were no suggestion that Sovereign International might be unable to pay any compensation ordered, I would in my discretion decline to allow any of the amendments adding extra parties on the basis that the interests of justice came down firmly in favour of proceeding to trial within the timescale currently fixed and without incurring extra costs, because, if successful, the plaintiff would achieve full recovery from Sovereign International and nothing would be gained by introducing additional claims at a late stage against Sovereign Gibraltar and Mr Hodgson.

46 Although Mr Tracey was somewhat coy about admitting this, it seems to me reasonably clear that the main motivation for the amendments, and in particular the decision to seek to

join Sovereign Gibraltar and Mr Hodgson, is that, in January 2009, the plaintiff was informed that Sovereign International's insurers were not maintaining cover. As indicated earlier, it is Sovereign Gibraltar which is the main company of the Sovereign Group with employees, property etc whereas Sovereign International merely acts as a trustee. The plaintiff is therefore concerned as to whether, even if successful, it will necessarily recover all financial loss to the Trust from Sovereign International. I emphasise that I have no way of knowing whether there is any risk in this regard, but no financial information concerning Sovereign International or Sovereign Gibraltar has been drawn to my attention. It seems to me reasonable that, if, although he has potential claims against additional parties, a plaintiff chooses to concentrate on just one defendant on the basis that, if successful, he will recover from that defendant all of his losses, he may wish to change his tactics if he discovers that, contrary to his belief, the defendant he has chosen may not be able to meet any judgment in full. Such circumstances would, it seems to me, provide proper grounds for an application to bring in defendants against whom he has an arguable claim but whom he decided not to join when it did not seem necessary.

47 Although this amendment is late, in the sense that it is likely to lead to a loss of the trial date, this is a very different sort of case from many of those to which I was referred, where amendments were sought either during the trial or immediately prior to its commencement. In those circumstances there will clearly be considerable inconvenience through wasted preparation, need to stand witnesses down etc. The position here is very different. The trial date is still some four months off and the decision to postpone it by two or three months will not cause any substantial degree of prejudice. In my judgment, balancing the various factors, I propose to exercise my discretion in favour of granting leave for those amendments where I am satisfied that there is a properly arguable case.

Conclusion

48 In summary:-

(i) I give leave for the amendments at (i) – (iii) of para 12.

(ii) I give leave for the plaintiff to re-amend his order of justice so as to include an allegation that, in the event of the deed dated 1st September, 2003, appointing Sovereign International as trustee of the Trust being held to be invalid, both Sovereign International and Sovereign Gibraltar are liable as " *trustees de son tort"* for any losses suffered by the Trust. However, I refuse leave to bring an allegation to the effect that, even if Sovereign International was validly appointed as trustee by the deed of 1st September, 2003, Sovereign Gibraltar is nevertheless a trustee de son tort. It follows that I also give leave for Sovereign Gibraltar to be added as fourth defendant on this limited basis.

(iii) I adjourn consideration of the application to amend so as to include allegations of dishonest assistance against Sovereign International, Sovereign Gibraltar and Mr Hodgson and the accompanying application to join Mr Hodgson as fifth defendant. I will re-consider this latter application upon receipt of a further draft of the proposed re-

amended order of justice which addresses the defects in the present draft referred to earlier.

49 I will hear the parties as to the exact form of any order, matters of timing etc.