Anne-Marie Heinrichs v Pantrust International SA

Jurisdiction:	Jersey
Judge:	MJ. A/Clyde-Smith
Judgment Date:	30 September 2016
Neutral Citation:	[2016] JRC 174
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Court:	Royal Court
Date:	30 September 2016

Text

[2016] JRC 174

ROYAL COURT

(Samedi)

Before:

MJ. A/Clyde-Smith, Esq., Commissioner, sitting alone

In the Matter of the Brazilian Trusts

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

Between
Anne-Marie Heinrichs
First Representor

and

Werner Cornelius Heinrichs
Second Representor
and
Pantrust International SA
First Respondent

and

Richard George De Winton Wigley
Second Respondent

and

James Richard De Winton Wigley
Third Respondent

and

G.B. Trustees Limited
Fourth Respondent

Advocate S. M. Baker **for the First and Second Representors**

Authorities

Heinrichs v Pantrust and Ors [2016] JRC 106A .

Representation of the Manor House Trust and the Russian Trust [2015] JRC 208 .

Trusts (Jersey) Law 1984.

Stock v Pantrust [2016] JRC 053 .

Stock v Pantrust [2016] JRC 069 .

Edoarda Crociani and Others v Cristiana Crociani and Others [2014] JCA 095 .

View PDF (316 KB) Trust — Costs.

COSTS JUDGMENT

THE COMMISSIONER:

1 On 14 th April, 2016, the Court heard the application of the first to third respondents seeking to set aside the order of the Court granting leave to the representors to serve their representation on them out of the jurisdiction. Judgment was reserved.

2 On 27 th April, 2016, the Court issued a draft judgment indicating that it was going to refuse the application on the basis that both Brazilian Trusts were governed by Jersey law over which the Court should exercise its supervisory jurisdiction.

3 By letter dated 28 th April, 2016, Sinels, who had acted for the first to third respondents in the matter, gave notice that the first to third respondents had not and would not submit to the jurisdiction of the Jersey court and that they were no longer instructed in the matter. Thus, when the Court sat to hand down the judgment on 16 th June, 2016, the first to third respondents were not represented. The Court removed the first to third respondents as trustees of the Brazilian Trusts appointing the fourth respondent in their place. The Court ordered the first to third respondents:-

> (i) to take immediate steps to place the fourth respondent in control and possession of all of the assets comprised within the trust funds of the Brazilian Trusts; and
>
> (ii) within 14 days to provide the fourth respondent, in so far as they were able, with up to date accounts of the Brazilian Trusts, a schedule of every asset and liability and its location, details of the officers and administrators of any corporate entities comprised within the trust funds and how the shares of those entities are held.

The first to third respondents have not complied with those orders.

4 The reasons for the Court accepting jurisdiction over the Brazilian Trusts are set out in its judgment of 16 th June, 2016, (*Heinrichs v Pantrust and Ors* [2016] JRC 106A) which needs to be read in conjunction with this judgment on costs but by way of overview:-

> (i) The facts of this case are very similar to the facts in *Stock v Pantrust* [2015] JRC 208, which involves the same respondents, the representors in the two cases being related.
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> (ii) There are potentially two trusts bearing the same name, one created by trust deed dated 9 th December, 1977, and the other by declaration of trust dated 15 th November, 1984. The position will have to be rationalized in due course, but at that very preliminary stage, the Court proceeded on the basis that there are potentially two trusts in existence (paragraph 50 of the judgment), hence my reference to “the Brazilian Trusts”.
>
> (iii) The Brazilian Trust created by the 1977 deed had always been governed by Jersey law. It was effectively conceded by the first to third respondents that the purported change in the proper law of the Brazilian Trust created by the 1984 deed from Jersey to Panama was ineffective. Accordingly, the Court found that both the 1977 and the 1984 deeds created Jersey trusts over which the Court had jurisdiction under Article 5 of the Trusts (Jersey) Law 1984 (paragraph 39 of the judgment).
>
> (iv) The majority of the relief sought by the representors invoked the Court's

supervisory jurisdiction over trusts, namely the removal of the trustees, the transfer of the trust assets, declarations as to the proper law and an account of the trusteeship of the first to third respondents. However, the relief sought extended to the existence, validity and enforceability of loans purportedly owed to the first to third respondents or companies controlled by them. For the reasons set out in the judgment, the Court refused to accept jurisdiction over these loan issues and that part of the relief contained within the representation was struck out.

(v) In correspondence between Baker & Partners, acting for the representors and Sinels, acting for the first to third respondents prior to the hearing, the first to third respondents had agreed to transfer the assets of what they alleged was a sham trust (that created by the 1984 deed) to the fourth respondent but the parties were unable to reach agreement on the terms of that transfer. The Court found it difficult to understand why the representors had not been able to take advantage of that offer without the need of any intervention by the Court in that respect (paragraph 15 of the judgment).

Position of the parties

5 The representors submit that having succeeded in resisting the jurisdictional challenge and having obtained the removal of the first to third respondents as trustees, they should have their costs paid by the first to third respondents and even though part of the relief sought (the loans issue) was struck out, the conduct of the first to third respondents justified all of the representors' costs being paid on the indemnity basis.

6 Whilst not submitting to the Court's jurisdiction, the first to third respondents filed a letter supported by a fourth affidavit by the second respondent in which they seek costs from the representors jointly and severally on the indemnity basis because:-

(i) the first to third respondents had agreed to transfer the trust assets to the fourth respondent prior to the hearing; and

(ii) the relief sought in relation to the loans issue was, they said, a naked attempt by the first representor to obtain the trust assets free of the second representor's debt obligations; the Courts of Ontario where the second representor lives being the correct forum to deal with those obligations.

7 The second respondent's affidavit asked the Court to excuse the non-attendance of the first to third respondents at the costs hearing, as they meant no disrespect.

Costs sought by the first to third respondents

8 I am not prepared to entertain any applications by the first to third respondents for costs orders in their favour for the following reasons:-

(i) Having failed in their challenge as to the Court's jurisdiction, they have decided not to submit to this Court's jurisdiction and have made it clear that they will not do so. They cannot, on the one hand, reject this Court's jurisdiction but on the other hand, seek to invoke that jurisdiction in their favour.

(ii) They have not complied with the Court's order to transfer the trust assets to the fourth respondent. Even if the Brazilian Trust created by the 1984 deed is a sham, as they claim, although their position on this is not consistent (see paragraph 49 of the judgment), they have retained assets which do not belong to them and on any basis they are under an obligation to account for those assets.

Costs sought by the representors

9 The second respondent has admitted to manufacturing documentation and making statements on affidavit which are untrue. These admissions are contained in his third affidavit, sworn on 17 th March, 2016. Paragraph 5 of that affidavit is in these terms:-

> " *5 The reason I am filing this third affidavit is because it is necessary for me to correct one of the statements I made in my affidavit of 22nd December 2015.* At paragraph 26 of that affidavit, I stated that the Heinrichs Loans were made by the company Oxford Financial Services Limited in its capacity as agent for the Trustee of certain third party Trusts in which Mr Heinrichs had no interest. That statement was untrue. The actual lenders of the various loans which comprise the Heinrichs Loans were the companies La Hougue Boete Société Fiduciaire Avec Responsabilité Limitée, La Hougue Financial Management Services Limited and Pantrust respectively. In each case they made loans with monies obtained from third parties."

10 No further explanation is forthcoming for the making of this untrue statement.

11 A consistent complaint of the representors is that the third to third respondents have failed to provide any documentary evidence of the loans being claimed. Paragraphs 18 and 19 of the judgment is worth setting out here:-

> ***"18 The first representor had undertaken a detailed examination of some 300 cardboard boxes of documents found in the squash courts at St John's Manor and now held by the Jersey police, and in her first affidavit, she exhibits a number of documents which she says she has unearthed relating to these alleged loans.*** Advocate Baker spent some time taking us through them. Certainly they give rise to a number of questions that appear to show, inter alia a pattern of inter-trust dealing by which, taking loan 23 as an example:-
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> ***(i) La Hougue loans CA$ 234,000 to Quartz International Finance Limited, ('Quartz') a company which the first to third respondents say was***

beneficially owned by the second representor, at an interest rate of 6.75% per annum .

(ii) On the same day, Quartz lends the same sum of Oxford at an interest rate of 10% per annum .

(iii) On the same day Oxford lends the same sum to La Hougue at an interest rate of 12% per annum .

19 A separate document headed "Direction to pay" signed on the same day indicates that La Hougue was initially acting in its capacity as trustee and ultimately received the monies back to itself in its capacity as agent. The identity of the trust and the identity of the principal are not stated. If genuine these documents show the interest rate almost doubling from the initial loan made by La Hougue as trustee for an unidentified third party trust, to the loan it received back as agent for an unidentified principal, with handsome turns being made by both Quartz and Oxford."

12 The role of Oxford as purported lender is, we are now told, untrue.

13 At paragraph 6 of his third affidavit, the second respondent says this:-

" *6 I also wish to make clear that, in seeking to recover the Heinrichs Loans, the lender companies will not be relying on the loan documentation exhibited to Ms Heinrichs' affidavit at AMHI/4 (the "Documentation").* The reason for this is that*although all of the loans referred to in the Documentation were genuinely made (and, if necessary, this will [be] proved in proceedings before the Courts of Ontario) the Documentation itself is a fiction, and was executed with the knowledge and approval of Mr Heinrichs for the sole purpose of disguising the true identity of both the lender and the borrower*."

14 As the Court noted at paragraph 21 of the judgment, in the *Stock v Pantrust* litigation it was revealed that much of the loan documentation in that case (which had been filed by the second respondent) had been manufactured after the event (see paragraphs 27 and 28 of the judgment of 4 th March, 2016, (*Stock v Pantrust* [2016] JRC 053).

15 Since the April, 2016 hearing, Advocate Baker says that further evidence has emerged that references to a Code 085 in some of the loan documentation is a reference to the Brazilian Trust, contrary to the claims of the first to third respondents. Furthermore, Advocate Baker handed to me copies of particulars filed by Mr Victor M Seabrook, a trustee of the Avenue Trust and a plaintiff in the Ontario proceedings referred to in paragraphs 23 and 24 of the judgment. Advocate Baker informed me that at the material time, Victor Seabrook was the second representor's personal lawyer and centrally involved in his affairs and dealings with the first to third respondents. In those particulars, Victor Seabrook makes it clear that he regarded the Brazilian Trust (created by the 1977 deed) as a true trust, of which the

representors were beneficiaries.

16 Advocate Baker made the point that if the loans (amounting, apparently, to some US$ 16M) were made to the Brazilian Trust as opposed to the second representor personally or to entities controlled by him, then the lenders' remedy would be restricted to the more limited assets of the Brazilian Trust. It would be in the interests therefore, of the first to third respondents to disavow any loans being made to the Brazilian Trust or the validity of that trust.

17 Advocate Baker's concern is that Sinels had not been properly instructed by the first to third respondents at the April hearing on this issue, and that as a consequence, the Court had been manipulated, successfully, into declining jurisdiction over the loans issue.

18 Advocate Baker talked in terms of the second respondent having admitted to perjury, an accusation to which the second respondent has not had an opportunity to respond. Perjury is a criminal offence involving the wilful telling of an untruth in a court on oath. Whilst the second respondent has admitted that the statement made in his affidavit of 22 nd December, 2015, was untrue, he has not admitted that this was done wilfully and furthermore, that untrue statement was corrected before the hearing through his third affidavit. As to the loan documentation, it was the first representor who placed it in evidence before the Court, not the second respondent. It might be said that by stating it was manufactured (with, he says, the knowledge and approval of the second representor), the second respondent was ensuring that the Court was not misled by that documentation.

19 In any event, whilst of course I accept Advocate Baker's submission as to the importance of the Court and all those involved in the court process being able to rely on sworn evidence and the need for serious consequences to follow for those who knowingly mislead the Court, there is no basis upon which I can properly and fairly conclude, for the purposes of assessing costs, that the second respondent intentionally misled the Court.

20 Turning to the first to third respondents' offer to transfer the trust assets to the fourth respondent prior to the hearing, I have considered the relevant correspondence again. That offer was made without prejudice to either side's claim as to whether there was a valid trust or not. The deed of retirement and appointment (“DORA”) presented by the first to third respondents and executed by them on 21 st December, 2015, was expressed as being governed by the laws of Ontario with a non-exclusive submission to the jurisdiction of the courts of Ontario. Baker & Partners suggested that the DORA should be governed by Jersey law, which the first to third respondents accepted, and that the parties should submit to the non-exclusive jurisdiction to the courts of Jersey (with an undertaking not to use that submission in the jurisdictional challenge), which the first to third respondents would not accept. The first to third respondents also declined to have the assets listed in a non-exhaustive schedule. As a consequence, the DORA was not executed and no transfer of the assets took place prior to the hearing. Very regrettably, no transfer of the assets has taken place since.

21 Standing back from all of this, I am reminded that the Court was concerned with a challenge by the first to third respondents to its jurisdiction over two trusts, both of which were governed by Jersey law. In the similar case of *Stock v Pantrust* costs were awarded to the representor on the indemnity basis for the reasons set out in the Court's judgment of 22nd March, 2016, (*Stock v Pantrust* [2016] JRC 069). In that judgment, I reached this conclusion:-

> " ***13 I considered whether the first to third respondents should be ordered to pay indemnity costs from the point at which the Court gave them this warning, with standard costs applying up to that date.*** However, bearing in mind the untenable position that they were in, it was unreasonable for them as trustees, in furtherance of their personal interests and in conflict with the interests of the trust estates, to have mounted the jurisdictional challenge and to do so in reliance upon the 2007 DORAS and entirely ignoring the 2015 ***DORAS, which they had executed in contravention of an order of the Panamanian regulator.*** Their clear duty as trustees, at least from the point where the Panamanian regulator removed the first respondent's licence to conduct trust company business, was to proffer the resignation of the first respondent as required by the Panamanian regulator. I conclude that the representor should have her costs on the indemnity basis."

22 The warning given to the first to third respondents in that case of the consequences of their continuing in office as trustees applies just as much to their continuing in office as trustees of the Brazilian Trusts.

23 The first to third respondents knowingly put their personal interests first in conflict with the interests of the trust estates and mounted a challenge as to the jurisdiction of the Court, on the basis:-

> (i) of a purported change in the proper law of the Brazilian Trust created by the 1984 deed to Panama in 2007, which they conceded was ineffective; and
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> (ii) that the Brazilian Trust created by the 1984 deed was a sham when subsequent deeds had been executed in 2007 and 2015 on the basis that it was valid. Furthermore, the evidence contains letters written by the first to third respondents and their legal advisers on the basis that the trust was valid.

24 Whilst I will not entertain an application for costs by the first to third respondents who have rejected the jurisdiction of this Court and who are in default of its orders, I have taken into account their written representations and the fourth affidavit of the second respondent in that respect. In essence, they say that the representation was wholly unnecessary – I can only disagree. It was their challenge to the jurisdiction with which the Court was concerned and their conduct which gave rise to the representation in the first place.

25 In my view, the conduct of the first to third respondents should result in their being condemned to pay costs on the indemnity basis.

26 I considered whether the offer to transfer assets before the hearing on the terms set out in the DORA should lead to costs being awarded on the standard basis, but I concluded that the amendments to the DORA sought by the first and second representors were reasonable and the fact of the matter is that the hearing had to take place in order to deal with the jurisdictional challenge and for the first to third respondents to be removed as trustees and to be ordered to transfer the trust assets. Costs should therefore be awarded on the indemnity basis.

27 However, the jurisdictional challenge by the first to third respondents was successful in part, in that the Court declined to accept jurisdiction over the loans issue. The Court said this at paragraph 66:-

> " ***66 These reverse debt claims should have been flagged by the representors as a separate claim in the application for leave to serve out of the jurisdiction and a good arguable case put forward in that respect.*** If that had been done, then in our view, leave to that extent would have been refused. In any event, we decline to accept jurisdiction in respect of this part of the relief. It will therefore be struck out of the representation."

28 In my view, the first and second representors should not have their costs in relation to the loans issue.

Payment on account

29 The power of the Court to order an interim payment on account of a costs bill is now settled and the approach to the Court is set out in the Court of Appeal judgment in *Edoarda Crociani and Others v Cristiana Crociani and Others* [2014] JCA 095. The underlying principle is set out at paragraph 16 of the judgment of the Hon. Michael Beloff QC:-

> " ***16 In my view the achievement of justice, to which all exercises of discretion under procedural rules aspire, would usually require that a party, who is, pursuant to a court order, entitled to its costs, should be paid on account a percentage of the amount he is likely to recover on taxation calculated on a conservative basis to avoid any real risk of over payment***."

30 Advocate Baker has produced an account setting out his firm's costs applying factors A and B, which amounts to £283,720.17p, the principal time being that of himself and a senior associate, James Sheedy. To that are added disbursements, including the costs of the Panamanian legal advice and travel expenses to Canada of £39,282.99p, making a total of

£327,823.23. The time on this matter commences on 16 th March, 2015, with work starting on the drafting of a representation in October 2015. Costs between March 2015 and September 2015 amounted to £51,086.06p. An issue for the taxing officer will be the extent to which time incurred during this period and through to the hearing in April 2016 was concerned with the loans issue.

31 Taking a cautious approach, I conclude that it would be fair for the first to third respondents jointly and severally to make a payment on account of £100,000.

Conclusion

32 I therefore order the first to third respondents jointly and severally:-

(i) to pay the costs of the first and second representors of and incidental to their representation (other than in relation to the loans issue) on the indemnity basis up to and including the April hearing and of and incidental to the hearing on costs; and

(ii) to make a payment to the first and second representors on account of those costs of £100,000 within 28 days of this order being handed down.