

Insinger de Beaufort v Moodie Blu

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	18 June 2003
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Text

[2003] JRC 97

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats de Veulle, **and** Tibbo.

In the matter of the Representation of Insinger de Beaufort Trust (Jersey) Limited (The Trustee)

And in the matter of the Moodie Blu Trust (The Trust)

And in the matter of Articles 47 and 49 of the Trusts (Jersey) Law, 1984.

Advocate P.D. James for the minor beneficiaries of the Trust
First Party Convened
The Attorney General

Second Party Convened.

Advocate F.B. Robertson for the Trustee

The First Party convened in person.

A.J. Belhomme, **Esq., Crown Advocate on behalf of the Attorney General.**

Authorities

[*Re: S Settlement*](#) (24th July 2001) Jersey Unreported; [2001/154]

Representation of Quorum Trustees (14th March 2002) Jersey Unreported [2002/61]

[*Re LeisureNet*](#) (26th February 2002) Jersey Unreported; [2002/46].

Criminal Justice (International Cooperation) (Jersey) Law 2001: Article 5.

Proceeds of Crime (Jersey) Law 1999: Articles 32,33.

Application for Directions

Deputy Bailiff

THE

- 1 This is an application by Insinger de Beaufort Trust (Jersey) Limited as Trustee of the Moodie Blu Trust for approval of a decision on its part to appoint 8.25 million Rand to Rodney Mitchell.
- 2 The background can be shortly stated. The liquidators of a South African company called LeisureNet Limited have brought proceedings against a number of individuals arising out of alleged breaches of fiduciary duty by Mr Peter Gardner and Mr Rodney Mitchell as directors of LeisureNet. The full background can be seen in a Judgment which the Court delivered on 26th February, 2002 when the liquidators sought recognition of their appointment in this jurisdiction. ([*Re Leisurenet*](#) (26th February, 2002) Jersey Unreported: [2002/46]).
- 3 It is alleged by the liquidators that some of the proceeds of the breach of fiduciary duty have been paid to various companies owned by the Moodie Blu Trust. Proceedings have been brought by the liquidators not only in South Africa but also in Jersey and injunctions have been granted restraining disposal of the assets in the Moodie Blu Trust.

- 4 Negotiations have taken place in South Africa between the liquidators and Mr Mitchell and Mr Gardner. An agreement has been reached whereby Mr Mitchell and Mr Gardner will pay the liquidators a total of 16.5 million Rand in consideration of the liquidators dropping their various claims against those two individuals and against any offshore companies or trusts which allegedly received proceeds of the breach of fiduciary duty.
- 5 The liability is joint and several, but it is anticipated and understood that Mr Mitchell's share is 8.25 million Rand and that the same amount will be paid by Mr Gardner. Mr Mitchell has now asked the Trustee of the Moodie Blu Trust to make a capital distribution to him in the sum of 8.25 million Rand in order that he can pay the liquidators pursuant to the Agreement because he does not have funds of that nature in his own hands.
- 6 There is also a criminal investigation in South Africa into the conduct of Mr Mitchell and Mr Gardner, and at the request of the South African investigating authorities, the Attorney General has served notices under Article 5 of the Criminal Justice (International Cooperation) (Jersey) Law 2001 requiring information from, amongst others, the Moodie Blu Trust.
- 7 As a result of service of that Notice the Trustee made a suspicious transaction report to the Jersey Financial Crimes Unit pursuant to the Proceeds of Crime (Jersey) Law 1999. It is for that reason that the Attorney General has been convened to these proceedings. He has however confirmed that, in the particular circumstances of this case, he does not object to the proposed payment and he has handed up to the Court a formal consent from the Jersey Financial Crimes Unit. Accordingly there is no difficulty in this respect caused by the provisions of Article 32 or Article 33 of the Proceeds of Crime (Jersey) Law.
- 8 The Moodie Blu Trust was constituted by a declaration of trust executed by the Trustee on 6th March 1998. It is a conventional discretionary trust, the proper law of which is the law of Jersey. The beneficiaries are Mr Mitchell, his wife Susan, and their four children, two of whom are of age but two of whom are still minors. Advocate James has been appointed to represent the interests of the two minor children.
- 9 The Trustee believes that the payment is in the best interests not only of Mr Mitchell but also of the other beneficiaries. It is clearly for Mr Mitchell's benefit as it will enable him to settle his debt to the liquidators and there is clear authority for the proposition that payment of a debt which results in satisfaction of that debt can be a payment for the benefit of the beneficiary who owes the debt.
- 10 But the Trustee also believes that the payment will be in the best interests of the other beneficiaries notwithstanding that the proposed distribution will result in a payment out of something just over one third of the trust fund. The other adult beneficiaries, that is the wife and the two adult children, all agree with the proposed distribution.

- 11 In essence, it is said that the claims against Mr Mitchell are having a very adverse effect, not only on him, but also on his family. He cannot find employment whilst the matter remains unresolved and his credit lines have been withdrawn. The litigation and publicity which results is distressing for the family. Further details of the effect on the family are set out in the affidavit of Mr Mitchell's South African lawyer, Mr Igor Vukic, which is before the Court.
- 12 Advocate James on behalf of the minor beneficiaries has also investigated the position and has made submissions to the Court. He too has concluded that, in the particular circumstances of this case, it is in the overall interests of the family, including the minor beneficiaries, that this matter should be settled and the only way that this can be achieved is if the Trust makes the requested capital distribution.
- 13 It is understood of course that settlement of the civil proceedings brought by the liquidators will not necessarily result in the ending of the criminal investigation, so that a number of the adverse consequences to which we have referred, such as publicity and so forth, will continue unless or until the criminal proceedings are brought to an end. Nevertheless, it is submitted by all parties that the settlement of the civil proceedings is an important first step to allowing this family to rebuild their lives in the light of the allegations made against Mr Mitchell.
- 14 This is an application falling within the second category described in the case of [*Re: S Settlement*](#) (24th July 2001) Jersey Unreported [2001/154], in other words the Trustee has not surrendered its discretion to the Court but wishes to have the Court's approval of what it categorizes as being a momentous decision.
- 15 In the light of the evidence placed before us we agree that the Trustee's decision to make the appointment of 8.25 million Rand is a reasonable decision reached in good faith which has not been vitiated by any conflict of interest. We therefore approve the appointment to Mr Mitchell but we wish to impose two limitations on that as a result of matters raised by the Court during the hearing.
- 16 First, we think it important that any distribution should be made direct to the liquidators. This payment will only be for the benefit of the other beneficiaries if it in fact results in the settlement agreement becoming effective and the civil proceedings ending. Therefore, we wish to take all necessary steps to ensure that the moneys do find their way to the liquidators.
- 17 Secondly, we have mentioned that the liability of Mr Gardner and Mr Mitchell is joint and several. It follows that, if Mr Gardner were to default in his payment, the payment of 8.25 million Rand by Mr Mitchell would not result in the agreement becoming effective and he could still be pursued for the 8.25 million that should have been paid by Mr Gardner. We think therefore that any payment by the Trustee for the benefit of Mr Mitchell, by paying the

8.25 million Rand direct to the liquidators, should only be made if it is clear that, at the same time, Mr Gardner's obligation is being fulfilled so that the agreement will become fully effective and the civil claims ended.

- 18 Subject to those two matters we approve the distribution. It will follow of course that the next step is for an application to be made to vary the injunction issued by this Court in the proceedings brought by the liquidators, because at present the payment that we have just approved cannot in fact be made because of the terms of the injunction. Therefore an appropriate variation will need to be applied for.