

Broere v Maurant & Company (Trustees) Ltd

Jurisdiction:	Jersey
Judge:	Vaughan JA, Southwell JA, Hodge JA
Judgment Date:	14 January 2004
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Text

[2004] JCA 9

COURT OF APPEAL

Before:

R.C. Southwell, **Esq., Q.C., President**; D.A.J. Vaughan, **Esq., C.B.E., Q.C., and P.S.**
Hodge, **Esq., Q.C.**

Between
Jacobus Broere
Representor/RESPONDENT
and
Maurant & Co (Trustees) Limited
First Respondent

and

Fusina Trust Co. Limited
Second Respondent

and

Cornelis Broere
Third Respondent/APPELLANT

and

Elizabeth Broere
Fourth Respondent

and

Jacoba (Jacqueline) Broere
Fifth Respondent

and

Cornelia A.K. Broere
Sixth Respondent

Advocate R.J. Michel for the Third Respondent/APPELLANT;

Advocate M.J. Thompson for the Representor/RESPONDENT.

Authorities

[*In the matter of the Rabaiotti 1989 Settlement* \[2000\] JLR 173.](#)

[*The Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Company* \[1882\] 2 QBD 55.](#)

[*Buchanan Michaelson v Rubinstein and Others* \[1964\] 3 All ER 850.](#)

[*B v B \(Matrimonial Discovery\)* \[1979\] 1 All ER 801.](#)

[*Szentel v Szentel & Ors* \[2001\] VSC 42.](#)

[*Izodia plc v Lynch Talbot Ltd* \[2003\] JRC 094](#)

[*Schmidt v Rosewood Trust* \[2003\] 2 WLR 1442.](#)

Appeal by the Third Respondent/APPELLANT from the Judgment of the Royal Court of 22nd July, 2003, whereby by the Third Respondent/APPELLANT was ordered to swear a further Affidavit within twenty-one days of the said Order appending a list of documents to include those documents described in paragraphs 2 and 3 of Part II of Schedule I to the list exhibited as “CB2” to the Third Respondent/APPELLANT's Affidavit, sworn on 1st May, 2003.

Vaughan JA

- 1 This is an appeal against the decision of the Royal Court, Sir Philip Bailhache, Bailiff, and Jurats, dated 22 July 2003 whereby the Royal Court (inter alia) ordered the Third Respondent (here the Appellant) to swear a further affidavit within 21 days appending a list of documents, to include those documents described in paragraphs 2 and 3 of Part II of Schedule 1 to the list exhibited as CB2 to his affidavit dated 1 May 2003, the Court noting that if any of those documents have come into his possession other than in his capacity as a beneficiary of the Bastiaan Broere Trust that is not, of itself, a bar to the inspection of those documents. Leave to appeal was granted by a Single Judge by order dated 3 December 2003.
- 2 A brief summary of the background facts and procedural history of this matter is as follows. On 17 October 1980 Bastiaan Broere ("Bastiaan") as Settlor, by instrument in writing, established a trust known as the Bastiaan Broere Trust (which I shall refer to as the BB Trust). The Respondents, Mourant & Co (Trustees) Limited and Fusina Trust Co Limited, are currently the trustees of the BB Trust. They are also in that capacity Respondents to the Representation instituted by Jacobus. The Settlor, Bastiaan, died on 9 May 1985. He had no children. His brother, Jacobus Broere Senior who died in 1967, had 2 children: Leendert Broere who died in 1996, and Cornelis Broere whom I shall refer to as Cornelis. Cornelis has no children. He is also the Third Respondent to the Representation issued by Jacobus, and the Appellant herein. Leendert had 4 children, Elizabeth, Jacobus, the Representor in these proceedings, Jacoba, and Cornelia, of whom only Jacobus has issue. Cornelis, Jacobus, Jacobus's issue and his sisters are all beneficiaries under the terms of the BB Trust.
- 3 Other remoter relations of Bastiaan also fall within the definition of beneficiary under the terms of the BB Trust. Jacobus states that he and his sisters are regarded by the BB Trustees as the final beneficiaries of the BB Trust. Mourant & Co (Trustees) Limited is, as its name suggests, the trustee company of Mourant & Co, Advocates. Fusina is partially or wholly beneficially owned by Cornelis. Cornelis is the Settlor of another trust, namely the CB Trust, established on 30 December 1980. He is also a beneficiary of that trust. Jacobus was at one time a beneficiary of the CB Trust but is no longer such having apparently been removed as a beneficiary some time prior to the institution of these proceedings. The current trustees of the CB Trust are also Mourant & Co (Trustees) Limited and Fusina Trust Co Limited.
- 4 Until January 2001 the assets of the BB Trust consisted largely of a shareholding in a company called Broere Corporation Liberia Limited ("BCL"). BCL had at that time a shareholding of some 50% in a company called Project Management and Development Construction ("Prodamco") which owned land in the US. Following a resolution by the BB Trustees in November 2000 to distribute the assets of the BB Trust and to sell the BB Trust's BCL shares, there was a sale and buy back by the BCL Board and others of the BB

Trust's shares in BCL. As a result the BB trustees had shares in Prodanco either issued or distributed to them so that as a result of the sale and buy back the BB Trust owned directly approximately a 44.9% interest in Prodanco.

- 5 Up until after the issue of the Representation the CB Trust also indirectly owned 50% of the shares in Prodanco through an intermediate holding company, Anglo American Finance Company Limited. That ownership interest in Prodanco was entirely separate from the BB Trust's interest in its Prodanco shares. Since the issue of the Representation, the CB Trust shareholding has been disposed of so that CB Trust apparently no longer has any interest, whether direct or indirect, in shares in Prodanco.
- 6 Following the resolution to distribute the assets of the BB Trust there was considerable correspondence between the advocates acting for Jacobus on the one hand and the advocates acting for the BB Trustees on the other. In that correspondence Jacobus made repeated and extensive requests for information relating inter alia to the BB Trust assets including Prodanco and other matters. Dissatisfied with the answers which he was getting to his requests for information, on 18 July 2002 advocates on behalf of Jacobus issued the Representation. The prayer of the Representation sought inter alia the following:

- (i) An order setting aside the resolution for final distribution of the BB Trust assets and their distribution on an alternative basis in accordance with a letter of wishes;
- (ii) An order seeking to set aside an appointment of approximately 38% of the BB Trust funds to Cornelis; and that Cornelis repay the monies paid to him together with interest and/or capital gain;
- (iii) An order directing Maurant & Co and Fusina to resign as BB Trustees and an order that new trustees be appointed to consider how to recover monies allegedly owing to the BB Trust by Cornelis;
- (iv) An order directing the new trustees of the BB Trust and/or Maurant & Co and Fusina as trustees of the CB Trust to take control of Prodanco and effect recovery of its assets and produce adequate and up to date accounts.

- 7 The basis for the relief sought in the prayer was Jacobus's contention in the Representation that the BB Trustees had acted in breach of their fiduciary and other duties as trustees as set out in greater detail at paragraphs 3 (a)-(f) of the Representation (as particularised in the Representation), namely that:

(a) The Trustees have departed from the final distribution of Trust assets provided for by the Settlor in his letter of wishes to the Trustees to the detriment of the Representor without providing any, or alternatively any valid, reasons and without adequately considering the personal circumstances of the beneficiaries;

(b) The Trustees have allowed one beneficiary, Cornelis, to play an improper role in

the administration of Trust affairs and have not allowed other beneficiaries to have similar opportunities;

(c) The Trustees have failed to object to or prevent transactions which appear to allow one beneficiary, Cornelis, to obtain direct or indirect benefits from Trust property;

(d) With respect to Fusina, by reason of its close connection to one beneficiary, Cornelis, and its co-Trusteeship with Maurant & Co. of the Cornelis Broere Trust there is a real and apparent risk of conflict of interest in it making decisions with respect to Trust affairs and accordingly, in the circumstances it has not and cannot act impartially;

(e) Cornelis and Fusina have conspired together with the objective of preventing the Representor from receiving the benefits envisaged under the letter of wishes of the Settlor, and they have been guilty of bad faith;

(f) The Trustees have failed to monitor and obtain appropriate information in relation to an asset of the Trust namely the shareholding in a company now known as Project Development and Management Consortium N.V. and formerly known as Prodamco ('Prodamco').

- 8 Basically, Jacobus complains that the BB Trustees have acted under the control of Cornelis and with inappropriate and undue favouritism towards him as a beneficiary of the BB Trust.
- 9 On 25 July 2002, Advocate Robinson acting for Maurant & Co and Fusina wrote to Advocate Thompson acting for Jacobus to enquire on what basis Maurant & Co and Fusina had also been convened in their capacity as the CB Trustees, stating that it would appear that the only reason for taking that step is to obtain an order that the trustees of the CB Trust should be directed to take control of Prodamco and in effect recover its assets and produce adequate and up-to-date accounts.
- 10 Advocate Robinson asked specifically "what right did Jacobus have to seek such an order if he was not a beneficiary of the CB Trust". In his response dated 26 July 2002, Advocate Thompson for Jacobus replied as follows;

"I should also confirm that the application brought is under Article 47, (3) of the Trusts Jersey Law (1984), and my client applies as beneficiary of the BB Trust. You are also correct that your clients have also been convened in their capacity of Trustees of the CB Trust; this is to address the Prodamco issue alone as you identify. My client has the right to seek such an order as Prodamco is owned jointly between BB Trust and the CB Trust as we understand it. What my client has done is to convene before the Court, all interested parties so that directions can be given to the trustees of those trusts interested in Prodamco to take all necessary steps to ensure that the affairs of Prodamco are run on the proper footing. Please therefore confirm that your clients are still the trustees of CB Trust."

- 11 On 31 December 2002, the CB Trustees issued a summons seeking an order that they should be removed as parties from the representation in that capacity. On 14 January 2003, the Royal Court dismissed the CB Trustees' application for such an order that they should cease to be parties to the proceedings in that capacity. On 10 September 2003 the Court of Appeal allowed the appeal by the First and Second Respondents against that decision, and accordingly the First and Second Respondents have been removed as parties from the Representation in their capacity as the CB Trustees, and accordingly there can be no order against the First or Second Respondents in their capacity as the CB Trustees.

THE ROYAL COURT'S DECISION

- 12 The summons which was before the Royal Court in essence required the Third Respondent to disclose those documents listed in Schedule 1 Part II, paragraphs 2 and 3 of his affidavit dated 1 May 2003, being documents which he objected to producing on the grounds that

“(ii) they consist of documents, correspondence and memoranda which have been prepared by him or for him or have come into his possession solely in his capacity as the Settlor of the Cornelis Broere Trust and/or the Broere Charitable Foundation and, as such, are not the subject of, nor relevant to, the issues in this Representation;

(iii) they consist of documents, correspondence and memoranda which have been prepared by or for him or have come into his possession solely in his capacity as a director and the Chairman of the Broere Corporation Limited and, as such, are not the subject of, nor relevant to, the issues in this Representation.” (emphasis added)

- 13 Before the Royal Court, the Representor contended that it was not open to Cornelis to qualify his response by restricting it to documents in his possession, custody or power “as a beneficiary of the Bastiaan Broere Trust”. It was for this reason that Cornelis contended that they were not as such the subject of, or relevant to the issues in the Representation.
- 14 The Royal Court, having referred to the judgment of Brett M.R. in [Compagnie Financière du Pacifique v Peruvian Guano Co.](#) (1882) 11 QBD 55 at 63, the judgment of the English Family Division in [B v B \[1979\] 1 All ER 801](#), the judgment of Pennycuik J in [Buchanan-Michaelson v Rubinstein \[1965\] Ch 258](#) at 263, an Australian case [Szental v Szental](#) [2002] VSC 42, and the decision of the Royal Court in [Izodia plc v Lynch Talbot Ltd and others \[2003\] JRC 94](#), came to the conclusion that it was not open to Cornelis to limit discovery in the way he sought to do, and stated that Cornelis had to list the documents he had in his possession, custody or power and which were relevant to the issues, whatever the capacity in which the documents came into his possession. The mere fact that the documents had come into his possession other than in his capacity as a beneficiary of the BB Trust was not, of itself, a bar to the inspection of any

of those documents. The Court added that if it is contended that any of the documents so disclosed should not be inspected on some other specific ground, it would be for Cornelis to issue a summons to that effect.

15 It is from that judgment that Cornelis appeals.

THE APPEAL

16 By the Notice of Appeal dated 14 August 2003 it was contended on behalf of Cornelis that:

- (i) The Royal Court erred when it treated this Representation as adversarial litigation between Jacobus and Cornelis, and Cornelis as a substantive party to the litigation rather than a beneficiary who has merely been convened;
- (ii) The Royal Court erred when it failed to take into account the underlying purpose of the Jacobus's Summons, which was not to obtain evidence material to the issues to be decided in the hearing of the Representation but for a collateral and improper purpose;
- (iii) The Royal Court should have distinguished the cases cited to it as they were clearly distinguishable on the facts;
- (iv) The Royal Court erred when it required Cornelis to list documents which had come into possession as a Settlor of the Cornelis Broere Trust because the Representor, not being a beneficiary of that trust, had no rights thereto.

17 Subsequent to the decision of the Royal Court, the Board of Directors of BCL at a meeting held on 22 July 2003 had resolved to refuse Cornelis access to the documents being the property of that company for the purpose of the discovery process in these proceedings. Further, as set out above, this Court on 10 September 2003 had ordered that the First and Second Respondents, in their capacity as trustees of the CB Trust, should not continue as parties to these proceedings.

18 It is convenient at the outset to stress, as made clear by the Privy Council in [Schmidt v Rosewood Trust Ltd \[2003\] 2 WLR 1442](#), that the right to seek disclosure of trust documents by a beneficiary should be best approached as one aspect of the court's inherent and fundamental jurisdiction to supervise and, if appropriate, to intervene in the administration of a trust. See also [In the matter of the Rabaiotti 1989 Settlement \[2000\] JLR 173](#) (Royal Court). Accordingly the existence of a lis as between parties does not have such significance as in ordinary litigation.

19 In ordinary litigation it can be seen that documents can be required to be produced, if relevant, even if held in some other capacity: see for example [B v B \[1979\] 1 All ER 801](#).

- 20 If it be necessary to show that there is a lis as between Jacobus and Cornelis (which is not necessarily the case), there can be no doubt that in this case there is a lis between the two, as can be seen from the Representation, from Cornelis's Answer to the Representation and from the Affidavits sworn by Cornelis. Thus:

I consider that so long as the documents are relevant and are in the possession, custody or power of Cornelis, it matters not in what capacity they are so held. They will accordingly need to be listed in Cornelis's Affidavit as required by the Royal Court. As the Royal Court made clear, it will be at this stage that it will be possible to resolve issues relating to whether in fact there is some reason why a document or class of documents should not be made available for inspection at all or in a redacted form or what safeguards should be imposed to limit the use which may be made of the documents or information disclosed under the Order of the Court (see [Schmidt v Rosewood Trust Ltd](#) supra).

(i) With regard to the matters relating to the failure of the Trustees of the BB Trust to follow, to the letter, the letter of wishes, it is not disputed on behalf of the Third Respondent that there is such a lis, and clearly that is right not least because the Representor seeks repayment by the Third Respondent of monies he had received.

(ii) With regard to the matters relating to the issue of requiring the BB Trustees to retire in favour of new Trustees, who are to consider how best to recover monies owing to the Trust by Cornelis, and entities under his influence or control, this again in my opinion is part of the lis as between Jacobus and Cornelis. The whole underlying factual basis for such a contention and allegation in the Representation is that the Trustees have allowed Cornelis to play an improper role in the administration of the Trust, and that Cornelis has been party to a conspiracy to prevent the Representor obtaining his due rights and that he has acted in bad faith. This is extensively dealt with by Cornelis in his Affidavit sworn on 29 January 2003 (see in particular paragraphs 10–12, 16–17, 21 & 46) and his raising a positive case in his Answer to the Representation dated 31 January 2003 on these issues. There is no basis whatsoever for contending that Cornelis will simply be a witness on such issues in this case.

- 21 Accordingly I agree with the way in which the Royal Court exercised its discretion, and I consider that there is no reason to overturn that exercise of discretion, and I would accordingly dismiss Cornelis's appeal.

Southwell JA

- 22 I agree and only add this observation, repeating what I said in the course of argument, that it must be abundantly apparent to any outside observer that in the best interests of this family they would be well advised to take every step they can to try and dispose of this vexed matter by agreement rather than by fighting family disputes in public.

Hodge JA

23 I agree.