# Trustcorp Ltd, David Roberts, Daniel Roberts, William Roberts, Landmark Securities Ltd v Barclays Private Bank and trust Ltd

| | |
|---|---|
| **Jurisdiction:** | Jersey |
| **Judge:** | Clyde-Smith, COMMISSIONER |
| **Judgment Date:** | 20 February 2007 |
| **Neutral Citation:** | [2007] JRC 43 |
| **Reported In:** | [2007] JRC 43 |
| **Court:** | Royal Court |
| **Date:** | 20 February 2007 |



**Text**

[2007] JRC 43

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner (sitting alone)**.

Between
Trustcorp Limited
First Plaintiff
David Williams Roberts
Second Plaintiff
Daniel Morgan Roberts

Third Plaintiff
William Edward Roberts
Fourth Plaintiff
Landmark Securities Limited
Fifth Plaintifft
and
Barclays Private Bank and Trust Limited
First Defendant

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

**Advocate** D. Benest **for the Defendant**.

**Authorities**

*Victor Hanby Associates Limited v Oliver* [1990] JLR 337 .

*Blenheim Trust Company Limited v Eric Lyn Morgan & Others* [2001] JRC 238 .

APPLICATION FOR SPECIFIC DISCOVERY

Clyde-Smith COMMISSIONER
**Introduction**

1 The Plaintiffs apply for specific discovery by the Defendant of a number of documents.

2 The Plaintiffs, representing the current trustee and the beneficiaries of the D W Roberts Family Settlement ("the Settlement") and the investment company forming part of the trust fund of the Settlement are seeking damages from the Defendant arising out of investments made by it as a former trustee of the Settlement in certain zero dividend preference shares defined in the pleadings as "the LIF ZDP shares" in a company incorporated in Jersey and named Leveraged Income Fund Limited defined in the pleadings as "LIF". This kind of investment vehicle is commonly known as a Split Capital Trust. The LIF ZDP shares had been acquired by the Defendant as trustee of the Settlement on 18 th June 1998 at a cost of £102,954 which then represented some 10% of the value of the portfolio of investments held in the Settlement. The LIF ZDP shares were still held by the Defendant in the Settlement when LIF went into receivership on 12 th August 2002. The Defendant retired as trustee of the Settlement on 10 th December 2004 in favour of the First Plaintiff

3 In broad terms the issues to be determined by the Court when the case is heard are whether the LIF ZDP shares were an appropriate investment for the Defendant, as trustee, to have made and whether, having made that investment, the Defendant should have disposed of the same before LIF went into receivership.

4 The case was set down for hearing on 21 st June 2006 and is due to be heard on 12 th March 2007. The parties have served lists of documents verified by affidavit. The Defendant's list of documents was filed on 16 th August 2006 and was supported by an affidavit by Kenneth Brierley ("Mr Brierley"), a director of the Defendant, sworn on the same date. In that affidavit, Mr Brierley made the usual confirmation on oath that to the best of his knowledge information and belief neither the Defendant nor its advocate nor any person on its behalf had then or ever had in their possession custody or power any document of any description whatsoever relating to any matter in question in these proceedings other than the documents listed. A supplemental list of documents was filed by the Defendant on 14 th September 2006 again supported by an affidavit in similar terms sworn by Mr Brierley. The supplemental list disclosed some six research updates covering the period 14 th September 2001 to 24 th October 2002.

**Background to request for specific discovery**

5 By letter dated 16 th June 2007, Sinels, on behalf of the Plaintiffs, made a request for specific discovery of ten documents or categories of document which request was later supported by an affidavit dated 5 th February 2007. Appleby, on behalf of the Defendant, responded by letter dated 26 th January 2007 enclosing a formal reply to that request, in effect saying that of the ten requests that had been made, they were seeking instructions in relation to six of them and objected to the remaining four. Following further correspondence, Appleby wrote to Sinels on 12 th February 2007 providing a number of further documents which were attached to their letter. Mr Benest informed me that the Defendant had been advised to take a pragmatic view of the request for specific discovery and the documents which were disclosed with his firm's letter of 12 th February 2007 should not be interpreted as an admission that they were relevant and therefore should have been disclosed earlier. In any event this further disclosure has disposed all of the requests for specific discovery bar one, namely request 7 which I will now refer to as "the Request".

6 No formal summons for specific discovery had been issued by the Plaintiffs, but by agreement, the Request was argued before me following a pre-trial review. The Plaintiffs had filed a skeleton argument in support of their requests generally. No skeleton argument was filed by the Defendant and there was no affidavit in response but the Defendant has undertaken to file a further affidavit in support of the further discovery given by its letter of 12 th February 2007.

**Principles to be applied**

7 The guiding principles for a court hearing an application for specific discovery were summarised by Chadwick JA in the case of *Victor Hanby Associates Limited v Oliver* [1990] JLR 337 C of A p 347-351 as follows:-

> ***"A party seeking further discovery after an affidavit has been made following an order under r.6/16(1), must persuade the court that, despite the affidavit, his opponent has not complied with the order.*** It seems to us that it must be necessary, in these circumstances, for the party seeking further discovery to show, by evidence on oath, not only a prima facie case that his opponent has, or has had, documents which have not been disclosed, but also that those documents must be relevant to matters in issue in the action. The court must be satisfied that the documents will contain information which may enable the party applying for discovery to advance his case, damage that of his opponent, or lead to a train of inquiry which may have either of these consequences. It is not enough to show only that the documents may be relevant in the sense described. A court faced with evidence which
>
> ***establishes no more than that the documents may or may not be relevant would not be entitled to disregard the oath of the party who, having ( ex hypothesi) seen and examined the documents with the assistance of his advocate, has sworn, in effect, that they are not relevant*** .
>
> ***We should add that, even where a prima facie case of possession and relevance is made out, an order for specific discovery should not follow as a matter of course.*** The court will still need to ask itself the question whether an order for specific discovery is necessary for disposing fairly of the cause or matter."

I was referred to the following passage of the judgment of Commissioner Page in the case of *Blenheim Trust Company Limited v Eric Lyn Morgan & Others* [2001] JRC 238:-

> ***"It is perhaps as well to emphasise that, as I read this passage, Chadwick JA was not suggesting that a court has to be "satisfied" that the documents "must be" relevant to any higher a standard of proof than that of a prima facie case: his repeated use of "prima facie" in the passage cited above and in the immediately preceding and succeeding paragraphs, makes it plain that the term governs 'relevance' as well as 'possession'"*** .

8 The Plaintiffs must therefore show, by evidence on oath:-

Even if a prima facie case of possession and relevance is made out, I must then go on to ask myself whether an order for specific discovery is necessary for disposing fairly of the case.

> (i) That there is a prima facie case that the Defendant has, or had, documents which have not been disclosed.
>
> (ii) That there is a prima facie case that the documents in question must be relevant to matters in issue in the case.

**The Request**

9 As originally framed the Request was for -

> *"Copies of other client lists and/or portfolios managed by the Defendant which were advised to invest in LIFL ZDPs further to manuscript notes made on a letter sent by the Second Plaintiff addressed to Laura Youngs dated 29 November 2001 which read "only IOM client"".*

Although the Request was for "copies of other client lists and/or portfolios" Mr Sinel submitted that those words were used generically and that the position of the Plaintiffs was unfolding as further documents were revealed by the Defendant. It is the case that the documents discovered by the Defendant show that there was at least one other client of the Defendant who had been advised to invest in LIF ZDP shares. Essentially the Plaintiffs want to know what the Defendant advised those other clients in relation to the LIF ZDP shares and if and when those shares were sold. The word "client" has not been defined and the expression can therefore presumably include individuals, companies and trustees.

10 To support the Plaintiffs' application, I was referred by Mr Sinel to the following, in particular:-

(i) In the letter to the Defendant dated 29 th November 2001, the Second Plaintiff made the following request:-

> *"Finally, how many clients has BPB [the Defendant] put in to Leveraged and what was the total cost of the combined investment?* I will not ask whether the other parties are happy with their investment".

On receiving the letter, someone within the Defendant had written in hand against that request:-

> *"026331D - only IOM client"*

I was informed that 026331D is the number given by the Defendant to investments in LIF.

(ii) In e-mails dated 29 th November and 11 th December 2001 discovered by the Defendant, references were made to client lists and to attachments headed "ZDP's XIS" and "ZDP high risk list" respectively, which attachments had not been discovered.

(iii) An internal report of the Defendant dated 12 th June 2002 concerning the then current exposure of its clients to Split Capital Trusts.

(iv) One page of a transcript of a conversation between a Mr Christopher Dorey ("Mr Dorey") of the Defendant and a Mr Greg Powell ("Mr Powell") of the Defendant's

brokers held it is believed some time in 2001, in which reference is made to Mr Dorey faxing to Mr Powell "his portfolio" with "his name" rubbed out for the purpose of Mr Dorey being given advice Mr Powell for a meeting with "him". Because the transcript as a whole had been discovered by the Defendant on the basis presumably that it was relevant to the issues in the case, Mr Sinel had deduced from it that the meeting referred to was one to be held between Mr Dorey and the Second Plaintiff and that the portfolio referred to was that of another client of the Defendant. He argued that if sight of this other portfolio was thought by Mr Dorey to be relevant to the meeting with the Second Plaintiff, then it must be relevant to the issues in this case.

11 Having referred to the above, Mr Sinel set out the order that he was now seeking on behalf of the Plaintiffs in relation to the Request as follows:-

> *"That the Defendant make discovery in relation to the other investments made by its other clients in LIF Limited"*.

**The Defendant's response**

12 In relation to paragraph 10(i) above, Mr Benest accepted that there was an Isle of Man client of the Defendant who had invested in zero dividend preference shares (although it was not clear whether that investment had been in shares in LIF). In relation to paragraph 10(ii) above, the Defendant had now disclosed the lists which were attached to the e-mails of 29 th November and 11 th December 2001 and accepted that in error they had been improperly omitted from the Defendant's discovery list. Mr Benest explained that they had simply been missed. In relation to clause 10(iii) above, he accepted that there were other clients of the Defendant who had invested in Split Capitol Trusts. Finally, in relation to Clause 10(iv) above, Mr Benest had been shown the one page extracted from the transcript on the day of the hearing before me but from that page was unable to see whether the meeting referred to was indeed a meeting held between Mr Dorey and the Second Plaintiff or whose portfolio was being referred to. I too found it difficult to see how Mr Sinel was able to assert from that one page that the portfolio referred was that of another client and was being copied for the purpose of a meeting with the Second Plaintiff.

13 Mr Benest submitted however that none of the documents now being sought by the Plaintiffs were relevant to any issues in the case or indeed were necessary for disposing fairly of the case.

14 He accepted that other clients of the Defendant had invested in shares in LIF and that there were therefore documents in existence in relation to those investments made for those other clients. In his view the Plaintiffs' case is premised upon their establishing that it was inappropriate for the Defendant as trustee of the Settlement, to have acquired and thereafter retained the LIF ZDP shares. What the Defendant may have advised other clients would depend upon the circumstances of those other clients and was therefore irrelevant. He emphasised the importance of the third limb of the criteria set out in *Hanby*, namely whether

discovery of those documents was necessary for disposing fairly of the case. Any advice given by the Defendant to those other clients could only be properly assessed by an examination of the circumstances of those other clients which would give rise to expense and trouble that would be disproportionate.

**Decision**

15 Applying the first limb of the criteria laid down in *Hanby*, it is clear that the Defendant has, or has had documents, in relation to other clients who invested in shares in LIF, which documents have not been discovered. However, I accept Mr Benest's submissions that these documents are neither relevant nor necessary.

16 The issues as pleaded by the Plaintiffs in this case are whether it was appropriate for these LIF ZDP shares to have been acquired by the Defendant as trustee of the Settlement and thereafter retained. In addition to receiving expert evidence, the Court will need to consider the particular terms and circumstances of the Settlement. Investments made and advice given by the Defendant to other clients, whether individuals, companies or trustees, in no doubt difference circumstances, are irrelevant to determining whether it was appropriate for the Defendant to have acquired and retained the same for the Settlement. I find therefore that the Request fails the second limb of the *Hanby* criteria, namely relevance.

17 If I am wrong in relation to relevance, I have gone on to ask myself the question set out in the third limb of the *Hanby* criteria, namely whether specific discovery of these documents is necessary for disposing fairly of the case and have concluded that it is not. In order to give proper consideration to advice given by the Defendant to other clients, the Court would need to be apprised of the circumstances of these other clients. This would set in motion a potentially far reaching inquiry that would be disproportionate leaving aside the issues of expense and potential delay. Whatever the Defendant may have advised and done for others, the issue in this case is whether it should have acquired the LIF ZDP shares for the Settlement. In my view, fairness dictates that the case against the Defendant should proceed as pleaded namely on the basis of the action it took and the advice it gave in relation to the Settlement and not on what it may have done or advised in relation to other clients.

18 I therefore decline to make the order sought by the Plaintiffs. It has been agreed that any submissions on costs arising out of this application will be adjourned to be dealt with following the hearing of the case