

## A Settlement

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith
<b>Judgment Date:</b>	01 June 2011
<b>Neutral Citation:</b>	[2011] JRC 109
<b>Reported In:</b>	[2011] JRC 109
<b>Court:</b>	Royal Court
<b>Date:</b>	01 June 2011

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### Text

[2011] JRC 109

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith., **Commissioner, sitting alone.**

IN THE MATTER OF THE B SETTLEMENT

AND IN THE MATTER OF THE D SETTLEMENT

AND IN THE MATTER OF THE C SETTLEMENT

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

Between

RBC Trust Company (Jersey) Limite

Representor

and

E

F

G

H

I

K

First Respondents

Advocate Claire Davies Appointed to represent the grandchildren and remoter issue of D

Second Respondent

L

J

M

N

O Both on their own behalves and representing their own children and remoter issue)

Third Respondents

and

J

P

Q (both on their own behalves and representing their own children and remoter issue)

Fourth Respondents

**Advocate D. M. Cadin for the Representor**

**Advocate L. M. Langlois for the First Respondents.**

**Advocate C. R. G. Davies for the Second Respondents.**

**Advocate S. J. Young for the Third and Fourth Respondents.**

## Authorities

*In Re Rabaiotti (1989) Settlement* [\[2000\] JLR 173](#) .

Lewin on Trusts 18th edition.

*Re A Settlement* [\[1994\] JLR 139](#) .

*A Settlement* [\[2010\] JCA 231](#) .

*In re Internine Trust* [\[2006\] JLR 195](#) .

*A Settlement* [\[2010\] JRC 085](#) .

*A Settlement* [\[2009\] JRC 125](#) .

**THE COMMISSIONER:**

- 1 This is an application by the first respondents for the Representor ("the trustee") to disclose documents for the purposes of a directions hearing scheduled to commence on 19<sup>th</sup> September, 2011.
- 2 The background to the matter is set out in the Court of Appeal's judgment of 22<sup>nd</sup> December, 2010, (JCA 231). By Act of the Court of Appeal of 24<sup>th</sup> January, 2011, it remitted the matter back to the Royal Court for consideration as to whether the trustee should be directed:-
  - (i) to pursue by way of shareholder action all or part of the further information identified in the schedule to the Act of Court dated 4<sup>th</sup> May, 2010;
  - (ii) to bring proceedings in Ireland to recover sums overpaid to the directors of the underlying companies; or
  - (iii) to draw inferences against the directors of the underlying companies and order distributions in the light thereof.
- 3 The summons for disclosure was issued by the first respondents on 3<sup>rd</sup> May, 2011, following procedural directions that were given by me on 8<sup>th</sup> March, 2011, and the filing by the trustee of its suggestions as to the directions the Court should give the trustee at the substantive hearing, as set out in V's affidavit of 12<sup>th</sup> April, 2011.
- 4 In very broad terms, the trustee suggests that adverse inferences be drawn against the D directors which should be taken into account in the exercise of the trustee's discretion and that furthermore certain payments should be made from the D Settlement to the B Settlement and the C Settlement.
- 5 Documents which the first respondents seek disclosure of are listed as follows:-

The first respondents have made a further request by letter of 11<sup>th</sup> May, 2011, to be provided with an updated schedule showing the distributions which have been made out of the B Settlement and the C Settlement for the period 6<sup>th</sup> April, 2004, to date.

  - (i) Copies of all the "redacted documents" in the bundles which have previously been filed before the Royal Court and the Court of Appeal;
  - (ii) Copies of all instructions to Elspeth Talbot-Rice QC, together with all the underlying documentation provided to Counsel;

(iii) Copies of all correspondence/attendance notes between the trustee/its lawyers and RR concerning the possibility of an injunction being sought against W on the grounds of alleged breach of duties of confidentiality;

(iv) Copies of all correspondence/attendance notes concerning the circumstances surrounding the change in the trustee's Irish solicitors from RR to KK;

(v) Copies of all correspondence between the trustee/its lawyers and W/DD concerning additional disclosure from the Irish directors.

6 After a short discussion, counsel agreed that I could deal with the application sitting as a single judge.

7 Mrs Langlois' primary submission was that these documents are all trust documents (which is not in issue) which following *In Re Rabaiotti (1989) Settlement* [2000] JLR 173, there was a strong presumption that the first respondents as beneficiaries were entitled to see. Mrs Langlois referred me to *Lewin on Trusts* 18<sup>th</sup> edition, paragraph 23–20 to the effect that in determining whether what and how disclosures should be made, the Court is exercising its own discretion and not merely reviewing on limited grounds an exercise of discretion by the trustee. She particularly drew my attention to the following passage:-

***“There may be cases, particularly where it is obvious that the application for disclosure is being made in anticipation that disclosure, if made, will be followed by a breach of trust claim against the trustees, in which trustees are in a position of conflict or possible conflict between their personal interest and their duty to consider the application for disclosure. But fear of a breach of trust claim could never, we think, be a good reason for not making disclosure and so if that was the only reason for declining or limiting disclosure, the duty of the trustees would be clear.”***

8 The first respondents have issued a representation alleging breach of trust in relation to the fees charged by the trustee in this matter, which is currently stayed, and it is clear that there is a lack of trust between the first respondents and the trustee. The implication is that in resisting disclosure, the trustee is motivated by fear of breach of a trust claims being pursued against it.

9 The first respondents feel that the trustee is controlling the flow of information to the Court in such a way that has led the Court in the past and may lead in the future to the Court having an unbalanced view of the matter. Many of the requests are aimed at “scene setting” to counter the unbalanced impression given they say of the D directors. The application is not, Mrs Langlois submitted, a fishing expedition although she conceded that in most cases she could not be entirely sure of the relevance of the documents until she saw the.

10 The headnote in *Rabaoitti* is in the following terms:-

**“Held, ordering disclosure of both sets of documents:-**

**(1) There was a strong presumption that the beneficiary was entitled to see the trust documents, requiring good reason to refuse disclosure.** As a matter of general equitable principle, the court nevertheless had an overriding discretion to withhold documents if it were satisfied that it was in the best interests of the beneficiaries as a whole, though in this case there were no good grounds for preventing disclosure .

**(2) There was a strong presumption against the disclosure of a letter of wishes because it was a document which was confidential to the trustees, and the court would not allow the inspection of a letter of wishes unless a clear case was made for its disclosure.** In this case disclosure would be permitted, as the English court might otherwise proceed on an erroneous basis, having regard to information essentially different from that contained in the letter of wishes, and this was clearly not in the best interests of the beneficiaries. In addition, the only other child of the settlor supported full disclosure.”

11 In exercising its discretion to withhold documents, Mr Cadin submitted that the Court should have regard to a number of factors, namely:-

- (i) Context: including the state of the relationship between the trustee and the beneficiaries, whether proceedings are afoot, and if so, for what;
- (ii) Capacity: is the beneficiary seeking documents in its capacity as a party convened to proceedings (in which case, the test is as to the documents they need to make fully informed submissions per *Re A Settlement* [\[1994\] JLR 139](#)) or simply as a beneficiary against the trustee (following *Rabaiotti*):-
- (iii) Relevance: are they relevant to any current or potential issues?
- (iv) Purpose: for what purpose does the beneficiary want the documents?
- (v) Floodgates: is this a substantive request for specific documents and information or is it a fishing expedition which will engender further correspondence, additional requests and significant costs to the detriment of the other beneficiaries? In that regard, the trustee notes that since the summons was issued on 3<sup>rd</sup> May, 2011, there has been a further request for documents;
- (vi) Third parties: do the documents concern any third parties and if so, do their interests need to be protected?
- (vii) Procedural appropriateness: the extent to which an order for disclosure may amount to pre-action discovery.

- 12 *Re A Settlement* concerned an application of the beneficiaries for disclosure of “**all trust documents**” in the context of an application for directions and this on the basis that the beneficiaries should be placed on an equal footing with the trustee. Noting that the trustee and the beneficiaries were not, as yet, in an adversarial position and that the good faith of the trustee had not been impugned, the Court held that the appropriate test was for the beneficiaries to have sufficient information to make fully informed submissions.
- 13 Mr Cadin submitted that this was the test to be applied and that the Court should be extremely careful before ordering wider disclosure, given the existence of the representation alleging breach of trust. The first respondents had more than sufficient material to make fully informed submissions on the issues that would be before the Court in September and the majority of the material that they were seeking was wholly irrelevant to those issues. In the circumstances, the requests were nothing more than a fishing expedition and/or pre-action discovery.
- 14 He further submitted that it cannot be in the interests of justice for trustees who have yet to obtain final directions from the Court on difficult issues to have all of their previous advice and decisions in the context of those proceedings disclosed. At the very least it would give certain beneficiaries a tactical advantage in that they would know how the trustee approaches litigation decisions and may be able to identify pressure points. Disclosure was likely to lead to further requests for disclosure which would have significant cost implications, none of which was in the interests of the beneficiaries as a whole. Finally, Mr Cadin addressed the importance of confidentiality in the context of these three families.
- 15 In general terms I accept:-
- (i) that the factors set out by Mr Cadin in paragraph 10 above are relevant matters for the Court to take into account in the exercise of its discretion and in particular I accept that the appropriate test in the context of this application is that set out in *Re A Settlement*, namely the documents the beneficiaries need to make fully informed submissions.
  - (ii) That it is not in the interests of justice for trustees in the course of obtaining directions from the Court to have all of their communications with their advisors in the context of those proceedings disclosed. Trustees are often faced with difficult situations in which they are entitled to seek the guidance and protection of the Court. That process entails obtaining legal advice and it is important in my view that trustees are not inhibited in their communications with their advisors by the fear that those communications will, as a matter of course, be required to be disclosed to beneficiaries convened to the directions hearing. There may, of course, be circumstances in which disclosure of such communications will be requisite, such as, for example, where the conduct of the trustee in bringing the directions application itself is impugned.

16 It is helpful to bear in mind that these are not hostile proceedings. The Court has been convened in its administrative capacity so that it can give directions to the trustee as to how it should proceed on the basis of the information currently before it. This is a practical exercise in which the Court, with the assistance of the parties, will consider what steps the trustee should take now, based on the position, rightly or wrongly, it is now in. It is important therefore that the Court and the parties focus their attention on the current practicalities and avoid being side-tracked into a series of mini investigations about events in the past. Requests for disclosure must be seen in that context. A number of other factors have to be borne in mind in this case:-

(i) The trustee is trustee of all three settlements which have invested together through EE and the majority of the documents sought relate to the affairs of all three of them. The third and fourth respondents, being the beneficiaries of the B settlement and the C settlement, oppose the disclosure being sought and Mr Young on their behalves stressed their particular concern over confidentiality.

(ii) One of the options before the Court is to direct the bringing of proceedings in Ireland against the D directors to recover sums allegedly overpaid so that although this application is not hostile, it is necessary for me to bear in mind that three of the first respondents may, at some stage, be defendants in hostile proceedings brought in the interests of the settlements.

(iii) This matter has been ongoing since 2004 and seeking out documentation will be time-consuming and expensive. On the basis of the costs orders made by the Court of Appeal in which costs were divided equally between the three trusts, two-thirds of any costs incurred at the instance of the beneficiaries of the D settlement are susceptible to being met by the other two trusts. It is not appropriate in my view that the costs incurred in seeking out information that goes beyond what is required for the purpose of the directions hearing should fall upon the trust estates of the three settlements.

17 The trustee has produced for me a bundle (not given to the other parties) containing copies of the documents or samples of the documents which would be disclosed if the orders sought were made, although Mr Cadin stressed that in that eventuality a further more extensive search would be required.

18 Taking each category in turn:-

### **Copies of all the redacted documents**

19 By Act of Court of 2<sup>nd</sup> July, 2009, by which the beneficiaries were convened, the trustee was given liberty to remove and/or redact documents disclosed to them on the basis of confidentiality.

20 I have considered the documents redacted/deleted supplied to me by the trustee under this



category and can confirm that they relate to communications with beneficiaries and/or their advisers which should be protected. Justice does not require their disclosure (see *In re Internine Trust* [2006] JLR 195).

- 21 There are a number of other documents which the trustee would have no concern over the Court authorising disclosure and those are listed in paragraphs 13(2), (3) and (5) of Mr Cadin's skeleton argument. I agree that these can be disclosed. The remaining documents cover the regulatory issues and working communications between the trustee and its lawyers which for the reasons mentioned above should not be disclosed.

**Copies of all instructions to Elspeth Talbot-Rice QC, together with all the documentation provided to Counsel**

- 22 The opinion of Elspeth Talbot-Rice featured in the Royal Court's judgment of 4<sup>th</sup> May, 2010, (JRC 085) and the judgment of the Court of Appeal and was concerned with the use by the Court of Article 51 of the Trusts (Jersey) Law 1984 to obtain the information it required from the D directors. The first respondents have seen the instructions issued to counsel for the purpose of that opinion but those instructions make reference to earlier instructions having been given to her in relation to this matter. In her opinion, counsel made comments about the D directors which the first respondents feel are damaging and the concern is that the Court in September will be adversely affected by those comments. They want therefore to investigate the earlier instructions and information given to counsel in order to ascertain how and why these comments came to be made.
- 23 As Mr Cadin pointed out, the latter exercise in which counsel was involved is historic and has no relevance to the task before the Court in September. If the first respondents are concerned about prejudice then he suggests that the opinion simply be removed from the documents before the Court, it being irrelevant to the Court's task. Indeed he suggested that any concerns about prejudicial material should be raised with the trustee to see if the same can be deleted from the Court bundles.
- 24 I have considered the written instructions given to counsel in June 2009, and as might be expected they are concerned with the options open to the trustees in addressing its concerns over fees and expenses charged to the Irish companies. It will not assist the Court in any way in the directions hearing this September. One might question what harm its disclosure could do but as I said above it has to be remembered that one of the options to be considered by the Court is the issuing of proceedings in Ireland against the D directors. They remain, for the moment, potential defendants and it would be prejudicial to the interests of the three trust estates for them to be privy to documentation of this kind. Furthermore this is the sort of unhelpful mini investigation that the Court should avoid being side tracked into. For these reasons I decline disclosure.

**Copies of all correspondence/attendance notes between the trustee/its lawyers and**



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**RR concerning the possibility of an injunction being sought against W on the grounds of alleged breach of duties of confidentiality; Copies of all correspondence/attendance notes concerning the circumstances surrounding the change in the trustee's Irish solicitors from RR to KK;**

- 25 These two requests can be taken together. The resignation of W and his colleagues from the Irish companies was referred to in paragraph 8 of the Royal Court's judgment of 26<sup>th</sup> June 2009 ([\[2009\] JRC 125](#)). The impression given says Mrs Langlois is that the Irish companies were so toxic that they had to resign. In fact, her clients believe they resigned because the D directors had threatened them with injunctive proceedings for breach of confidentiality. They have seen a letter from RR to V dated 28<sup>th</sup> April, 2009, which refers to the possibility of such injunctions. The trustee has not yet been able to find any further documentation on this issue.
- 26 There is limited documentation that the trustees have been able to find in relation to the change to the trustee's Irish solicitors and they shed little additional light on the change beyond a preference for the new team and greater confidence in their advice and abilities.
- 27 In my opinion these are again the kind of unhelpful mini investigations which we need to avoid for the purpose of the directions hearing in September and I again bear in mind the potential prejudice to the trust estates in such information being given to beneficiaries who may become defendants in future proceedings brought at the instance of the settlements. Disclosure is therefore refused.

**Copies of all correspondence between the trustee/its lawyers and W/DD concerning additional disclosure from the Irish directors.**

- 28 Bearing in mind that additional disclosure from the D directors has been the central issue in this matter from the outset, this request on its face extends to every communication between the trustee and its advisers. However, Mrs Langlois made it clear that in fact the request was intended to be very limited. The first respondents wish to inquire into how the scope of the information requested widened between the letters written by W in May and October 2009 and in particular how the companies in which the settlements have a minority interest came to be included. This will assist in submissions the first respondents intend to make in September that a substantial number of the documents requested by the Court were irrelevant to the issues the Court had identified.
- 29 In my view, this is not a permissible line of inquiry. The schedule was produced at the hearing in October 2009 at which the first respondents were represented and its scope was challenged by the first respondents at the hearing on 4<sup>th</sup> May, 2010, when the Court rejected Mr Hoy's submission that there was nothing further for the D directors to disclose (see paragraph 10). The relevance of the information sought was one of the grounds of the appeal brought by the first respondents and although they succeeded on a different ground,

the Court of Appeal made it clear that this complaint had no substance. Quoting from paragraph 34(4) of the Court of Appeal's judgment:-

***“(iv) The assertion that the Royal Court's order is oppressive comprehends a number of related individual complaints.*** It is said that the disclosure is not relevant to the issue whether or not the appellants have improperly benefited from the assets of the Irish companies, and that no other issue is properly identified, so that the order amounts to a roving search for evidence; that the documents ordered to be disclosed are not defined with sufficient clarity; and that the scope of the order was so wide, and so disproportionate to the value of the remaining settled assets, as to be oppressive. We do not think these complaints have substance. The Commissioner clearly identified two issues in paragraph 5 of his judgment of 4 May 2010: the actions of the appellants in relation to the Irish companies, and separation of the interests of the three settlements. The appellants' contentions ignore the relevance of the second of these issues: the affairs of the settlements cannot properly be separated without full knowledge of the benefits directly or indirectly obtained by the beneficiaries, and the only satisfactory method of obtaining full information on that matter currently available is wide-ranging disclosure. The categories of documents appear to us to be adequately defined, and the fact that the exercise may be onerous does not mean that it is oppressive. Again, therefore, we do not think that the Royal Court's exercise of discretion could have been faulted on these grounds.”

- 30 The hearing in September must proceed on the basis therefore that the Royal Court has found that the information contained in the schedule was relevant to the two issues it had identified. The issue for the Court is how the trustee should be directed to proceed in the absence of that information. I therefore decline disclosure.
- 31 By reference to paragraph 34(iii) of the Court of Appeal judgment I accept that it was implicit in the Royal Court's order that the D directors were not required to disclose documents they did not have or which did not exist or which had already been disclosed.

### **Schedule of distributions**

- 32 Somewhat to the surprise of the trustee, the first respondents already have schedules of distributions made out of the B and C Settlements up to 2004 and they require this information to be updated.
- 33 Bearing in mind that the Court is being invited to sanction payments as between the settlements, it seems to me that information showing the extent to which distributions have been made in the past is relevant and is the sort of information that any trustee contemplating appointments would have.

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- 34 Mr Young was very concerned that the identity of individual recipients should be anonymised, although ironically, in the way these proceedings have evolved, he and his clients are aware of distributions recently sanctioned to beneficiaries of the D settlement.
- 35 Even so, I think it is right to respect confidentiality where possible, and I therefore order the trustee to update and disclose the schedules for all three settlements showing the date and the amount of the distributions made, but anonymising the identity and residence of the recipients.