Hawksford Trustees Jersey Ltd v A (the mother) and B (the father) and C (First son) and D (Second son) and E (Third son) and F (Fourth son) and Advocate Michael Christopher Goulborn (as guardian ad litem for the minor and unborn beneficiaries)

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Morgan, Kerley
Judgment Date:	25 February 2013
Neutral Citation:	[2013] JRC 43
Reported In:	[2013] JRC 43
Court:	Royal Court
Date:	25 February 2013

vLex Document Id: VLEX-793784005

Link: https://justis.vlex.com/vid/hawksford-trustees-jersey-ltd-793784005

Text

[2013] JRC 43

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and**Jurats Morgan**and**Kerley.

IN THE MATTER OF THE G FAMILY TRUST

AND IN THE MATTER OF ARTICLES 51 AND 53 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED)

Between
Hawksford Trustees Jersey Limited
Representor
and
A (the mother)
First Respondent

and

B (the father)
Second Respondent

and

C (First son)
Third Respondent

and

D (Second son)
Fourth Respondent

and

E (Third son)
Fifth Respondent

and

F (Fourth son)
Sixth Respondent

and

Advocate Michael Christopher Goulborn (as guardian ad litem for the minor and unborn beneficiaries)
Seventh Respondent

Advocate F. B. Robertson **for the Representor.**

Advocate M. H. Temple **for the First, Second, Fifth and Sixth Respondents.**

The Third Respondent appeared in person.

Advocate T. V. R. Hanson **for the Fourth Respondent.**

Advocate M. C. Goulborn **as guardian ad litem for the minor and unborn beneficiaries.**

Authorities

Re S [2001] JLR N 37 .

Companies (Jersey) Law 1991.

Alhamrani -v- J B Morgan Trust Company [2007] JLR 527 .

Rabaiotti 1989 Settlement [2000] JLR 173 .

Trust — consideration by the court of three matters adjourned from the hearing dated 17th December, 2012.

THE COMMISSIONER:

1 The Court sat on 15 th January, 2013, to consider three matters that had been adjourned from the hearing on 17 th December, 2012, namely:–

(i) Whether the Court should bless the decision of the representor ("Hawksford") not to further investigate potential claims against Nautilus Trustees Limited ("Nautilus"), as former trustee of the Trust.

(ii) Whether the Court should bless the decision of Hawksford not to further investigate potential loans due by the holding company to the father.

(iii) The fourth respondent's summons in respect of Hawksford's costs.

2 Following receipt of the 2012 Annual Report for the group, Hawksford also seek the blessing of the Court for its decision not to undertake any further investigation in respect of J Limited.

The Nautilus Claim

3 For the purposes of this judgment, we will adopt the same definitions as in the judgment of 17 th December, 2012. In that judgment, we stated at paragraph 85 that as the Trust is now being wound up, the Court is desirous of facilitating that process in a cost effective manner preserving as much of the capital as possible for the benefit of the beneficiaries, in particular the mother and the father. In paragraph 89, the Court expressed the view that a very substantial reserve would be required to ensure that the Trust could finance what could well be lengthy and costly litigation in respect of the Nautilus claim and that it might be thought that the Trust cannot now afford such an exercise, which could delay its ability to provide funds for the family if not threaten altogether its ability to do so:–

"The priority may now be the preservation of funds for the benefit of the

> ***beneficiaries, and in particular, the mother and the father…..*** the stage may have been reached where if any beneficiaries wish causes of action to be investigated and pursued by [Hawksford] then they should fund the exercise and take on the commensurate risk, not the Trust."

4 It is clear that Mr Temple's clients, namely the mother and the third and fourth sons, and indeed the board of the holding company, regard the claims against Nautilus as potentially very substantial indeed, and if successful, even in part, it would, they say, make an enormous financial difference to the beneficiaries. The advice of Bois & Bois, who might be instructed in the matter, is that those proceedings must be brought before August of this year. They have apparently given a costs estimate for bringing the claim of £850,000 (which makes no allowance for adverse costs orders). Experience shows that cost estimates are usually exceeded, but even so, this is major litigation, which one can assume will be vigorously opposed.

5 Mr Temple's clients have helpfully recognised (as have the other parties) that this claim cannot be investigated or pursued by Hawksford out of trust assets, i.e. it must be funded by a third party or by beneficiaries. Accordingly applying the test in *Re S* [2001] JLR N 37, we are satisfied that this is a decision of Hawksford which it is right and proper to bless. There was, however some difference over the wording of the order, the version put forward by Mr Temple only protecting Hawksford up to the point that the commercial property is sold.

6 The financial position of the Trust is such that we do not agree to such an order. We do not know what net equity will arise on the sale of the commercial property, but the effect of the wording put forward by Mr Temple would be to immediately freeze that equity, making it unavailable for the beneficiaries.

7 There will always be liberty to apply, but we bless the wording of the decision which Hawksford has made, which is in the following terms:–

> *"That the Court blesses Hawksford's decision not to:–*
>
> > *(i) undertake any further investigations into the potential claim(s) of Hawksford, as trustee of the [ ] Trust, against the former trustees, Nautilus Trustees Limited ("Nautilus"), and/or*
> >
> > *(ii) pursue any cause of action against Nautilus*,
>
> *unless (in either or both cases) a beneficiary or beneficiaries fund the same out of their own assets or obtain third party funding (and in relation to (ii) above after the event insurance)."*

8 We wish to make three points in relation to this:–

(i) In terms of any funding of proceedings, it will be reasonable in our view for Hawksford, which we anticipate will conduct these proceedings in its own name, to have funding not only for its own costs but also a reasonable reserve for any potential adverse costs order (unless insured).

(ii) We agree with Mr Hanson that before issuing any proceedings, Hawksford must seek the sanction of a Beddoes Court, not only for its own protection but also so that the beneficiaries can be heard on the arrangements. They have a legitimate interest in ensuring, for example, that no liability could be visited upon them personally arising out of this litigation through, for example, indemnities that they may have given to Hawksford on any distributions. That Beddoes application would also have to be funded by the beneficiary or third party wishing to pursue the Nautilus claim.

(iii) Subject to satisfactory funding arrangements, Hawksford must cooperate with the beneficiary or third party involved in the investigation and bringing of those proceedings subject to any directions given by the Beddoes Court.

The holding company loan

9 At the hearing in September 2012, Mr Temple raised the possibility of some £1M being owed by the holding company to the mother and father, quite separate from and in addition to the loan of £1.4M that had been put forward by the fourth son as being due to the mother and which will be repaid to her out of the proceeds of sale of the commercial property.

10 It would seem that in 1980 (some 33 years ago) the father sold five investment companies together with the benefit of loans due by them to the Trust for some £2.49M payable by annual instalments, which if paid would have been discharged many years ago. Roscott, chartered accountants, produced accounts from 1984 which show an unsecured interest free loan due to the father in the sum of £2,109,244. A loan in a similar sum was carried forward in the accounts until the year ending 31 st December, 2000, when it is written off without explanation. A loan in favour of the father is then written back into the accounts for the year ending 31 st December, 2003, in the sum of £1,656,087, again without explanation. In the year ending 31 st December, 2006, the accounts show the loan as then due to the mother and father, again without explanation. It reduces to £760,330 in the accounts for the year ending 31 st December, 2010.

11 As noted in paragraph 28 of the judgment of 17 th December, 2012, the family did not receive distributions at trust level, but benefited from the group in terms of loans, salaries and directors' fees. The position is explained by Robert Behan of BBA in his witness statement of 19 th April, 2012, as follows:–

> *"10. Prior to 31st December, 2008, the use of loan accounts and directors' tax free bonuses and loan write-offs were efficient methods of utilising an individual's personal tax allowance. Over the years the family members maintained loan accounts with the various companies. These loan account*

transactions often involved more than one company so that money borrowed from one company could be paid back to another. As a result, in order to understand each family member's benefit it is necessary to look at the companies as a whole and the consolidated accounts. To look at one company alone would be misleading. Prior to the 15 year review mentioned below, in the accounts of the Jersey companies most loan movements were recorded as directors' loans written-off. This was the most tax efficient method for family members to receive remuneration …… [emphasis added]

16. Appendix 3 of the report contains a full annual breakdown of all family loan transactions as reconciled to the financial statements of the companies. Each family member was asked to review their loan transactions and there were subsequent detailed discussions. Each family member was asked to agree, disagree or indicate whether further information was required in relation to each transaction. Items that were disagreed for a conclusive reason were adjusted. Appendix 4 of the report shows the remaining disputed items in each year.

17. According to appendix 1, the total sums received from the Jersey Group of Companies by the family members between 1995 and 2010 by way of directors' fees, salaries and loan movements (disputed and undisputed) was as follows:–

The father and the mother	*£6,526,003*
First son	*£1,305,215*
Second son and wife	*£1,231,325*
Third son	*£348,574*
Fourth son	*£358,005”*

Hawksford took the view that considered as a whole, the mother and father (and the other beneficiaries) are not owed monies arising out of these historic loan accounts.

12 BBA have confirmed that they took into account the loan due to the mother and father as at 31 st December, 2010, in reaching their conclusions. Thus, whilst Hawksford accepts that monies may technically be owed to the mother and father by the holding company, it is clear that based upon the BBA advice and observations, to view a loan by a beneficiary to just one company in the group in isolation would be to arrive at an incomplete and misleading conclusion.

13 Hawksford makes the point that had it known, at the time it made its decision in principle to distribute the trust fund, that the mother and father were owed a further sum, that would have been a factor taken into account in the exercise of Hawksford's discretion. Alternatively, if it is now found that a further sum is definitively due, then that would

constitute a material change in circumstances that Hawksford would have to take into account when it comes to making the actual distribution. Accordingly, spending unquantifiable sums in investigating these loan accounts may not in practice make any difference financially to the mother and father in terms of the amount of the distribution they receive.

14 The 2012 Annual Report of the holding company prepared by the directors (the mother, the fourth son and Mr Gardner-Hillman) states that the financial statements of all of the companies in the group are inaccurate and do not show the true picture, nor in their view does the BBA financial report. In particular, they state that the family loan accounts that have been provided by BBA are all wrong.

15 Mr Temple, whilst acknowledging that if any sum is found to be due, it may not affect the ultimate distribution to the mother and father, submitted that they may be better off as creditors of the holding company as opposed to discretionary beneficiaries of the Trust. He pointed out that it is the directors of the holding company who are responsible for the financial statements and records of that company and if it is to be wound up, it is the directors who have to sign a solvency statement. If they consider it right to investigate the loan (which he accepted would include investigating all of the companies within the group), then it is entirely their right to do so; indeed, he says it is their legal obligation to do so. At the very least, Mr Temple submitted, Hawksford should obtain an estimate from an accountant for undertaking this investigation.

16 Furthermore, Mr Temple submitted that unless this investigation was carried out, the mother, as the curator of the father, would have no alternative but to apply to the Jurats for approval to take action against the holding company of which she is a director, which would lead to the same appalling consequences that were incurred in relation to the loan litigation brought by the second son, which has now been settled.

17 This is an application by Hawksford for the Court to bless a decision it has made as trustee. We have no supervisory role over the directors of the holding company or any of its subsidiaries and would not wish to suggest that they should not discharge their duties as they see fit and as they may be advised. We would, however, make the following observations:–

> (i) Directors are required to act honestly and in good faith with a view to the best interests of the company (Article 74(1) of the Companies (Jersey) Law 1991) i.e. for the benefit of the members as a whole — in this case Hawksford as trustee of the Trust. Effectively the directors are required to act with a view to the best interests of the trust estate and it is for Hawksford, as the duly appointed trustee, to determine (with the assistance of the Court when sought) what those interests are.
>
> (ii) Hawksford can authorise or ratify any act or omission by the directors subject to the ability of the company to discharge its liabilities as they fall due (Article 74(2)).

Subject, therefore, to that (admittedly important) caveat, the directors can be authorised by Hawksford not to further investigate this loan.

18 The Court feels able to say with some confidence that no accountant would be able to give a reliable estimate of the cost of investigating this loan, which it is accepted will involve examining the complex financial affairs of all of the companies in the group, including, we presume the Spanish companies (which on 17 th December, 2012, we authorised Hawksford to wind up without further investigation) going back some 33 years. There is already evidence of a lack of documentation and therefore an investigation will involve taking statements from all of the directors and other persons involved over that time. There is no guarantee that they will be cooperative in that process. Investigating one loan account will inevitably involve investigating all of the loan accounts. We have serious doubts whether, in the context of this family history and dealings, any such investigation, even if undertaken, would be wholly determinative of the issues.

19 In its application, Hawksford set out with clarity what debts would be paid out of the proceeds of sale of the commercial property (including the loan to the mother of £1.4M) and how the balance would be divided between the beneficiaries. Its decision was premised, therefore, on the basis that any historic loan accounts that may be technically due from the companies within the group to members of the family would be written off. No one demurred from that, apart from Mr Temple, who raised the issue of this loan.

20 Drawing a line under the loan account history of the family within this group must be the sensible way forward and one that we urge on all of the family members, but there is a limit to what Hawksford can do to prevent what value may be left in this Trust from being destroyed. What the Court can do is to bless Hawksford's decision, which is in the following terms, being satisfied as we are as to the relevant tests in *Re S*:–

> *"That the Court blesses Hawksford's decision not to undertake any further investigations as to the status of the alleged loan account as between [the holding company] and the father or the mother."*

21 That decision is one made by Hawksford as trustee and its implementation at company level must self-evidently be subject to compliance with any applicable law.

J Limited

22 The background to this investment is set out in the 2012 Annual Report and it was accepted by all of the parties that there are simply no funds available for further investigation into this investment for the same reasons as set out above. Accordingly, we had no difficulty in being satisfied as to the test set out in *Re S* and to approve the decision of Hawksford as follows:–

> *"That the Court blesses Hawksford's decision not to undertake any further*

investigations in respect of J Limited unless a beneficiary or beneficiaries fund the same out of their own assets."

Costs

23 This is an administrative application and Hawksford proposes that the usual orders should apply, namely:–

(i) That the costs of Hawksford of and incidental to this representation be paid out of the trust fund of the Trust on the trustee basis.

(ii) That the costs of the respondents of and incidental to this representation be paid out of the trust fund of the Trust on the indemnity basis.

24 Whilst on a number of issues the Court has found against the submissions made by Mr Temple's clients, they were entitled to put their strongly held views to the Court as they have done and they cannot be criticised for that. The whole purpose of their being convened is for the Court to hear those views. We will therefore make the usual orders.

25 That is quite separate from the question of the quantum of any costs or whether they have been reasonably incurred, which brings us to the issue of the summons issued by the second son in relation to costs which is in the following terms:–

"1. Hawksford shall file and serve a breakdown of legal costs that it seeks to take from the Trust (including indirectly via the Trust owned companies) in relation to:–

(i) the costs of the loan litigation PL 2011/126, the Information representation 2011/295 and the [Holding Company] Representation PL 2011/365; and

(ii) the Representation of [the first son] and the Representation herein for directions, within 14 days.

2. In the event that any beneficiary objects to any portion of such costs being taken as aforesaid, he/she shall state why they object within 14 days of service of the said breakdown;

3. In the event of such objection and Hawksford declining to permit the costs in dispute to be taxed on the trustee basis, or there being an issue of principle as to recovery that requires resolution by the Royal Court, upon further application by summons, the Court shall determine the issue of principle and further whether the costs ought to be taxed."

26 Initially, the Court construed the purpose of the summons to be to prevent Hawksford from recovering its costs from the trust fund pending the process set out in parts 2 and 3 of the summons, but it was clear from Mr Hanson's submissions that the words *"that it seeks from the trust fund"* simply reflected the current reality, namely that there are no funds available to pay Hawksford's legal costs. Hawksford has a right both in law and under the trust deed, absent a finding of misconduct, to recover its costs out of the trust fund, but equally the beneficiaries have the right to challenge those costs on the grounds that they were unreasonably incurred or of an unreasonable amount. (See *Alhamrani -v- J B Morgan Trust Company* [2007] JLR 527).

27 Hawksford readily accepted that it was under a duty to provide a breakdown of its legal costs and that had already been provided in part. Mr Robertson had some understandable concern over the second son as plaintiff in an action against the holding company (now settled) coming round through the Trust as a beneficiary and challenging the quantum of the legal costs incurred in defending those proceedings.

28 In the absence of any authority, our view is that the mere fact that the second son acted as plaintiff in those proceedings does not deprive him of his right as a beneficiary to hold Hawksford to account in relation to the fees it has incurred in defending those proceedings. Therefore, in principle, he is entitled to see the breakdown, provided that the information he thereby obtains is used solely for that purpose and in no other way which might prejudice the trust estate. That is consistent with the principles enunciated in *Rabaiotti 1989 Settlement* [2000] JLR 173 where it was held that disclosure to a beneficiary can be refused if it were to be prejudicial to the interests of the beneficiaries as a whole. Disclosure to the second son of this information could be prejudicial to the interest of the beneficiaries as a whole if it could lead to further litigation against the Trust or a resuscitation of the now settled litigation. Furthermore, and subject to further argument on the matter, the second son should not be permitted to see the files maintained by Hawksford and any member of the group in relation to the defence of his claim.

29 Accordingly, we are prepared to make the order contained in paragraph 1 of the summons, on condition that the second son files with Hawksford and with the Court an undertaking that he will use the information thus obtained solely for the purpose of assessing and if he thinks appropriate challenging the legal costs incurred and not for any other purpose which might in any way prejudice the interests of the trust estate.

30 Turning to parts 2 and 3 of the summons, the second son, and indeed the other beneficiaries, must first consider the breakdown provided, but if they then wish to challenge the same on the grounds that the costs incurred by Hawksford are unreasonable in amount, then Hawksford agree that the matter can be referred to the Judicial Greffier for taxation (quantification). If however they wish to challenge the costs on the grounds that they have been unreasonably incurred then they shall have liberty to apply back to this Court to have that matter adjudicated upon or referred to the Judicial Greffier.

31 Finally, there should be liberty to apply.