Representation of U

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Esq, Jurats, Morgan, Nicolle, Clyde-Smith, Commr. and Jurats Morgan and Nicolle
Judgment Date:	06 July 2011
Neutral Citation:	[2011] JRC 131
Reported In:	[2011] JLR 452
Date:	06 July 2011
Court:	Royal Court

Text

[2011] JRC 131

ROYAL COURT

(Samedi)

Before:

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

Between
U Limited
Representor
and
B
First Respondent

C, both on her behalf and on behalf of her brother A together with their unborn issue and their future husbands, wives, widowers of both of themselves and their unborn issue
Second Respondent
D, both on her own behalf and on behalf of her unborn issue and her and their heirs, future husbands, wives or widowers
Third Respondent
E, both on her own behalf and on behalf of her issue and her and their spouses, widows or widowers
Fourth Respondent
J, both on her own behalf and on behalf of her issue and her and their spouses, widows or widowers
Fifth Respondent
M, both on her own behalf and on behalf of all other persons beneficially interested under the settlement
Sixth Respondent
V
Seventh Respondent

Advocate R MacRae **for the Representor.** B, the first respondent, was present.

Authorities

Re Internine Trust [2004] JLR 325.

Schmidt v Rosewood Trust Limited (2003) 2 AC 709.

Lewin on Trusts 18th Edition.

Trusts (Jersey) Law 1984.

In Re Rabaiotti 1989 Settlement [2000] JLR 173.

Re H Trust [2006] JLR 280.

In Re T Settlement [2002] JLR 204.

THE COMMISSIONER:

1 On 1 st March, 2011, we gave directions to U Limited ("the trustee") to disclose the accounts of the W Settlement ("the settlement") to the first respondent, B, and we now set out our reasons.

2 The settlement is a discretionary settlement established by B on 13 th March, 1989, with assets derived in substantial part from wealth created by his late father, P.

3 The settlement is now governed by Jersey law and whilst the beneficial class is very widely drawn, the trustee regards the second to sixth respondents as the persons principally interested under the settlement, namely B's three children, C, D and A and their respective issue and his three sisters, E, J and M and their respective issue.

4 It is clear that the settlement is one of a number of settlements created for the benefit of B and his three sisters and their respective children and remoter issue. The trustee's understanding is that the settlement was and is intended to be generational and dynastic and indeed no distributions have been made from it.

5 B and any wife of his are excluded from benefiting from the settlement; specifically under clause 30(1) of the settlement no discretion or power can be exercised in such manner as shall cause any part of the income or capital of the trust fund to be paid or lent or otherwise applied for the benefit of B or any wife of his. The consent of B during his lifetime and after his death the consent of his widow is required before the trustee can exercise its power of addition to or exclusion from the class of beneficiaries.

6 B and his wife Q have been engaged in divorce proceedings before the Family Division of the High Court of England and Wales for some [3] years. Her accountant, W FCA, wrote on 8 th December, 2010, saying that whilst some disclosure had been made (he had the settlement deed for example) he was severely hampered by the non-production by B and his advisers of copies of the accounts of the settlement. He expressed the view that the settlement was absolutely central to the T Trust structures, their operation and, as far as he could tell, owned assets whose value greatly exceeds the value of all of the other assets in the trusts which have been disclosed. On the face of it, the trustee could decide that the settlement had sufficient funds to meet the needs of all of the potential beneficiaries of all of the trusts save for B and Q, leaving the other trusts to make reasonable provision for them. Although it was a matter for the English court, it was essential, in W's view, that the financial history and financial position of the settlement be investigated to ensure that the English court is presented with a full picture of the family finances.

He could not see how the English court could make an informed judgment in the proceedings without disclosure of the accounts for at least the last three years of the settlement, whose gross assets he estimated at some £250M based on publicly available information.

7 On 2 nd February, 2011, the English court ordered B to use his best endeavours to obtain copies of the accounts of the settlement for the last three years. “Best endeavours” was to include his writing personally to the trustee, stating that he wished the accounts to be provided to him and that he considered it to be in the best interests of his children as beneficiaries of the settlement for those accounts to be provided, given that the nature and quantum of the financial provision for them is an issue in the proceedings. The English court recorded that in default of disclosure of the accounts, B may be at risk of adverse inferences being drawn against him by the court. In default of disclosure B was ordered to

set out in an affidavit a full account of the assets held in the settlement and their value as far as is within his knowledge.

8 B wrote to the trustee on 4 th February, 2011, and quoting from his letter:-

> *"I really cannot overstate how important it is to the fair resolution of the outstanding financial proceedings for these accounts to be made available to my wife's legal team.* If they are not made available, there is a risk of a significant misunderstanding occurring as to the nature and/or value of the trust. They are also important to give her the reassurance necessary to negotiate a settlement with me. Moreover, if the accounts are not produced, there is a risk of the court drawing the inference that I have tried to conceal the true nature and value of the trust or have something to hide in respect of it. As you know this is not the case.
>
> *Therefore, to assist the court, and also for my own personal best interests I do exhort the trustees to give completely fresh consideration to providing these documents to me.* I can stress that I am advised that this will not constitute any submission to the jurisdiction of the English Court. Further, any provision of this material will be treated in the strictest confidence by my wife's legal team and my own.
>
> *To underline the great importance of my being able to produce these documents, I enclose an order made yesterday by Coleridge J of the English High Court to which I submitted.* Please consider the preamble very carefully. I do stress that it is my wish for the accounts to be produced."

9 The trustee took the view that it should disclose very limited information to B, namely that there had been no distributions made from the settlement and that no transfers had been made to the settlement since the date the settlement was established but that to give further information to B and through him to Q, who are both excluded persons, could potentially prejudice the interests of the beneficiaries of the settlement and could result in their interests as beneficiaries of the other T Trusts being compromised. However, it applied to this Court for directions as to the steps it should take in the light of the English proceedings by way of disclosure of information to B.

The law

10 Mr MacRae referred us to the Court of Appeal decision in *Re Internine Trust* [2004] JLR 325 as authority for the proposition that the Court could only direct disclosure to B as an excluded person if the matter could be regarded as exceptional. That case involved hostile litigation in which the trustee played a neutral role and in which certain parties were seeking orders from the Court requiring the trustee to disclose information in relation to a trust in which their status as beneficiaries was in doubt. The issue before the Court was whether disclosure should be ordered before the issue of the applicants' status as

beneficiaries was conclusively resolved. The Court of Appeal held that on the facts of that case and in reliance on the principles laid down in the Privy Council decision in *Schmidt v Rosewood Trust Limited* (2003) 2 AC 709, the Courts in Jersey did, exceptionally, have power to exercise supervisory power in favour of the applicants.

11 However in the case before us, B was not seeking to invoke the supervisory jurisdiction of the Court for an order requiring the trustee to make disclosure to him. There are circumstances in which a settlor may be entitled to invoke that jurisdiction as summarised in Lewin on Trusts 18 th Edition at paragraph 23–103 namely where the settlor has a beneficial interest, where he has functions under the trust to perform particularly fiduciary functions, where he wants information to express his informed wishes as to the exercise of the powers and discretions conferred on the trustee and where he needs the information for the purpose of complying with some fiscal or other obligation imposed upon him by law.

12 B has no beneficial interest in the settlement (indeed he is excluded from benefit) and although he has an on-going function under the settlement in relation to the trustee's power to add or remove beneficiaries, he is not seeking disclosure for that purpose or for the purpose of expressing his wishes as settlor. The obligation that has been imposed upon him by the English Court did not arise out of his status as settlor but as a respondent in matrimonial proceedings and in any event it was not contended that he was entitled to disclosure on that basis.

13 It is the trustee that has invoked the supervisory jurisdiction of the Court by seeking directions as to whether it should, in the exercise of its own powers, accede to B's written request. The issue therefore is not whether B can require disclosure but whether the trustee, in the exercise of its powers, should make disclosure.

14 In the discharge of their duties to manage the affairs of a trust, trustees must have the power to decide whether, what and how disclosure of confidential information should be made (see extract from Lewin on Trusts at paragraph 17 below). They routinely do so when dealing with lawyers, bankers, investment advisers and others with whom they have to deal or transact as trustees. They do so because is in the interests of the beneficiaries that disclosure of confidential information be made and this pursuant to Article 24(2) of the Trusts (Jersey) Law 1984 which provides:-

> ***"A trustee shall exercise the trustee's powers only in the interests of the beneficiaries and in accordance with the terms of the trust"*** .

15 In our view the status of B as an excluded person is of no relevance to the issue of whether it is in the interests of the beneficiaries that he be given information in relation to the settlement. His exclusion simply means that no power can be exercised which may cause any part of the income or capital of the trust fund to be paid or lent or otherwise applied for his benefit and that is not in contemplation here.

16 Thus we concluded that we were not concerned with whether there were exceptional circumstances or some such equivalent test but simply with whether it was in the interests of the beneficiaries that the trustee exercise its own power to disclose the accounts of the settlement to B for the purposes of the English proceedings.

Role of the Court

17 Much of the case law on disclosure relates to disclosure to beneficiaries and Mr MacRae referred us to this extract from Lewin on Trusts 18 th edition at paragraph 23–20 on the role of the Court:–

> ***"The role of the court and the trustees***
>
> ***We consider that the court in determining whether, what and how disclosure should be made under the principles of Schmidt v Rosewood Trust Ltd to a beneficiary is exercising its own discretion in supervising, and where necessary intervening in, the administration of trusts.*** It is not, in our view, the case that the function of the court (in the absence of a surrender of discretion) is merely to review, on limited grounds, an exercise of discretion by trustees or give its blessing to a proposed exercise of discretion by the trustees, so that the court can and will intervene only if it is proved that the trustees' decision or proposed decision on disclosure is wrong or of a kind that no reasonable trustees could reach. But the fact remains that disclosure will, in the first place, be sought by beneficiaries from trustees. Normally applications for disclosure will be dealt with by the trustees and the court will not be involved. It cannot be the case that trustees have no power to decide whether, what and how disclosure should be made, and trustees need to have a discretion for exactly the same reason as the court needs to have a discretion. Indeed in a leading Australian case it was decided that the trustees did have a discretion to reach decisions on disclosure of confidential information. There may be cases, particularly where it is obvious that the application to 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. It is only where other circumstances exist which militate against disclosure that fear of a breach of trust claim might disable the trustees from reaching a decision, so necessitating a determination by the court on the matter without any exercise of discretion by trustees. Obtaining information with a view to a breach of trust claim is not the only reason for seeking disclosure, and in other cases there may be no real possibility of conflict of personal interest and duty at all. In such cases, the trustees do, in our view, have a discretion in deciding whether, what and how disclosure should be made. But if the matter is taken to the court, whether by a

beneficiary whose application for disclosure has not been met to his satisfaction, or by the trustees who may be well advised themselves to take the initiative in seeking directions in some circumstances, the court will exercise its own discretion. And the function of the trustees will be to persuade the court not to intervene against their decision or to assist the court in reaching a decision where the trustees make the application, the views of the trustees being no more than a factor taken into account by the court in determining the application."

18 *Lewin* cites *Schmidt -v- Rosewood* and *In Re Rabaiotti 1989 Settlement* [2000] JLR 173 as

authority for the proposition that in applications for disclosure to beneficiaries the Court will exercise its own discretion. In *Schmidt v Rosewood*, the Privy Council held that a beneficiary's right to seek disclosure was best approached as an aspect of the court's inherent and fundamental jurisdiction to supervise and if appropriate intervene in the administration of trusts. In Rabaiotti it was held that the Court had a discretion to refuse to order disclosure of trust

documents that a beneficiary is normally entitled to see. The Court would weigh the need for an

individual beneficiary to obtain trust documents against the interests of the beneficiaries as a whole.

19 We accept the role of the Court as put forward in *Lewin* and based in part on Jersey authority as applying under Jersey Law. B is not and cannot become a beneficiary although as settlor and with his on-going role in the settlement it would not be accurate to describe him as a stranger to the settlement. Even so in our view the role of the Court is the same. The issue is one of disclosure of confidential information in which the Court has to weigh his request against the interests of the beneficiaries as a whole. The Court will exercise its own discretion, the views of the trustee being no more than a factor to be taken into account by the Court in determining the application.

Responses of convened parties

20 Of B's three sisters, two, J and E did not support disclosure. They did not want their interest or possible future benefits to be used in any way that might support the demands of Q in the English proceedings and they were concerned with privacy. M whilst initially opposing disclosure ultimately expressed the view that the trustee should use its discretion to decide what was best for the interests of the family overall.

21 Of B's children, C (aged 22), who is currently in the USA, wrote on 20 th February 2011 requesting the provision of the accounts of the settlement and of its underlying companies. The trustee interpreted her letter correctly, in our view, as being a request for the provision

of information to her father and as having been written both on her behalf and on behalf of her brother A (aged 17). D (aged 19) has not responded but B informed us that she was in the middle of examinations and it had not been thought appropriate to disturb her studies with these issues. It is difficult to envisage any of the children not wanting their parents' divorce to be resolved fairly and on the basis of accurate financial information.

22 When B's mother, V, was convened to these proceedings, it was not appreciated that she had been excluded as a beneficiary along with her late husband P on 14 th May 1991. In any event, she wrote on 21 st February 2011, asking for the information to be provided to B as she felt it would assist him in progressing his divorce, which was in the interests of the whole family, including the beneficiaries of the settlement. She believed that her late husband would have shared her view.

23 B attended the hearing and his submissions were of considerable assistance to us. It might have been thought that whilst writing to the trustee in compliance with the orders of the English High Court seeking information, he was privately supportive of the reluctance of the trustee to provide the same. It is clear that this is not the case. He informed us that he knew the assets of the settlement well. 90% of the value of the trust fund was held in four entities, three of which he was actively involved in and two of which he was chairman. If the accounts of the settlement were not disclosed, he would, as ordered, provide the English court with an affidavit setting out his detailed knowledge of the assets of the settlement and therefore his sisters' concerns as to privacy were irrelevant.

24 Non disclosure of the trust accounts however was damaging. Uncertainty as to the value of the assets of the settlement was a key issue in the divorce proceedings and no matter what he might depose from his own knowledge of those assets, non disclosure of the trust accounts created uncertainty and suspicion, complicating the proceedings and impeding settlement. Disclosure of the trust accounts would disabuse his wife's advisers of any such uncertainty and suspicion. The non resolution of the divorce proceedings was costly and distracting and impacting upon the businesses owned by the settlement which was in turn damaging the value of those assets. It was his strong view that disclosure of the trust accounts was in the interests of all of the beneficiaries. He felt that resistance to disclosure by two of his sisters was an emotional reaction to the claims being made by his wife in the divorce proceedings and was not based upon an objective assessment of the true interests of the settlement. The trustee was, in his view, doing its best to reach an independent view but it had placed too great a reliance on the views of his sisters.

25 Information in relation to all of the other trusts had been disclosed by the trustee and it was important, he submitted, and in the interests of the beneficiaries, for the English court to be placed in the best possible position to make an order as between himself and his wife that was fair and based upon accurate and reliable information.

The trustee's position

26 The trustee's position was that the accounts should not be provided to B and through him to Q both of whom are excluded persons. In his second affidavit of 28 th February 2011, X, a director of the trustee, explained the rationale behind the trustee's position as follows:- *"It is clear from the letter written by W FCA, which is exhibited at pages 23 to*

> *27 of exhibit "IC2" of my first affidavit, that Q wishes to say to the English High Court that the [settlement] has the capacity to fund not only her children, but also all of the other beneficiaries, such that they will be able to be benefited from the [settlement] to the exclusion of all of the other trusts of which they are beneficiaries, which can therefore be regarded as being primarily for the benefit of and as a resource of the Settlor for the purposes of the English divorce and ancillary relief proceedings.* It is right to say that this is not how the Trustee regards matters. No distributions have ever been made, and the intention is that these assets will be held for the long term. The approach proposed by Q would prejudice the interests of the beneficiaries of the [settlement] because they would in effect be expected to subsidise the divorce of B and Q, as the English Family Court would be being asked to proceed on the basis that their interests under other trusts of which they are beneficiaries should be subordinated to those of B and Q. Such an approach would directly prejudice their interests as beneficiaries under the [settlement]."

Decision

27 The Court had some difficulty in understanding the rationale put forward by the trustee, in that non disclosure of the accounts of the settlement would not impede or prevent Q from pursuing the contentions which it feared could prejudice the interests of the beneficiaries. Indeed she would be able to pursue those contentions based upon potentially inaccurate information as to the value of the settlement and in circumstances in which adverse inferences might be drawn by the English Court. It was surely preferable that the English court at least had accurate information before it. As the Court said in *Re H Trust* [2006] JLR 280 at paragraph 17 in the context admittedly of a husband and wife who were beneficiaries of the trust concerned:-

> ***"We should add that the decision that the trustees should not submit to the jurisdiction is separate from the question of provision of information.*** It seems to us important, in this case, that the husband and the wife should have the fullest information concerning the financial affairs of the trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position."

28 The trustee's approach imputes to the English court an exorbitant exercise of jurisdiction over the settlement when it will be for this Court to decide, in its supervisory capacity, the extent to which the powers of the trustee under the settlement should be used to achieve the result contemplated by any final order of the English court, as made clear in *Re H Trust* at page 284. The same point applies to the other family trusts on the assumption that they

too are governed by Jersey law.

29 The trustee was, however, in a difficult position in that B and Q were not and could not become beneficiaries and his sisters (or at least two of them) were opposed to disclosure being made. It was an appropriate case in our view for the trustee to seek directions.

30 We concluded that upon our assessment of the facts before us it was in the interests of the beneficiaries for the accounts of the settlement to be provided by the trustee to B, the settlor of the settlement, for use within the English proceedings, subject to safeguards as to confidentiality and this for the following reasons:-

(i) We were concerned with a trust which is one of a number of trusts created for the benefit of the wider family and the provision of information in relation to one of those trusts (the settlement) for use in divorce proceedings involving members of that family.

(ii) The English court had received financial information in relation to all of those trusts with the

exception of the settlement. It thus had an incomplete and potentially inaccurate picture of the family finances.

(iii) Withholding the trust accounts would not in any way impede or prevent Q from pursuing her

contentions before the English court but it would enable her to pursue the same on potentially inaccurate information and in circumstances in which adverse inferences might be drawn by the English court.

(iv) Failure to disclose the accounts was protracting the divorce proceedings and impacting

adversely upon the businesses owned by the settlement in which B was closely involved.

(v) It was in the interests of the children of B (and in our view the wider family) that the divorce proceedings between B and Q be determined fairly and on the basis of accurate financial information. “Interests” for the purposes of Article 24(2) of the Trusts (Jersey) Law 1984 as in “benefits” is a term that is to be widely construed (see *In Re T Settlement* [2002] JLR 204 at page 208), and extended beyond purely financial matters, although in this case the financial interests of the beneficiaries would be adversely impacted by non-disclosure.

(vi) Privacy in relation to the information contained within the accounts was not an issue because of B's knowledge of the underlying assets which he would be required to provide to the English court in any event. The English court would therefore receive the bulk of the information it was seeking in relation to the assets of the settlement, but absent confirmation through the provision by the trustee of the trust accounts as to the

definitive position.

31 The trustee informed us that the trust accounts could not be easily interpreted without the accounts of the underlying companies and that if disclosure was to be made it should include the accounts of the underlying companies. Accordingly we extended the disclosure to the accounts of the underlying companies.