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Leapingwell v Sinclair

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff:
Judgment Date:	13 July 2012
Neutral Citation:	[2012] JRC 136
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Text

[2012] JRC 136

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **sitting alone.**

Between
F (The Mother)
Petitioner
and
G (The Father)
Respondent

Advocate M. E. Whittaker for the Petitioner.

Advocate L. J. Glynn for the Respondent.**Authorities**

Jones -v- Atkinson [1989] JLR N 2 c.

Victor Hanby Associates Limited and Hanby -v- Oliver [\[1990\] JLR 337](#) .

Beghins Shoes Limited [1995] JLR N 4B .

D -v- R [2001] JLR N 49 .

P -v- C [2002] JLR N 26 .

M -v- G [2003] JLR N 28 .

Matrimonial — application by the respondent that the petitioner be directed by the court to issue a letter regarding trust beneficiaries.

The Deputy Bailiff:

- 1 This is an application by the respondent for an order that the petitioner should by close of business on a particular date issue a letter to each of Bedell Trustees Limited, Investec Trustee (Jersey) Limited and Investec Nominees (Jersey) Limited making enquiry as to whether the petitioner or either of the children of the two parties is or has been or is ever likely to be a beneficiary of any trust or trusts of which the recipients of the letter might be trustees; and also asking of the same recipients whether any trust or trusts of which the recipient is a trustee has ever made any payment, loan, appointment or distribution whether in specie or otherwise either directly or to another person but for the ultimate benefit of the petitioner and/or either of her children or the trustees of the K Trust. The application suggested that such a letter should contain an explanatory note that in considering whether any of the petitioner or her children were “*ever likely to be a beneficiary*”, the recipient of the letter ought to consider such a matter likely if either the petitioner’s mother or brother is currently, has been, is likely to be or is intended to become a beneficiary or settlor of any such trusts where there is a power to add further beneficiaries.
- 2 The application is resisted by the petitioner who goes on to make a cross application that the Court should make an order that no further disclosure would be sought without leave of the Court, save for on-going disclosure in accordance with the existing orders.
- 3 The context of the application made by Advocate Glynn on behalf of the respondent is this. The Court has pending application by the petitioner against the respondent for child maintenance, interim maintenance, spousal maintenance, secured provision and a lump sum. There are also applications by the respondent against the petitioner for spousal

maintenance, a lump sum, variation of a settlement and a transfer sale or settlement of property. These applications are due to be heard later this year. On 6th July, 2011, the petitioner deposed to her affidavit of means. In it she described that she occupied as a licensee a property ultimately owned by the K Trust. She also disclosed that in the last 12 months she had received income from the same Trust.

- 4 The respondent had a number of questions to raise on the terms of that affidavit. In her answers delivered on 6th September, 2011, the petitioner confirmed that she had made a request to the K Trust for assistance in connection with the payment of legal fees arising out of the proceedings. The petitioner was also asked to set out in tabular format a schedule identifying "all distributions, loans, facilities or other benefit of any nature that the petitioner has received from any trust or other company or other entity owned by a trust during the marriage".
- 5 The response to that question referred to a letter from Advocate Dessain, which it is understood refers to the K Trust alone. The petitioner asserted that she had no other documents than those that were provided.
- 6 A further question in the same questionnaire related to the alleged recent purchase of property in London by the petitioner's brother. The question delivered was whether the funds used by her brother to acquire that property originated from a trust or entity owned by a trust, and if so what details could be provided. The response was that the petitioner is not privy to the private affairs of her brother.
- 7 In December 2011, the petitioner delivered responses to the respondent's second questionnaire on her disclosure. In particular, the respondent had questions arising out of the petitioner's statement that "to the best of the knowledge, information and belief of the petitioner, she is not a beneficiary or potential beneficiary of any other trust" [save the K Trust]. In that connection, the respondent had delivered a set of questions relating to a trust which he believed had been set up by M for the petitioner's benefit, that settlement having subsequently been transferred to Jersey on the advice of the late Advocate Cristin. The respondent also sought a confirmation as to whether the petitioner was or has ever been a beneficiary of a settlement emanating from the maternal side of the family, namely the H family. In her responses to these questions, the petitioner indicated that the trust transferred to Jersey on the advice of Advocate Cristin was no longer in existence as the assets were transferred to the K Trust in 1993 and she was not able to recover any documentation in relation to that earlier trust. She further went on to say that she had already disclosed her beneficial interests and she was not a beneficiary of any other settlements as far as she was aware.
- 8 A further question was put in relation to the alleged purchase of property by the petitioner's brother the underlying thesis of the respondent being that he had allegedly received funds from the petitioner's mother or a trust connected to the petitioner's mother, and that similar support would be provided to the petitioner. The response was that the petitioner was not

privity to the private affairs of her brother.

- 9 On 11th May, 2012, the respondent swore an affidavit particularising occasions on which he asserts the petitioner has indicated she is entitled to benefit or has an interest in the family wealth. His affidavit asserts that she told him in 1998 that she was an heir to the H and J (Grocers) fortune, and that her mother was the sole child of Mr and Mrs H who themselves were the co-owners of H and J. He asserts that the petitioner advised him that a Jersey family trust was set up in or around 1970 by persons associated with Mr and Mrs H in order to deal with the family wealth. He went on to assert that his researches indicated that the petitioner's mother lived in a property which was owned by a company called L Limited, the two shareholders of which were Investec Nominees (Jersey) Limited and Investec Trustees (Jersey) Limited, from which he concluded that the property was held under a trust structure. He asserted that the original Memorandum of Association of L Limited and its Articles were drafted by Advocate Cristin, who later married the petitioner's mother and who himself upon his death left significant assets into the K Trust for the benefit of the petitioner. He asserted that the trustees of the K Trust are Bedell Trustees Limited and that he had attended meetings with them in the company of the petitioner to discuss matters relating to the K Trust. He went on to assert that during the course of the marriage he and the petitioner had enjoyed the use of a number of properties which he believed to be assets settled into the family trust or otherwise owned by L Limited, including a property in London with a value of approximately £2m and a property in Staffordshire which was substantial and had formerly been the home of the petitioner's grandparents. In relation to the petitioner's brother, he asserted that the purchase of property by him in London had been at a cost of something in excess of £1.3m, that the petitioner's brother did not have savings or borrowing capacity to purchase such an expensive property, and that the petitioner had told the respondent that her brother had been given the purchase monies from the family either by way of gift or loan or both from the family trust.
- 10 The petitioner takes issue with some, perhaps all, of what is in the respondent's second affidavit. She continues to maintain that she is not aware of being a beneficiary of any other trusts than the K Trust, details of which she has already provided.
- 11 The case for the respondent is that there is *prima facie* evidence of a trust. Advocate Glynn submitted that it is not unreasonable to think that the petitioner and the children of the marriage might benefit from such a trust and all one was considering here was a direction to the petitioner that she should write to persons believed to be trustees to enquire whether she was a beneficiary. The expectation was that a trustee receiving such a letter would be obliged to answer affirmatively if in fact the petitioner was a beneficiary under a particular trust, and of course that might then lead to further enquiries being made. Advocate Glynn emphasised that it was simply information that was being sought and that this might be relevant to an application for income payments from the husband to the wife. This was merely a reasonable enquiry as to the means and resources available to the petitioner.
- 12 Advocate Whittaker asserted that this was not just an issue of sending three letters. The

Court was being asked to authorise a fishing expedition. This was not an application for specific discovery, but it was nonetheless a fishing exercise. Had it been an application for specific discovery, the respondent would have been required to show a *prima facie* case before obtaining such an order. Reliance was placed upon *Jones -v- Atkinson* [1989] JLR N 2 c, *Victor Hanby Associates Limited and Hanby -v- Oliver* [1990] JLR 337, *Beghins Shoes Limited* [1995] JLR N 4B, *D -v- R* [2001] JLR N 49, *P -v- C* [2002] JLR N 26 and *M -v- G* [2003] JLR N 28.

- 13 As there was no clear evidence that a trust existed, no order of this kind should be made. She went on to say that the petitioner would be embarrassed in writing letters to people she did not know. Furthermore the terms of the draft letter which the petitioner was requested to write were far too wide. In any event, to the extent that they were questions as to whether the children were beneficiaries, the respondent had parental responsibility and was perfectly able to write such a letter himself on their behalf.
- 14 As to the provision in the draft directions that an order should be made restraining further questions being put without the consent of the Court, she expressed the concern that the respondent would always find something else to ask questions about, and that dealing with constant enquiries was a disproportionate burden for a legally aided party to impose on a party who was not legally aided, but in fact running short of money.

The legal test

- 15 It is apparent that the parties were contending for different tests to be applied. The respondent claimed that the Court should make the order because it was merely ensuring that the petitioner made reasonable enquiry as to her means and resources in circumstances where the petitioner does not say specifically in her affidavit that she is not a beneficiary of any other settlement. The petitioner asserted that she was in effect being asked to give specific discovery, and that this was a fishing exercise.
- 16 What I have here is an affidavit sworn by the petitioner which contains the statement at page 15:-

"I, F of [] make oath and confirm that the information given above is a full, frank, clear and accurate disclosure of my financial and other relevant circumstances."

The affidavit is sworn.

- 17 The respondent is correct that there is no statement in terms that the petitioner is not a beneficiary of any other trust. However paragraph 2.16 of the standard form requires details of any assets not listed above to be set out and includes the guidance that trust interests, including interests under a discretionary trust, stating the estimate of the value of the interest and when it is likely to become realisable, should be disclosed. The guidance also indicates that if a party considers that the interest will never be realisable, or has no value,

reasons must be given. Accordingly the statement which I have set out in full above that the information is “*full, frank, clear and accurate*” must be taken to include a statement that there is no other trust interest of which the petitioner is aware. In theory, such a statement could be truthful and yet incorrect in the sense that there was in fact a trust interest of which the petitioner was unaware.

- 18 If this were an application for specific discovery in relation to a particular trust, I would accept the submission of Advocate Whittaker that it would be necessary for the respondent to show a *prima facie* case that such a trust existed. However this is not the application before me at the moment, and I therefore do not think that that is necessarily the test which should be applied.
- 19 I accept the submission made by Advocate Glynn that a party must make reasonable enquiry to ascertain the assets which he or she might have. Here, in my judgment the respondent has done enough that the petitioner has a duty to make further enquiry of the three financial services companies which have been identified. At this stage, all that is being required is that a letter be sent. As I put to Advocate Whittaker in the course of argument, I would have expected the petitioner to want to know whether she was a beneficiary of any other trusts, and it seems to me that it is unreasonable not to expect this enquiry to be made.
- 20 That is not to say that it is legitimate to ask a question of these financial services organisations in the wide terms which have been drafted. In principle the petitioner is not entitled to have information about the financial affairs of her mother and her brother. Generally speaking, these are private and confidential to them; but there is an important qualification. If it is so that their private financial business has an impact on the financial position of the petitioner, then at that stage it may be relevant to procure that further questions are put. The reasonable enquiry that needs to be made is therefore of limited ambit in the first instance, but that does not mean that further enquiry might not be relevant later, depending upon the nature of the responses. There may come a time when issues of proportionality will limit the further questions that might be raised. At present, I think that the letter which the Court would be prepared to direct the petitioner to send is a proportionate response to the issues with which I am now faced.
- 21 Essentially, I have reached the conclusion I have because it does not appear to me to be right at this stage to make any assumptions as to whether the evidence of the petitioner or the respondent on the matters contained in their affidavits is likely to be preferred by the Court at the time of trial. I therefore proceed on the assumption that the respondent's assertions may be true. If they are true, then there is a probability of a family trust – other than the K Trust – of which the petitioner may be a beneficiary. The fact that the property which the petitioner's mother occupies is owned by a company which on the face of it is at least in part owned by a registered trust company, also points in that direction, and if the mother is a beneficiary, it would not be at all unusual for the issue and remoter issue also to be beneficiaries. Whether such a beneficial status would have any impact on the probability of benefit in the short to medium term is of course quite another matter but one would not

know the answer to that until the information has been obtained.

22 I turn now briefly to the question as to whether the petitioner should send the letter only for herself and not in respect of her children. While I accept the view that the respondent has parental responsibility and is well able to send a letter on his children's behalf himself, convenience and practicality would suggest that it is better for the putative trustees – for of course that is all they are at this stage – to receive one letter rather than two, and to receive it from the petitioner.

23 The draft letter which the petitioner is directed to send to each of Investec Trustee (Jersey) Limited and Investec Nominees (Jersey) Limited is in the following terms:-

“Dear Sir

In the course of certain proceedings currently in train, to which I am a party, I have been directed by the Court to write this letter to you and I should be grateful for a reply as soon as reasonably possible.

I need to know whether I or either of my children E or D are, have been or are likely to become directly or indirectly beneficiaries or potential objects of an exercise of discretion of any trust (whether fixed or discretionary) of which you are trustee, as I am obliged to disclose such information to the other party and to the court, if that be the case. If there is an affirmative answer to this question, I would be grateful if you would provide me with information as to the nature of my interest and, if you are able to do so, a realistic assessment of any benefit I or my children have received in the last five years or are likely to receive in the future.

In order to assess whether I or my children may have a prospect of future benefit, it is likely to be helpful to look at not only any trust in which I have a direct interest but also any trust in which my mother N or my brother P have an interest. Nonetheless it is emphasised that the Court is not concerned with information that is private to my mother and brother. The guidance is given for the purposes of a proper focus on trusts from which I or my children might benefit.

I am very grateful for your help. If any costs are incurred in responding to this letter, please let me have a fee note of them so that it receives attention.

Yours faithfully.”

24 The petitioner is directed to send a similar letter to Bedell Trustees Limited, marked for the attention of Advocate Anthony Dessain. The only difference is that the letter needs appropriate amendment to ensure that there is specific reference to the K Trust insofar as the question is raised as to the benefits the petitioner has received in the last five years or is likely to receive in the future. If there is a disagreement about the final format of such letter,

there is liberty to apply.

- 25 Finally, I come to the requested direction that no further disclosure, other than on-going disclosure, is to be requested without leave of the Court. I stand that over for future consideration after the outcome of the letters to the three financial services institutions is known.