

Re Jacobus Broere Trust

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	14 January 2003
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Text

[2003] JRC 6

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Bailiff, **and** Jurats Potter **and** Le Breton.

In the matter of the Representation of Jacobus Broere, re Bastiaan Broere Trust and
Cornelis Broere Trust.

Between
Jacobus Broere
Representor
and
Mourant & Co (Trustees) Limited
First Respondent
and

Fusina Trust Co. Limited
Second Respondent

and

Cornelis Broere
Third Respondent

and

Elizabeth Broere
Fourth Respondent

and

Jacoba (Jacqueline) Broere
Fifth Respondent

and

Cornelia A.K. Broere
Sixth Repondent

Advocate M.J. Thompson for the Representor.

Advocate L. Springate for the First and Second Respondents.

Authorities

Mathews and Malek: Disclosure (being 2nd Ed'n of Discovery) (Sweet & Maxwell: 2001): paras 10.15 and 10.16.

In Re Abacus (C.I.) Ltd [\(2000\) JLR 165](#).

[Matthews v Voisin & Co](#) (23 October, 201) Jersey Unreported; [2001/209].

In re IMS [\(1996\) JLR 294](#).

[Blenheim Trust v Morgan](#) (17th March 1999) Jersey Unreported [1999/51].

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

Trusts (Jersey) Law 1984: Article 47 (3).

Royal Court Rules, 1992, as amended: Rule 6/29.

Application by the First and Second Respondents, as trustees of the Cornelis Broere Trust for an Order: (1) that they cease to be parties to the proceedings in their capacity as

Trustees of the said Trust; (2) that the Representor be ordered: (a) to return to them any copies of Exhibits JB14, JB15, and JB16; (b) to amend his representation, supporting affidavit and exhibits by removing any references to those documents; and (c) not to make any further use of the said documents or the information contained therein; and (3) that the Representor pay the costs of this application.

Bailiff

- 1 This is a summons issued by the First and Second Respondents as Trustees of the Cornelis Broere Trust (to whom we shall refer as “the Trustees”) seeking relief in two respects. First, they seek an order that they should cease to be parties to the proceedings instituted by Jacobus Broere (to whom we shall refer as “Jacobus”). Secondly, they seek the return of copies of documents furnished to Jacobus' legal adviser and consequential orders in relation to the use of those documents. We will deal with these applications in turn.
- 2 The grounds for the first application that they should cease to be parties to the proceedings are twofold. First, Mrs Springate for the Trustees, submits that Jacobus is not a beneficiary of the Cornelis Broere Trust and has no *locus standi* to bring these proceedings against the Trust. Counsel further submits that no leave has yet been sought pursuant to Article 47 (3) of the Trusts Jersey Law 1984, by Jacobus before applying to the Court for an order concerning the administration of the Cornelis Broere Trust.
- 3 This ground appears to us to be misconceived. Jacobus has brought these proceedings as a beneficiary of the Bastiaan Broere Trust. Under Article 47 (3) he is entitled to seek an order relating to the execution or administration of the Bastiaan Broere Trust (to which we shall refer for convenience as “the BB Trust”). To this application a number of persons have been convened. Two of those persons are the Trustees in their capacity of Trustees of the Cornelis Broere Trust (“the CB Trust”). This is not a case of a stranger to the CB Trust seeking an order in relation to that Trust. This is a case of a beneficiary of the BB Trust seeking an order and convening all those persons whom he believes to be necessary parties.
- 4 Secondly, Mrs Springate submits that in fact the Trustees are not a necessary party to Jacobus' application. Counsel contends that the information sought by Jacobus can be procured from the Trustees in their capacity of Trustees of the BB Trust or from others.
- 5 Counsel also contends that the relief sought against the Trustees could be obtained, and should more properly be obtained, against other persons. Mr Thompson for Jacobus submits that the application amounts to an attempt to strike out the proceedings against the Trustees. He contended, and indeed counsel for the Trustees agreed, that the Court could only strike out the proceedings if it was plain and obvious that the claim could not succeed.

- 6 Mr Thompson referred us to a decision of the Court of Appeal in [Blenheim Trust v Morgan](#) (17th March 1999) Jersey Unreported [1999/51] where the principles laid down by the English Court of Appeal in [Wenlock v Moloney \[1965\] 1 WLR 1238](#) were applied.
- 7 The jurisdiction to strike out should be sparingly exercised, and only in cases where it was clear on the face of the pleadings that the claim could not succeed. The underlying complaint of Jacobus is that he has been unfairly treated by the Trustees in their capacity of Trustees of the BB Trust. The Trustees in their other capacity have been party to arrangements for the distribution of assets from the BB Trust and, directly or indirectly, party to arrangements in relation to a company formerly known as Prodamco NV which was in part an asset of the BB Trust. It is by no means plain and obvious to us that the claim against the Trustees cannot succeed. The first application is accordingly dismissed.
- 8 We turn to the second application, namely the application of the Trustees for the return of documents and for an order that references to those documents be removed. During argument, the application was restricted to two specific documents; namely, a letter dated 18th January, 2001, from Cornelis Broere to a Mrs Ritter under the heading "Re: The Broere Charitable Foundation". The letter reads:

"Dear Mrs Ritter,

Shortly you will receive from the Bastiaan Broere Trust a Promissory Note to the amount of EUR 10,294,415.62 which has been issued by Broere Corporation Limited.

It is my intention to donate this Promissory Note to the Broere Charitable Foundation. The Foundation should use this Promissory Note to buy shares issued by Broere Corporation Limited.

The exact terms and conditions of the issue of the shares and of my donation to The Broere Charitable Foundation shall be given to you within the next few weeks.

Would you please be so kind as to immediately notify me (C/o Servador S.A.) when you have received the Promissory Note.

With kind regards

Yours sincerely

Cornelis Broere".

- 9 The second document is a letter from Cornelis Broere dated 14th June, 1985, to the Trustees of both the BB Trust and the CB Trust. It is sufficient to state that it contains evidence of the dislike of Cornelis Broere for his nephew, Jacobus.

- 10 The trustees claim that these are privileged documents which Jacobus is not entitled to see. The evidence of Advocate Richard Jeune for the Trustees is that these documents were furnished by mistake and that there was no waiver of privilege in relation to them. The relevant part of Advocate Jeune's affidavit states: "I am aware of the large amount of documentation in the possession of the Trustees of the Bastiaan Broere Trust which is a Trust of long duration. I am also aware that representatives of Jacobus Broere have inspected many of these documents which facility has been furnished by the Trustees of the Bastiaan Broere Trust voluntarily. Some documents which referred to both the Bastiaan Broere Trust and the Cornelis Broere Trust were redacted and others which could not be redacted and/or which related to the Cornelis Broere Trust alone have been withheld. Unfortunately, and I am sure in large part due to the large amount of documentation involved, a mistake was made on the part of Maurant and Co Trustees Limited, whereby certain documents pertaining to the Cornelis Broere Trust were inadvertently copied for Jacobus Broere's advocates. There was no intention to waive privilege in relation to these documents. As I say they came into the possession of Jacobus Broere and his advisers through pure inadvertence on the part of Maurant & Co Trustees Limited. The documents which the Trustees of the Cornelis Broere Trust now seek to recover are those specified in the summons.
- 11 Unfortunately, the affidavit of Advocate Jeune is silent as to exactly when these documents were furnished to Jacobus' advisers and as to when the mistake was discovered by the Trustees. Both Counsel agreed that the process of disclosure of documents has been slow and had taken place between December 2000 and October 2002. The first document is referred to in the representation itself, and must therefore have been disclosed before the 18th July, 2002. The second document is exhibited to the long affidavit of Jacobus sworn on the 23rd October, 2002, and is likely therefore to have been disclosed some weeks before that. No protest was raised by the Trustees until mid-December, 2002, when the legal advisers of Jacobus were told that this summons was to be issued.
- 12 Counsel for Jacobus referred us to a passage from Matthews and Malek: Disclosure 2001 at paras 10.15 and 10.16:
- "It is clear that mere inclusion of a privilege document in the first part of the list of documents will not be treated as a waiver of privilege. If the document was mistakenly so included the Court will ordinarily permit the party whose document it is to amend the list at any time before inspection has taken place. But once inspection has taken place the general rule is that the privilege has gone and it is too late to correct the mistake, the substance of the document having been communicated to the other side, who with the Court's permission may give secondary evidence of those contents or otherwise make use of them. The position is a fortiori if copies have been supplied.*
- But, as has been seen, there have been circumstances in which the Court will not allow the opposing party to give secondary evidence or make use of privileged information which he has obtained. Thus where such circumstances occur in the context of an inspection of documents such as procuring inspection*

of the relevant document by fraud or realising the mistake on inspection but saying nothing; the Court will in effect allow the mistake to be corrected and refuse to permit the opposing party to use the privileged document.

The test is in two stages: (1) was it evident to the solicitors seeing privileged documents that a mistake had been made? (2) If not, would it have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as the result of a mistake? If the answer to either is “yes” then the Court would normally restrain the solicitor if he did not give the documents back and might restrain him from acting further, if he had read the documents and it was impossible for the advantage to be removed in any other way.”

- 13 We think that these are the appropriate principles to be applied in this jurisdiction. It is true, as submitted by counsel for the trustees, that in this case disclosure was made not as part of the process of discovery, but in compliance with a consent order following a summons issued by Jacobus.
- 14 In our judgement, however, this is a distinction without a difference. The position here is that disclosure has been made, the documents have been inspected, and copies have been supplied. It is too late to correct the mistake and the privilege, if it ever existed, has gone. Should, however, permission be accorded to Jacobus to use the documents? Two factors seem to us to be material. First the Trustees knew in June, 2002, at the latest, with regard to the first document, and in October, 2002, at the latest, with regard to the second document, that they had come into the hands of Jacobus. Yet no action was taken until the mid-December, to protest or to attempt to procure their return. Secondly, we have some doubt as to whether the documents are in fact subject to any privilege.
- 15 We were not addressed as to what privilege was said to be in question. This is not a case, as it was in [Matthews v Voisin & Co](#) (23rd October, 2001) Jersey Unreported; [2001/209], in which counsel for the trustees relied on legal professional privilege. However, on the assumption that some privilege does exist the documents are clearly relevant to the issues raised by the representation and to the relief sought by Jacobus. In the exercise of our discretion we give leave for the documents to be used by Jacobus. It follows that the second application must also be dismissed.