

ROYAL COURT
(Samedi Division)

81.

26th April, 1994

Before: The Deputy Bailiff and Jurats
The Hon. J.A.G. Coutanche and G. H. Hamon

In re a Settlement

Trusts (Jersey) Law, 1984

Application by Trustees for directions

Application by Beneficiaries for leave to Intervene

The extent to which trustees should disclose documents to beneficiaries to enable them to make submissions to the Court.

Advocate T.J. Le Cocq for the trustees
Advocate P.C. Sinel for the beneficiaries

JUDGMENT

THE DEPUTY BAILIFF: This is a summons for directions issued by Cititrust (Jersey) Limited under Article 47 of the Trusts (Jersey) Law, 1984 ("the Law") in relation to a settlement of which it is the trustee. Proceedings are in train involving the trustee and third parties and the trustee is seeking the guidance of the court. Mr. Sinel, on behalf of the beneficiaries of that settlement, is seeking leave to intervene and to be heard in relation to the summons. Although argument was heard *in camera*, this judgment is being given in open court at the request of Counsel on the ground that the Court's ruling might offer some guidance to trustees generally.

Although many applications have been made to the Court under Article 47 of the Law, this appears to be the first in which beneficiaries have sought leave to intervene and to be heard independently of the trustee. The questions for the Court are whether leave should be granted, and if so, on what terms as to the disclosure of documents by the trustee to the beneficiaries.

The relevant part of Article 47 of the Law is in the

" Applications to and certain powers of the Court.

- (1) A trustee may apply to the Court for direction concerning the manner in which he may or should act in connection with any matter concerning the trust and the Court may make such order, if any, as it thinks fit.

- (2) The Court may, if it thinks fit -
 - (a) make an order concerning -
 - (i) the execution or the administration of any trust; or
 - (ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into Court or otherwise; and
 - (iii) a beneficiary or any person having a connection with the trust;
 - (b) make a declaration as to the validity or the enforceability of a trust;
 - (c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration.

- (3) An application to the Court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee or a beneficiary, or, with leave of the Court by any other person.

....."

In support of his contention that leave should be granted to the beneficiaries to intervene, Mr. Sinel drew our particular attention to paragraph (3) which makes it clear that a beneficiary has the right to apply to the Court under this Article. If leave were refused, Mr. Sinel submitted, the beneficiaries would be entitled of their own motion to apply to the Court for directions. The Court would then be faced with duplicate proceedings in relation to the same issue. Mr. Sinel also drew our attention to the position in England. There, it is governed by Rules of Court. An application for directions of this kind is known as an

"administration action". Order 85 Rule 3(2) of the Rules of the Supreme Court provides:-

"(2) Notwithstanding anything in Order 15, Rule 4(2) and without prejudice to the powers of the Court under that Order, all the persons ... having a beneficial interest under the trust ... to which such an [administration] action ... relates need not be parties to the action; but the plaintiff may make such of those persons, whether all or any one or more of them, parties as, having regard to the nature of the relief or remedy claimed in the action, he thinks fit."

Order 15 Rule 4(2) provides that in general a person entitled jointly with the plaintiff to relief must be a party to the action.

Atkins' Encyclopaedia of Court Forms in Civil Proceedings, (2nd.Ed'n.) Volume 41, (1991), paragraph 24, however suggests that in practice, the beneficiaries should be made parties to an administration action.

"24. Approval of proposed transaction under Rules of Court.

An action may be brought for an order approving any ... compromise or other transaction by a person in his capacity as trustee. ... It is desirable that all the beneficiaries should be parties to such an application ..."

Mr. Sinel urged that the Court should take the opportunity of laying down the general rule that beneficiaries should be made parties to any application for directions made by a trustee under Article 47 of the Law.

In support of his contention that leave should be granted to intervene, Mr. Sinel cited Marley and others v. Mutual Security Merchant Bank and Trust Co. Ltd. [1991] 2 All ER 198, which is a Privy Council case on appeal from the Court of Appeal of Jamaica. The appeal concerned the estate of Bob Marley, the well-known composer and performer of reggae music, but the detailed facts are not relevant. The case was cited to us because it is clear from the report that the trustee of the estate issued an originating summons seeking directions to which all the beneficiaries were made parties. Counsel drew from that case the further submission that because an application for directions involves the surrender of the trustee's discretion to the Court, it was important for the Court to be widely addressed, that is for the Court to hear argument from every interested quarter.

Counsel for the beneficiaries next cited Butler v. Butler [1878] 7 Ch D 116. One of the issues in that case concerned the realisation of the security for a loan advanced by the trustees. The English court held that it would not direct a sale of the property in the absence of the *cestuis que trust*. James L J stated:

"I also agree with what Mr. Justice Fry is reported to have said, that with regard to the question of a trustee filing a bill to enforce a security, it is very difficult for one trustee to file a bill against another trustee to realise that security in the absence of the *cestuis que trust*, who might prefer to allow the money to remain. They have a right to be heard upon that question."

Finally, Mr. Sinel drew attention to Rule 6/29 of the Royal Court Rules 1992:

"At any stage of the proceedings in any cause or matter a Court may on such terms as it thinks just and either of its own motion or on application -

(a) ...

(b) order any of the following persons to be added as a party, namely -

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

But no person shall be added as a plaintiff without his consent signified in writing or in such other manner as the Court may direct".

Irrespective of that rule, Counsel submitted that the Court had in any event an inherent jurisdiction to allow his application and to permit the beneficiaries to be joined as respondents to the trustee's summons.

In reply, Mr. Le Cocq for the trustee did not oppose the application by the beneficiaries for leave to intervene. The trustee did not regard itself as being in an adversarial position *vis-à-vis* the beneficiaries. Counsel conceded, however, that the beneficiaries did not consider that their interests were being adequately represented by the trustee. He agreed that the Court had the power to order the joinder of the beneficiaries as parties to the summons. He urged however that the Court should not lay down any hard and fast rule about the joinder of beneficiaries as parties to summonses for directions issued by trustees under Article 47 of the Law. What was or appeared to be the practice in England was not necessarily appropriate here.

The Court agrees that it has a discretion to permit the joinder of one or more beneficiaries as parties to applications for directions made by trustees under Article 47 of the Law and proposes to exercise its jurisdiction in favour of the beneficiaries in this case. The Court is not however prepared to go so far as to decree that as a matter of practice the beneficiaries should always be joined as parties to such applications. Much will depend upon the circumstances surrounding the proposed application. It is true that the beneficiaries will usually be interested in the outcome of an application for directions; and the Court would be surprised if trustees did not generally take it upon themselves to consult with, or at least to apprise the principal beneficiaries of an intended application to the Court under Article 47 of the Law. If trustees are aware of any dissentient views amongst the beneficiaries, they would, of course, have a duty to draw such views to the attention of the Court. If the Court is to exercise the discretion surrendered by a trustee by virtue of its application for directions, the Court must be put in possession of all the relevant material which it requires to exercise that discretion. Such material would undoubtedly include any dissentient views expressed by a beneficiary. In such circumstances it is inconceivable that the Court would not wish to give any such beneficiary the opportunity of being heard in relation to the trustee's application. It would seem desirable, therefore, that a trustee should take steps to join any beneficiary who had expressed dissentient views or indeed who might be adversely affected by the proposed order.

We therefore grant leave to the beneficiaries to intervene and to be heard in relation to the trustee's application.

We turn now to the second question which is the extent to which the trustee should disclose documents to the beneficiaries so as to enable them to make submissions to the Court. Mr. Sinel submitted that the beneficiaries had a proprietary right to see all trust documents, but in particular were entitled to see the draft consent order, all documentation including affidavits relating to the trustee's applications for directions and

and the legal advisers for the third parties. He cited a dictum of Lord Parmoor in O'Rourke v. Darbishire [1920] AC 581 where his Lordship said:-

"A cestui que trust, in an action against his trustees, is generally entitled to the production for inspection of all documents relating to the affairs of the trust. It is not material for the present purposes whether this right is to be regarded as a paramount proprietary right in the cestui que trust, or as a right to be enforced under the law of discovery .."

And in the same case, Lord Wrenbury stated:

"If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all the trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. A proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust and the beneficiaries are entitled to see them because they are beneficiaries".

Mr. Sinel conceded, however, that these broad statements were distinguished by the English Court of Appeal in Re Londonderry's Settlement [1964] 3 All ER 855 to which we refer below.

Counsel also drew the Court's attention to Article 25 of the Law which is in the following terms:-

" **Article 25**

Trustee may refuse to make disclosure

Subject to the terms of the trust and subject to any order of the Court, a trustee shall not be required to disclose to any person, any document which -

- (a) discloses his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or**
- (b) discloses the reason for any particular exercise of such power or discretion or performance of duty or**

the material upon which such reasons shall or might have been based; or

- (c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or*
- (d) relates to or forms part of the accounts of the trust,*

unless, in a case to which sub-paragraph (d) applies that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust".

Counsel argued that the phrase "accounts of the trust" embraced virtually every document connected with the trust, and that the beneficiaries were therefore entitled to inspect them, not only as a matter of proprietary right but also as a matter of statutory right.

We do not think that it is necessary to determine whether or not the beneficiaries of a trust have a proprietary interest in trust documents, which in any event begs the question of what are trust documents. The fact is that as a matter of general principle, beneficiaries are entitled to see some documents relating to a trust but not others. We reject the argument that the phrase "accounts of the trust" embraces virtually every document connected with the trust which appears to us to negate paragraphs (a), (b) and (c) of Article 25. Those paragraphs make it clear that, subject to the terms of the trust and to any order of the Court, trustees are entitled to refuse to disclose matters touching upon the exercise of a power or discretion or the performance of a duty imposed upon them. In the context of discretionary trusts, it seems to us eminently sensible and reasonable that trustees should be able to weigh conflicting considerations as between different beneficiaries and to judge the merits and demerits of particular courses of action without being exposed to minute examination as to their motives and processes of reasoning at the instance of disaffected beneficiaries. Trustees of such a trust have been entrusted with a confidential rôle and should, in general, be permitted to exercise their functions away from the glare of publicity. Of course, if they are not acting in good faith, that is an entirely different matter. Finally, it might be added that if a settlor wishes to allow the beneficiaries to have unrestricted access to all the trustee's papers it is open to him to make specific provision to that effect in the trust deed.

But these general considerations are of limited assistance here where the Court is considering whether to order the trustee to disclose documentation relating to its application for

directions. Mr. Le Cocq for the trustee conceded that, if the beneficiaries were to be permitted to intervene, they must have sufficient information to make informed submissions. They should have a copy of the draft consent order and all the raw material before the trustee. That raw material would include all the documentation filed in connection with the proceedings between the trustee and the third parties, and copies of correspondence relating to those proceedings between the legal advisers to the trustee and the legal advisers to the third parties. He submitted however that the affidavits filed in connection with the applications for directions contained evidence of the trustee's process of reasoning which ought not to be disclosed, and did not contain any information which would not otherwise be released to the beneficiaries. In reply to that, Mr. Sinel submitted that the beneficiaries should be placed on an equal footing with the trustee. It would be extraordinary if during the hearing of the application the trustee were able to refer to documents which the Court would have but which were denied to the beneficiaries.

Both Counsel referred to Re Londonderry's Settlement [1964] 3 All ER 855. This was an application for directions where the trustees of a discretionary settlement had been requested by a beneficiary to supply copies of documents which the trustees considered they ought not, in the interests of the family as a whole, to furnish. On appeal by the trustees from an order of the judge to supply copies of certain documents, the English Court of Appeal held that a beneficiary's right to inspect trust documents did not extend to documents bearing upon the deliberations of the trustees leading to their decisions (taken in good faith) as to the exercise of discretionary powers, for those were decisions taken in a confidential rôle and the trustees were not bound to disclose their motives and reasons. The trustees were also not bound to disclose certain communications between individual trustees and appointors, nor communications between any of the trustees or appointors and an individual beneficiary. The Court of Appeal was reluctant, however, and we think rightly, to give the trustees in that case general directions. Danckwerts L J stated in the course of his judgment:

"It seems to me that it would have been far better that the matter should have been left until an action were started by a beneficiary who claimed to have a right to see particular documents and the Court would fairly face the problem whether the particular documents were ones which the trustees were bound to disclose to a particular beneficiary."

The principles set out in Re Londonderry's Settlement were approved by this Court in B.S.West, G.B.West, G.B.West, B.I. West, and M.M.West v. Lazard Brothers & Company (Jersey) Limited and Lazard Trustee Company (Channel Islands) Limited (1987 - 88) JLR 414 and Re Lombardo Settlement (5th December, 1990) Jersey Unreported. We endorse the reservation of the learned Deputy

contained in Re Londonderry's Settlement were not intended to be applied inflexibly and in all circumstances. However, they do afford general guidance and it seems to us that, with the application of common sense, the parties ought to be able to agree what documents should fairly be released to the beneficiaries to enable them to make fully informed submissions in relation to the trustee's application. It is to be noted that the trustee and the beneficiaries are, at any rate not yet, in an adversarial position. Furthermore, the good faith of the trustee is not impugned. We therefore propose to order the release of those documents which the trustee has indicated its willingness to release viz. the draft consent order, the documentation filed in connection with the proceedings involving the trustee and the third parties, and copies of correspondence relating to those proceedings between the respective legal advisers to the trustee and the third parties. We note the undertaking given by Counsel for the trustee to review most carefully the affidavits filed on behalf of the trustee in relation to the applications for directions to see whether the objections to their release in whole or in part should, in the light of this ruling, be maintained. In the event of continuing disagreement, we give liberty to either party to re-apply.

Authorities

- Trusts (Jersey) Law, 1984.
- R.S.C. (1993 Ed'n): O.85, r.3(2).
O.15, r.4(2).
- Royal Court Rules 1992: Rule 6/29.
- Atkins' Encyclopaedia of Court Forms in Civil proceedings (1991: 2nd Ed'n): vol. 41, para 24.
- Marley & Ors -v- Mutual Security Merchant Bank and Trust Company, Ltd.
[1991] 2 All ER 198.
- Butler -v- Butler [1878] 7Ch.D. 116.
- O'Rourke -v- Darbishire [1920] A.C. 581.
- in re Londonderry's Settlement; Peat & Ors. -v- Walsh [1964] 3 All ER 855.
- West -v- Lazard Brothers (1987-88) J.L.R. 414.
- In re Ezekiel's Settlement Trusts: National Provincial Bank -v- Hyam (1942) 1 Ch.D. 230.
- In re Earl of Strafford, dec'd; Royal Bank of Scotland -v- Byng & Ors. [1980] 1 Ch. 28.
- In re Earl of Radnor's Will Trusts (1890) 45 Ch. D. 402.
- Butler -v- Butler (1877) 7 Ch.D. 116 C.A.
- Smith & Ors. -v- Croft & ors. (1986) 2 All ER 551.
- re Moritz, dec'd; Midland Bank Executor and Trust Company -v- Forbes & Ors. (1959) 3 All ER 767.
- re Eaton, dec'd; Shaw -v- Midland Bank Executor & Trust Company & Ors. [1964] 3 All ER 229.
- 4 Halsbury 48: paras. 909-934 p.p. 502-519.
- Clore -v- Stype Trustees (Jersey) Ltd & Ors. (1984) JJ 13.
- 4 Halsbury 37: para. 226: p.p. 171-2.
- Midland Bank Trust Company & Anor. -v- Green & Ors. (1978) 3 AllER 555.