In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 136

BETWEEN:

DAVID LIONEL WINGATE

Plaintiff

-and-

BUTTERFIELD TRUST (BERMUDA) LIMITED

Defendant

JUDGMENT

Date of Hearing: 5 and 6 November 2007

Date of Judgment: 14 December 2007

Mr David Kessaram, Cox Hallett Wilkinson, for the Plaintiff

Mr John Riihiluoma, Appleby, for the Defendant

Introduction

1. These proceeding concern a trust which was settled by the plaintiff's father, Harold Hyam Wingate ("the Settlor"), on 26 March 1976. I will refer to this trust as "the Trust", and will refer to its pertinent provisions in due course.

2. The Settlor and his wife ("Minnie") had four children, one of whom, Nina, predeceased the Settlor. Nina's children are entitled to the interest which she had in the Trust. The Settlor's remaining children are Anthony, the plaintiff (to whom I will refer either as "David" or "the Plaintiff"), and Roger. Anthony is a retired teacher who has no issue, and Nina was a medical practitioner. Neither Anthony nor Nina's children have any interest in these proceedings. David was a physician, and is now retired, and Roger is or was a businessman.

3. The source of the Settlor's wealth which was settled in the Trust was a property company, Chesterfield Properties Limited ("Chesterfield") which was incorporated by the Settlor in November 1945 and floated on the London Stock Exchange in 1962. Chesterfield also owned subsidiaries which were involved in the entertainment industry.

4. The key provisions of the Trust deed, as recited in the statement of claim, were:

    (i) The Perpetuity Day was 21 years from the date of death of the last survivor of the descendants of King George V living on 26 March 1976. (In fact, the Trustee could declare an earlier day to be the Perpetuity Day, but that has not happened, and has no relevance at this stage).

    (ii) The income beneficiaries were the issue (including adopted children) of the Settlor's parents born before the Perpetuity Day, their spouses, widows and widowers, the Settlor's widow, any past or present Chesterfield employee, a foundation established by the Settlor and any charitable purpose. Minnie having died in 2004, the income beneficiaries in practical terms for the purpose of these proceedings are Anthony, Nina's children, David and Roger.

    (iii) The capital beneficiaries were the same as the income beneficiaries with the exception of Chesterfield employees. Again, in practical terms for the purpose of these proceedings, the capital beneficiaries are Anthony, Nina's children, David and Roger.

5. The Trust appointed Theodore S White and the defendant as original trustees. In fact the defendant has at all material times effectively been the sole trustee of the Trust, and I will refer to it as "the Trustee". Various of the Trustee's employees have dealt with the Trust over the years. In an affidavit sworn on behalf of the Trustee for the purpose of securing an extension of time within which to deliver its defence, Mr. Riihiluoma referred to the Trustee having had "a succession of trust officers dealing with the Trust", but he identified one person, David Nash, an English accountant, as an individual who had been involved with the Trust for a very long period of time and remained so involved. As well as having provided advice to the Trustee, Mr. Nash also advised various members of the Wingate family in their personal capacities over the years.

These Proceedings

6. The statement of claim recites that David has sought information from the Trustee in relation to the Trust since the mid 1980s, and that his London solicitors Farrer & Co have attempted to obtain information and documentation in relation to the Trust since late 2005. There have been extensive communications between Farrer

& Co and the Trustee since that time, with various Trust documentation and information having been supplied during that period. James Edmondson is the partner at Farrer & Co acting on David's behalf in relation to these proceedings, and in his second affidavit sworn on 26 October 2007, Mr. Edmondson referred to having been "drip-fed" information by the Trustee. Mr. Edmondson identified five categories of information which he described as "still inadequate", being information concerning

- the Trustee's fees and charges,
- ACT Entertainment Limited (the holding company which operated Chesterfield's entertainment division, hereafter "ACT Entertainment"),
- certain property development in New York in which the Trust participated, referred to as "the New York Transactions",
- distributions made from the Trust, and
- other miscellaneous matters.

7. The statement of claim makes detailed complaints in respect of the matters referred to above. The Plaintiff contends that the Trustee is in breach of trust in respect of

    (i) its failure to provide any or any reasonably sufficient information and / or documentation in relation to the Trustee's fees and expenses, ACT Entertainment, and the New York Transactions
    (ii) a failure to use reasonable care and skill or the prudence to be expected of a professional trustee in relation to ACT Entertainment, and
    (iii) its fees and disbursements.

    The Plaintiff then seeks an account from the Trustee in relation to all property which is or has been subject to the Trust, that the Trustee provide the Plaintiff with all information and documentation sought on his behalf, compensation, interest, the appointment of a replacement trustee, a representation order, and all necessary vesting and consequential orders and directions.

8. That is the position in relation to the statement of claim, to which the Trustee has filed a defence, and the Plaintiff in turn has filed a reply. However, the application before the Court is made by way of a summons dated 31 August 2007, in which orders are sought pursuant to Order 14 of the Rules of the Supreme Court 1985 ("RSC") by way of summary judgment, that the Trustee make disclosure by affidavit, exhibiting all material documents in relation to the New York Transactions, Chesterfield and ACT Entertainment, the Trustee's fees and

expenses, and the other matters contained in the letter written by Farrer & Co on David's behalf on 25 November 2005.

9. The summons originally sought an account on the basis of wilful default in respect of Chesterfield and ACT Entertainment. However, in its written submissions filed on David's behalf, Cox Hallett Wilkinson indicated that in light of the affidavit sworn by Graham Jack, the Trustee's managing director, on 3 October 2007, it was now willing to include ACT Entertainment in the common form account and not to seek summary judgment for an account on the footing of wilful default. In relation to the common form account, David seeks an order pursuant to Order 43 rule 1 RSC of all other property that had come into the hands of the Trustee as trustee of the Trust.

The Trustee's Fees and Expenses

10. I will deal with this aspect of matters at this stage because of the manner in which events developed during the course of the hearing. In his second affidavit, Mr. Edmondson maintained his complaints as to the inadequacy of the information furnished by the Trustee in relation to the charges it had made. Particularly, he referred to the affidavit which Mr. Jack had sworn, in which he had said no more than that the Trustee's fees "have been based upon its standard scale which is in accordance with the market rates in Bermuda". Mr. Edmondson complained that Mr. Jack at that point had not even provided the Trustee's terms and conditions for the relevant years, and of course one has to bear in mind that before 2000 the Trustee apparently did not charge trustee fees per se, but received its compensation through "corporate administration fees", presumably charged to the companies owned by the Trust. Mr. Edmondson then pointed out that the accounts of the six principal companies held by the Trust between 1976 and 2004 showed that total fees had been paid in the sum of US $4.7 million, but that it was impossible to say what proportion of this figure had been paid to the Trustee or companies related to it. He continued to press for the Trustee's published terms and conditions in respect of all years over which it had taken trustee fees from the Trust, together with a breakdown of the manner in which trustee fees had been calculated between 2000 and 2004, as well as a breakdown of other fees which the Trustee or its subsidiaries or affiliates had recovered from the Trust, together with information as to whether such fees were in line with the Trustee's standard charges.

11. This caused Appleby, on behalf of the Trustee, to write a letter to Cox Hallett Wilkinson dated 2 November 2007, which enclosed the Trustee's published fee schedule as at January 2004. More significantly, the Trustee indicated that if David's advisors wished to inspect and copy invoices in respect of the Trust disbursements and expenses, those documents would be made available for

inspection and could be copied. That letter and Mr. Riihiluoma's undertaking that the Trustee would endeavour to provide all relevant documents essentially led to this aspect of matters being resolved. It would be premature to say that there was agreement between the parties in relation to it, but in light of the Trustee's willingness to make all documents relating to fees available to David's advisors, matters were left on the basis that counsel would endeavour to agree a form of words covering the issue, and so far as the Court is concerned, that aspect of matters can be regarded as resolved, no doubt with liberty to apply in the event that the exercise of inspection and copying leaves unanswered questions so far as David's advisors are concerned.

The Issues on the Summons

12. As I have said, there have been substantial requests for information and documentation made on David's behalf in relation to the Trustee's stewardship of the Trust, and the starting point in relation to a determination of what information and documentation ought to be provided is to examine the issues between the parties, and take a view in relation to those issues. It may well be that once that has been done, it will be possible for counsel to reach agreement as to the position. Certainly, towards the conclusion of the argument, when Mr. Kessaram was reviewing the provisions of the draft order attached to his written submissions, it was recognised that circulation of a judgment in draft might well lead to agreement on the detail.

The Ordering of an Account in Common Form

13. During the course of argument Mr. Kessaram for the Plaintiff appeared at various times to equate the request for an account in common form with the provision of information which had been the subject of repeated requests, dating, according to Mr. Edmondson, from 2001, and culminating in the comprehensive letter sent by Mr. Edmondson to the Trustee dated 25 November 2005. That letter essentially sought specific information and documentation, as opposed to a common form account. By the time this application came on for hearing, the application for the common form account came first, and the request for outstanding information followed. In relation to the request for a common form account, detailing what had been received by the Trust, what had been paid out and distributed, and what was left, counsel for the Plaintiff put matters on the basis that any beneficiary was entitled to see trust accounts, that it was not necessary to establish a breach of trust for this to be ordered, and that the trust relationship was sufficient to give the beneficiary the necessary entitlement.

14. For the Trustee, Mr. Riihiluoma drew a distinction between the ability to obtain trust documents (that is to say existing trust documents), which he accepted the

Court could order at the request of a discretionary beneficiary in appropriate circumstances, and the jurisdiction to order an accounting in common form, which he submitted arose on an entirely separate basis. He argued that a fundamental feature of an entitlement to an account was the applicant's proprietary interest in the funds held by the accounting party. Here, submitted Mr. Riihiluoma, the Plaintiff had no such proprietary interest, and hence no entitlement. These submissions were made separate and apart from Mr. Riihiluoma's submissions in relation to limitation and the inappropriateness of making such orders on a summary judgment application. I will return to those issues in due course. In terms of the need for an account in common form, Mr. Riihiluoma submitted that that was unnecessary at this stage, because following delivery of the remaining accounts the Plaintiff would have all the information that he could reasonably expect in regard to the Trustee's stewardship of the Trust. He said that the questions asked by the Plaintiff will not be answered by an account in common form, and that the preparation of a 30 year common account was not just unnecessary, but "a monstrous task". He maintained that production of a common form account would make the Plaintiff and his advisors none the wiser than they are now.

15. Mr. Riihiluoma did go on to acknowledge that it may well be that the documents which the Plaintiff seeks now will be discoverable in relation to the breach of trust claim in due course, but he maintained that it is a point of principle for the Trustee to maintain such defences as are available to it in respect of any order made by the Court in the exercise of its discretion at this stage. In that regard, Mr. Riihiluoma submitted that a discretionary beneficiary can receive copies of trust accounts or trust documents, but said that the line was drawn at documents relating to the management of a trust and the transactional business of that trust.

Review of Authorities

16. As part of the Plaintiff's submissions in relation to a beneficiary's right to an accounting in common form, the Plaintiff relied upon *Armitage –v- Nurse* [1998] Ch 241. That case is no doubt helpful when the Court comes to consider the applicability of limitation defences, but it seems to me to provide limited support for the Plaintiff's contention, which in essence has to be that a discretionary beneficiary is entitled by virtue of that status to an order for a common form account. In *Armitage –v- Nurse*, Millett L.J. commented (at page 261) that:

> "Every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not."

But that seems to me to be a reference to the production of such accounts as a trustee may have prepared, as opposed to an order for an account in common form to be given.

17. No doubt part of the problem in this case lies in the fact that the Trustee did not prepare trust accounts in the traditional way. Because all (or almost all) of the Trust's activities were undertaken through corporate entities owned by the Trust, the Trustee took the view that its duties in relation to the preparation of trust accounts were sufficiently discharged by the preparation of accounts for those companies through which the activities of the Trust had been undertaken. When Mr. Edmondson on behalf of the Plaintiff started pressing for trust accounts, the Trustee undertook an exercise of preparing trust accounts, and produced an eleven page document purporting to represent trust accounts from the inception of the Trust in 1976 to 31 December 2005. Mr. Edmondson in his first affidavit described these accounts (prepared by Deloitte & Touche and described by that firm as "unaudited financial information") as being of minimal help to the reader attempting to identify how that the Trust had operated over the period in question. I agree. No doubt these accounts were prepared at some significant expense, but for my part, like Mr. Edmondson, I did not find them to be helpful in understanding how the Trust had in fact operated. Neither can they be relied upon as completely accurate, given that Deloitte & Touche noted that approximately 15 years of bank statements were missing.

18. So it does not seem to me that *Armitage –v- Nurse* furnishes authority for the proposition that a discretionary beneficiary is entitled to a common form account, as opposed to production of such trust accounts as a trustee may have prepared. It may be that the Court retains discretion to make such an order, as part of its inherent jurisdiction to supervise that administration of a trust, but that is a different proposition than the one for which the Plaintiff contended.

19. The case of *Schmidt –v- Rosewood Trust Ltd* [2003] 2 AC 709 was a case where the Privy Council considered applications by a discretionary beneficiary for disclosure of trust accounts and information concerning trust assets. There are two passages of general application in the judgment of the Board delivered by Lord Walker of Gestingthorpe to which I would refer; first (at page 724):

> "It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust."

And (at page 729):

> "Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he make seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion."

20. It does seem to me that the basis for a court to order an account in common form at the behest of a discretionary beneficiary must be undertaken on the basis of the court's discretion, on a consideration of all the relevant facts, where the court comes to the view that such is necessary in a context of the court's jurisdiction to supervise the administration of a trust.

21. I was also referred to the case of *Foreman –v- Kingstone* [2004] 1 NZLR 841, a case in which the Auckland High Court considered the duties of a trustee to disclose documentation and information to discretionary beneficiaries. At paragraph 81, the court held:

> "The principal issue determined by the Privy Council in *Schmidt* was that a beneficiary's access to trust documents rests not on an equitable proprietary interest in trust property, but should be approached as an aspect of the Court's inherent jurisdiction to supervise the administration of trusts. It removed any distinction between beneficiaries with an equitable interest, and discretionary beneficiaries and those who are the object of a mere power. Thus the plaintiffs as discretionary beneficiaries or objects of a mere power are not disentitled to disclosure because they cannot claim a proprietary interest in the trusts."

And at paragraph 89:

> "Approached as a matter of principle, the entitlement of beneficiaries to disclosure of trust documents pursuant to the trustees' fundamental obligation to be accountable to beneficiaries, must be measured against another fundamental principle that the autonomy of trustees and the

> exercise of their discretions under the trust instrument must be ensured. Hence, trustees are not obliged to disclose to beneficiaries their *reasons* for exercising their discretionary power (*Re Londonderry's Settlement*)."

22. Mr. Riihiluoma also referred the Court to the Australian case of *Glazier Holdings Pty Ltd –v- Australian Men's Health Pty Ltd* [2001] NSWSC 6. In this case, Austin J. set out the distinction between an order for an account of administration in common form, and an order for an account of administration on the basis of wilful default. There was nothing in the judgment of Austin J. which I felt took matters further than the judgments in *Schmidt* and *Foreman*, the former of which is of course binding on this Court.

Disclosure on a Summary Judgment Application

23. Before turning to the issue of limitation, and then to the exercise of the Court's discretion, it is convenient to deal first with the threshold question of whether it is possible for the Court to make the orders sought at this stage of the proceedings.

24. In this regard, Mr. Kessaram essentially said no more than that the relief sought should be ordered now, without descending into the detail as to the test to be applied to disclosure in the context of a summary judgment application, as compared to a full hearing. Mr. Riihiluoma, on the other hand, did seek to draw a distinction between orders made at the Order 14 stage of proceedings, when compared with orders made at trial at the end of the day. He reminded the Court of the relevant test in relation to summary judgment applications, and cited by way of example the position in regard to a limitation defence, where he said that the stage of the proceedings had relevance. He referred to the case of *Ronex Properties –v- John Laing* [1983] 1 QB 398 as authority for the proposition that it is only in the clearest of cases that a claim can be struck out on limitation grounds, and argued that the same principle operated in respect of limitation, to the effect that a limitation defence and its equitable equivalent were not matters for summary judgment.

25. Given that *Schmidt* makes it clear that the right to seek disclosure of trust documents is but one aspect of the Court's inherent jurisdiction to supervise (and if necessary to intervene in) the administration of trusts, it seems to me that the sensible starting point is to consider the procedural route followed in *Schmidt* and the other cases to which I was referred. In *Schmidt*, it was contended that the court's jurisdiction to order disclosure could be exercised under Order 41 of the Rules of the High Court of Justice of the Isle of Man 1952, which rule was the equivalent of Order 85 RSC. The petitioner in the Isle of Man proceedings was the son of the co-settlor of two Isle of Man settlements, of which the sole trustee

was Rosewood Trust Limited ("Rosewood"). He commenced proceedings in June 1998 in the Isle of Man against Rosewood, alleging breach of trust and breach of fiduciary duty. He obtained an ex parte order, subsequently varied by consent, and it is of note that that order apparently provided for "extensive disclosure of information" - see paragraph 5 of Lord Walker's judgment. The petitioner then commenced a second set of proceedings, in which he contended that the disclosure made to him pursuant to the ex parte order in the 1998 proceedings "raised more questions than it answered". He sought fuller disclosure of trust accounts and information about the trust assets by virtue of the discretionary interests or expectations which he claimed. Those proceedings were apparently attacked by Rosewood as being an abuse of process, but that submission was rejected at first instance and not pursued on appeal.

26. So it is clear that orders for extensive disclosure were made in the *Schmidt* case on application supported by affidavit, much as has happened in the case before me, although in *Schmidt* the disclosure was not ordered on the basis of a summary judgment application, but on an interlocutory basis in the context of the court's supervisory jurisdiction in relation to the administration of a trust.

27. In *Foreman*, the proceedings were taken under the provisions of the New Zealand Trustee Act 1956, in which the plaintiffs sought information and documentation, and the parties agreed a question for preliminary determination by the court pursuant to the relevant provision of the New Zealand High Court Rules. And in *Armitage –v- Nurse*, the questions before the court were dealt with on the trial of preliminary issues in an action for breach of trust.

28. It does seem to me that the Plaintiff may have taken on a greater burden than necessary in making his application in the context of a summary judgment application, but it also seems to me to be right that he should not be prevented from securing relief to which he might otherwise be entitled by reason of the particular procedure followed, on the basis of an argument that the issue should be approached with the strict principles of Order 14 RSC in mind. Clearly, the Court does have jurisdiction to make orders for disclosure in the exercise of its supervisory jurisdiction in the administration of a trust, and to do so on an interlocutory basis. In those circumstances, it seems to me to be right to deal with matters on such basis, and not to penalise the Plaintiff for any procedural error which he might have made (and I see no reason to decide whether he has in fact done so). I would propose to treat the application as if regularly made on an interlocutory basis, inviting the Court to exercise the supervisory jurisdiction which it clearly has.

Limitation

29. Much of the argument before me turned on the apparent conflict between two authorities, each of which considered the judgment of Millett L.J. in *Armitage –v- Nurse* with some care, and concentrated on a passage in Millett L.J.'s judgment at page 261, and with particular regard to the last sentence of that passage. The passage is in the following terms:

> "the respondents submit that the policy to which section 21 (3) of the Act of 1980 (and this is in similar terms to the provisions of section 23 (3) of the Bermuda Limitation Act 1984) gives effect is that it would be unfair to bar a plaintiff from bringing a claim unless and until he is a full age and entitled to see the trust documents and so has the means of discovering the injury to his beneficial interest. The difficulty with this argument, in my judgment, is that it proves too much. Every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not. The rationale of section 21 (3) appears to me to be different. It is not that a beneficiary with a future interest has not the means of discovery, but that he should not be compelled to litigate (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy. Similar reasoning would apply to exclude a person who is merely the object of a discretionary trust or power which may never be exercised in his favour."

The two cases in question are *Johns –v- Johns* [2005] WTLR 529, a judgment of the Court of Appeal of New Zealand, and *Lemos –v- Coutts (Cayman) Limited* [2006] 9 ITELR 616, a judgment of the Court of Appeal of the Cayman Islands.

30. With all respect to counsel, it does not seem to me to be either necessary or productive for me to review these conflicting authorities and take a view as to which correctly deals with the limitation defence, with particular reference to the proviso to section 23 (3) of the Limitation Act 1984. I say this because both of these cases were concerned with claims for breach of trust and breach of fiduciary duty, which meant that it was necessary to determine the nature of the interest of the discretionary beneficiary claimant in order to make a determination as to whether that claimant's claims were statute barred. While it is the case that claims for breach of trust have been made in these proceedings, those claims are not presently before me for determination, and I am concerned only with the questions of whether to order an account in common form, and/or whether to order disclosure of the information and documentation sought. Mr. Riihiluoma

submitted that if an account (and in this context I draw no distinction between an account in common form and the disclosure of information and documentation) was being sought to "found a springboard" for the pursuit of claims arising from the New York Transactions or ACT Entertainment, that involved a "sterile exercise" which would nonetheless be expensive for the Trustee.

31. I do not regard the production of information and documentation as involving a sterile exercise, and I would not decline to make the orders sought solely on limitation grounds, even if a limitation defence would ultimately defeat a claim based on breach of trust. I therefore turn to consider whether the Court in the exercise of its discretion should make the orders sought on behalf of the Plaintiff.

The Exercise of the Court's Discretion

32. At this point it is no doubt relevant to set out a little more detail as to the nature of David's interest. In this regard it is to be noted that it had been the Trustee's intention to proceed to a final distribution of the Trust property (see paragraph 14 of Mr. Jack's affidavit), and in this context Mr. Nash on behalf of the Trustee had sent Mr. Edmondson a letter dated 6 March 2007 which set out what the Trustee was said to have thought to be as equitable a distribution to the beneficiaries as was possible. Mr. Jack said (paragraph 33 of his affidavit) that the final distribution proposal "sought to achieve a broad equality between the principal beneficiaries based upon the amount available for distribution less the amount already received by way of distribution". This final distribution proposal was said by Mr. Jack to be in the best financial and tax interest of the current beneficiaries, and he indicated that all of the beneficiaries, including the Plaintiff, had confirmed that the proposal was advantageous. However, Mr. Jack carried on to say that the Plaintiff's complaints had delayed the final distribution.

33. As part of the distributions which had already been made to the beneficiaries, the Trustee had acquired (for the benefit of, at least, the Settlor's children) what Mr. Jack described as "handsome residences which have significantly increased in value". So in practical terms, no matter what their status is as beneficiaries, the Settlor's children (and in the case of Nina, her children) have been the only beneficiaries (apart from Minnie), and when the final distribution proposal is put into effect that will remain the case. And the Trustee acknowledged in its written submissions that the Settlor's children and their issue could be considered the principal beneficiaries of the Trust.

34. It seems to me that that is a highly significant factor when considering how the Court should rule on the Plaintiff's requests for information and documentation. Mr. Kessaram, in his written submissions, submitted that the Plaintiff was a primary beneficiary, an income beneficiary and a capital beneficiary, meaning

that he is one of a class entitled to receive income so far as not distributed and is entitled in default of appointment to a share in capital upon termination of the Trust. He carried on to point out that under the final distribution proposal made by the Trustee for winding up the Trust, the Plaintiff would receive a substantial distribution, and he then carried on to say, "if the Court's discretion were not exercised in favour of so significant a beneficiary, it is difficult to see in whose favour it could be exercised".

35. I agree. It seems to me that someone in the position of the Plaintiff is entitled to have reasonable questions answered. I will therefore now consider whether it is appropriate to grant the particular orders sought, in the exercise of my discretion given the particular facts of this case.

The Reasonableness of the Information and Documentation Sought

36. As indicated in paragraph 7, the information and documentation sought essentially falls into five categories, and I would propose to deal firstly with the issue of the Trustee's fees and other charges, even though that aspect of matters has been the subject of provisional agreement. The reason that I make reference to this issue is because I regard Mr. Jack's response to Mr. Edmondson's enquiries on this issue as having been wholly inadequate. In his first affidavit, Mr. Edmondson made the point that no proper breakdown of fees had ever been provided to the Plaintiff. Given that there did not appear to be any issue between the parties as to the Trustee's obligation to demonstrate that fees had been charged at proper rates, it is surprising, to say the least, that Mr. Jack chose in his reply affidavit to say no more than that the Trustee's fees were charged "upon its standard scale which is in accordance with the market rates in Bermuda", without saying what that scale was, and that third parties' fees and expenses were charged at market rates. Even the letter sent by Appleby dated 2 November 2007, which enclosed the Trustee's published fee schedule, could not have helped the Plaintiff work out whether fees had been charged at proper rates. The published fee schedule showed a charge based on the value of the assets held in trust, so that to determine whether fees had been charged at proper levels, one needed a statement of the value of the Trust assets at the time when the Trustee's charges were made. I note that in its written submissions, the Trustee commented that in making its offer, it did not accept that an order for an account in common form would allow "this level of detail and back up information." With respect to the Trustee, in relation to the issue of the Trustee's fees, the necessary level of detail has thus far been completely absent, and had there not been settlement on this issue, I would not have hesitated to make an order requiring that level of detail and back up information. As I have said, hopefully that aspect of matters will now be resolved by agreement, but in my view the Trustee's approach to this issue was singularly unhelpful.

37. Another matter which may well be resolved is the question of the payments made by the Trustee to Minnie, to which Mr. Jack referred at the end of paragraph 13 of his affidavit. That in turn led Mr. Edmondson to comment that this distribution (of sums amounting to £4.5 million) was not referred to in the Trust accounts, and no deed of appointment had been provided to the Plaintiff evidencing these distributions. Mr. Riihiluoma said in the course of his submissions that there was an explanation in relation to Mr. Edmondson's queries, that the distributions had taken place at the time of re-settlement (which took place in 1981), and that he would make the explanation and/or documentation available to Mr. Kessaram. It may well be that the explanation to be provided will satisfy the Plaintiff, but again I did not find that Trustee's manner of dealing with these matters to have been a helpful one, particularly when the Trustee had said that all or almost all of the Trust's activity had taken place in the underlying companies owned by the Trust, and the accounts of those companies did not show the distributions in question.

38. The position is perhaps less clear in relation to the New York Transactions and ACT Entertainment, but in regard to these matters, the answers which have been given by the Trustee to the Plaintiff's questions have only led, quite understandably, to further questions being asked. At the root of the Plaintiff's queries on the New York Transactions are the events of late 1980. By this time the Settlor had died, and Minnie had expressed a wish, in mid November 1980, that the Trust's participation in a development at 50 Broadway, New York, which had been undertaken by the Trust through a company named Bleadon Incorporated NV ("Bleadon") should be transferred to Roger. Bleadon was duly transferred to Roger, apparently in return for a refund of the sum of $600,000 which had been the capital put into the venture on behalf of the Trust. There are questions raised as to how and when the $600,000 payment by Roger was made and the transfer of the Bleadon shares to him effected, and whether this represented a distribution to Roger. In this regard, there are also issues arising from the fact that payments were made to Bleadon before the end of 1980 representing profit from the venture amounting to some $2,860,000. In these circumstances, I do not find it at all surprising that questions should be raised in relation to the accounts of Bleadon and the valuation put on the Trust's interest at the time of its transfer to Roger. Other questions arise in relation to the New York Transactions which merit responses from the Trustee.

39. Then there are the questions raised in relation to ACT Entertainment. Again, some of the information given naturally leads to further questions being raised. The Trust had only a 14% interest in Chesterfield at the time of the sale of that company, yet it was the Trust which acquired the entirety of ACT Entertainment because the purchaser of Chesterfield did not wish to retain it. ACT Entertainment then consistently lost money, and consequently value, until it was

transferred to Roger, who had been involved in its management. However, even in relation to that transfer, questions arise as to whether assets had been stripped out of the holding company before the transfer. And the fact is, as Mr. Jack accepted, that by the time ACT Entertainment was distributed to Roger in late 2005 it was "essentially worthless".

40. There are other questions raised in relation to the administration of the Trust which in my view merit a response in terms of production of the relevant document or documents. In summary, it seems to me that the questions which have been raised on behalf of the Plaintiff in relation to these various matters are entirely reasonable, and of the type which the Court in the exercise of its supervisory jurisdiction should require the Trustee to answer. The Trustee's defence (paragraph 51) avers that the Trustee has provided the Plaintiff and his advisors with all information he is entitled to and which is available to the Trustee. As the written submissions for the Plaintiff rightly point out, this plea elides two quite different points. And if it is the case that the Trustee does not have a particular document or piece of information, it can say so.

41. I next refer to Mr. Riihiluoma's submission that a distinction is to be drawn between trust accounts or documents, and documents relating to the management and transactional business of a trust. Mr. Riihiluoma did not furnish authority for this proposition. In *Schmidt*, the court was primarily concerned with the status of the enquiring beneficiary, but there are extensive references in the judgment to disclosure of information in the form of unredacted documents and information, and I can find nothing in the judgment to warrant an inference that disclosure does not relate to documents produced in the course of the management of a trust or in relation to a particular trust transaction. But Lord Walker did refer (paragraph 65) to the fact that neither side had sought to distinguish between trust documents and documents relating to the affairs of a company controlled by the trustees. I take the words "trust documents" to cover any document produced in the course of the administration of the particular trust, and not to be circumscribed as contended for by Mr. Riihiluoma.

An Account in Common Form

42. As I said earlier, Mr. Edmondson's letter to the Trustee of 25 November 2005 sought specific information and documentation, as opposed to a common form account. I do not regard the ordering of an account in common form as being a remotely productive exercise in relation to the Trust. It may or may not be that Mr. Riihiluoma is right when he says that the production of a common account would make the Plaintiff and his advisors none the wiser than they are now, but I cannot see it providing any more assistance to the Plaintiff than an order for disclosure of information and documentation, and it would no doubt be an

extremely expensive exercise (as I suspect the preparation of the Trust accounts was), which would not be justified in terms of the benefit to be gained from the exercise.

The Appropriate Form of Order

43. In regard to the provision of information and documentation, the draft order attached to the Plaintiff's submissions included a schedule which as I understood it summarised the Plaintiff's position in relation to the outstanding information and documentation. I have not gone back over the documentation and information requested and that produced, on the basis that I expect that the parties and counsel will be able to conduct that exercise without difficulty. I therefore make an order in principle for disclosure of the documentation and information set out in clauses 1 to 5 and 9 to 20 of the schedule to the draft order. Paragraphs 6 to 8 are covered by the provisional agreement reached in relation to fees and disbursements. I wish it to be clearly understood that in respect of requests for documentation, my order covers only existing documentation. I do not impose an obligation on the Trustee to produce documents (for instance, up to date accounts) which the Trust has not thus far produced in the course of its administration of the Trust or its underlying companies. Given the broad way in which I have dealt with this aspect of matters, I do think it is appropriate to give to the Trustee liberty to apply, in the event that it takes the view that production of any particular document or piece of information is unduly onerous, and I so order.

Distribution Delayed

44. One of the points made on behalf of the Plaintiff is that there is no justification for the Trustee's view, as expressed by Mr. Jack, that the Plaintiff's complaints have delayed the final distribution of the Trust. Farrer & Co have said in terms on the Plaintiff's behalf that he did not wish to hold up the proposed distribution of the Trust. One can readily see that the Trustee would not wish to wind up the Trust in its entirety while there remained the possibility of work being undertaken and fees being incurred. But I would have thought that it should be possible to settle on an appropriate level of reserve, and to proceed with a substantial portion of the proposed distribution. That is not said by way of making any finding or order; it simply expresses a view, and it remains a matter for the Trustee to proceed as it may be advised in relation to this aspect of matters.

Representation Order

45. This issue was raised in the submissions, but does not in fact appear to be a part of the summons. As I understand the position, the Plaintiff sought a representation order on the basis that this was needed if he were to be successful in his

application for an order for an account in common form, so as to bind the other beneficiaries. In the event, I have declined to make an order for an account, so that the need for a representation order falls away.

Costs

46. I note the position taken on behalf the Plaintiff in written submissions, and in any event would regard it as appropriate for me to hear counsel in regard to the issue of costs.

Dated the 14th of December 2007.

_____

Hon. Geoffrey R. Bell
Puisne Judge