In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 349

IN THE MATTER OF THE CAPRICORN TRUST
AND IN THE MATTER OF THE AQUARIUS TRUST
AND IN THE MATTER OF THE TRUSTEE ACT

BETWEEN:

ORCONSULT LIMITED
(As Trustee of the Capricorn Trust and Aquarius Trust)

Plaintiff

-and-

(1) CLARISSA BLICKLE
(2) CEDRICK BLICKLE
(3) HER MAJESTY'S ATTORNEY GENERAL
(4) VISTRA TRUST COMPANY (JERSEY) LIMITED
(As Trustee of the Alsam Settlement, the Colleen Settlement and the Logany Settlement)
(5) HOLGER BLICKLE
(6) MAYTOWN UNIVERSAL SA
(7) PLYMPTON UNIVERSAL SA
(8) PENNY ASSET AG
(9) ALSAM HOLDING AG
(10) COLLEEN INVESTMENT AG
(11) LOGANY EQUITY AG
(12) CLARICK AG
(13) VIERWALDSTATTER BETEILIGUNGEN AG
(14) COLLEEN LLC
(15) LOGANY LLC
(16) WILLIAM TACON
(As receiver of Maytown Universal SA and Plympton Universal SA)

Defendants

Date/s of Hearing: June 10-11, 2008
Date of Judgment: June 18, 2008

Mr. Alan Boyle QC of Counsel and Mr. Craig Rothwell of Cox Hallett Wilkinson, for the Plaintiff
Mr. John Riihiluoma of Appleby, for the 1st-2nd Defendant
Mr. Rod Attride-Stirling of Attride-Stirling & Woloniecki, for the 5th Defendant

RULING

Introductory

1. The Plaintiff ("Orconsult") is the Trustee of two Bermudian trusts settled on December 2, 1999 and known as the Aquarius and Capricorn Trusts. Orconsult has been described as a special purpose vehicle, because it was apparently incorporated for the specific purpose of providing trustee services to Trusts apparently established to hold and manage assets worth in excess of $100 million. Its principals admittedly had no prior experience of managing a Bermudian or even an "Anglo-Saxon" trust. They now believe that the principal behind the corporate Protector from whom they took their instructions, Dr. Stoffel, has defrauded the Trusts of assets worth over US$13.8 million.

2. Orconsult applies to this Court for directions in relation to a "momentous" decision. It seeks approval for its decision to transfer the assets of both Bermuda Trusts to the Trustee of three Jersey Trusts, Vistra Trust Company (Jersey Ltd.) ("Vistra"). This decision is supported by all interested parties who appeared on the present application. It will resolve the need to determine the obviously complex and costly issues in separate proceedings brought by Vistra for a declaration that the assets of the Bermuda Trusts are in fact held by the Jersey Trusts. The two main beneficiaries of both sets of Trusts seek to support the validity of the Jersey Trusts. Their father, who in the past had raised doubts surrounding the validity of the establishment of at least two of the Jersey Trusts, supports the transfer while reserving his rights as to the validity of the Jersey Trusts.

3. Argument centred on whether Orconsult is entitled to retain sufficient monies (Euros 3 million) as a secured indemnity for itself in respect of (a) costs incurred in disclosing information about the suspected fraud to the beneficiaries; and (b) future costs of defending pending Swiss arbitration proceedings to which Orconsult, as Trustee of the Bermuda Trusts, has been made a defendant. It was sensibly conceded by Mr. Riihiluoma that costs incurred by the Trustee in these and related Bermuda proceedings were properly incurred.

The Trusts

4. Clause 10 of each Trust appears to indemnify the Trustee from liability for any losses occurring from mistakes or omissions "*made in good faith*" (clause 10(a)(ii)). Although this provision is not directly in point, it is noteworthy that where the Trustee is dismissed or ceases to be Trustee for any reason, it is not required to transfer any assets until all outstanding amounts due are paid and an indemnity is given in respect of future liabilities (clause 10(c)).

5. Clause 19 provides:

> "*The Trustees shall have the power to pay out of the Trust Fund all expenses of whatever nature incidental to the creation and administration of the Settlement.*"

6. Unsurprisingly, the Trust Deeds are silent on the right to an indemnity if all the trust assets are transferred in circumstances where the Trustee remains in office. The present circumstances are exceptional indeed. Regard must be had to general principles of trust law in order to determine the legal principles applicable to the indemnity issues which fall for determination.

Key legal principles

7. Section 22 of the Trustee Act 1975 provides as follows:

"**Implied indemnity of trustees**

22 (1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for those of any bank, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

(2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers."

8. Although the scope of the implied indemnity provided for under section 22(1) may perhaps be modified by the Trust Deeds (so that breach of trust requires proof of only bad faith and not "*wilful default*"), there is no suggestion that the right to reimbursement in respect of expenses has in any way been diluted by clause 19. I accept Mr. Boyle's submission that the only circumstances in which expenses which would otherwise fall within section 22(1) or clause 19 are not recoverable by a trustee is where the right to an indemnity is extinguished by a proven breach of trust: *In re Chennel* (1877) 8 Ch.D 492 at 502-503. This does not oust the jurisdiction of the Court in the context of an application for approval of specific expenses to satisfy itself that the relevant expenses were in fact incurred on behalf of the relevant trust.

9. I accept Mr. Riihiluoma's submission that in one context the Court does have a discretion when considering a reimbursement approval request, namely in the context of considering whether a trustee is entitled to recover the costs of legal proceedings. However, the usual rule is that the trustee should receive his costs out of the trust fund if he has acted properly in participating in the proceedings: *Merry-v-Pownell* [1898]1 Ch 306. I reject any wider proposition to the effect

that the general indemnity in respect of expenses is not a positive entitlement but subject to the discretion of this Court.

10. I also find as a matter of law that the right of reimbursement gives rise to a lien over the trust assets so that the trustee can exercise his right of reimbursement out of the trust assets and, if asked to transfer the trust assets, to retain them until the lien is satisfied. According to '*Lewin on Trusts*', 18th edition[1]:

> "*A trustee, and each of the trustees separately where the trustees are more than one in number, has a first charge or lien upon the trust fund, conferring an equitable interest in the trust fund, in respect of the liabilities, costs and expenses covered by his right of indemnity. The trustee's charge takes priority over the claims of the beneficiaries, and of purchasers or mortgagees claiming under them. The trustee's right of indemnity as secured by the charge or lien comprises rights of reimbursement, exoneration, retention, and realization, as follows:*
>
> > *(1) A trustee who incurs a liability may discharge the liability out of his own resources and then reimburse himself from the trust property.*
> > *(2) Alternatively a trustee may, and usually will, discharge or pay the liability directly from the trust property so as to exonerate himself from the liability. A trustee, if solvent, may assign or charge his right of exoneration to a creditor to the extent necessary to discharge the liability of the creditor in respect of which the right to indemnity arose. While a right of reimbursement is a proprietary charge or interest freely disposable by a trustee for his own benefit or for the benefit of his own general creditors, a right of exoneration, however, benefits a trustee only to the extent that it allows him to resort to the trust fund for the purpose of payment of an expense of the trustee within the scope of his right indemnity which otherwise would be borne by the*

[1] (Sweet & Maxwell: London, 2008), paragraph 21.

trustee personally and so does not confer any proprietary charge or interest allowing the trustee to resort to the trust property for the purpose of satisfying claims of his own general creditors.

(3) A trustee may retain trust assets or income until he has been indemnified, both as regards present liabilities, to the extent needed for the purpose, and, in general, as regards contingent or future liabilities for which he may become accountable, to the extent required to meet the worst case on the basis of reasonable but not fanciful assumptions. A beneficiary or his assign cannot compel a transfer of the trust fund until the trustee's just demands have been met."

11. Mr. Boyle contended that it was not properly open to this Court on the present application of Orconsult to determine any allegations of breach of trust advanced by the beneficiaries. Counsel relied upon the fact that (a) no cross-application had been made in these proceedings and (b) no independent breach of trust proceedings had been brought. Mr. Riihiluoma submitted that it was open to this Court to adjourn the present application and to determine any issues of impropriety which were sufficiently raised on the evidence before the Court and which were relevant to the question of whether the Trustee's expenses were properly incurred. I accept Mr. Riihiluoma's submission that this Court possesses the jurisdiction to determine any breach of trust issues impacting on the merits of the Court's approval of the present application which are seriously raised on the evidence before the Court. The Court is not bound to insist that the beneficiaries file a formal cross-application or alternatively file separate breach of trust proceedings.

12. I also find that the correct legal approach when a trustee seeks to exercise its lien over the trust assets in circumstances where the validity of the trust (or the transfer of assets to a trust) has been questioned is to assume until the contrary is established that the trust is valid. Any different approach would undermine the commercial efficacy of Bermuda trust law by enabling the mere assertion of a

challenge to the validity of a trust to interfere with the fundamental right of a trustee to be paid and/or reimbursed for *bona fide* expenses.

Factual findings: were the disclosure expenses properly incurred?

13. In my judgment, it is clear on the facts that the disclosure expenses were in general terms properly incurred for the benefit of the Bermuda Trusts, although they involved providing information to the beneficiaries. These expenses were incurred (a) by way of response to Bell J's Order of May 21, 2007, (b) providing further information between late August 2007 and late October 2007, and (c) expenses in relation to a letter from Appleby (for the beneficiaries) dated October 15, 2007. I am not minded to approve the specific sums set out in the Schedule of Costs totaling GBP 203, 262.05 unless Orconsult provides copies of invoices to the beneficiaries enabling them to confirm that they have no objections to any specific reimbursement amounts. Rather, adequate particulars should be supplied to the beneficiaries within 14 days or such other period as may be agreed and the beneficiaries shall have 14 days to seek to resolve any concerns. In default of agreement, any dispute shall be determined by this Court.

14. These particulars have been ordered to enable justice to be seen to be done in circumstances where the beneficiaries understandably wish to verify that the expenses claimed do not impermissibly overlap with expenses which should be attributable to other clients of Orconsult SA (a Swiss company which is related to Orconsult) from whom information may have been sought, or indeed, perhaps, Orconsult itself. It seems plausible that Orconsult may have had to seek advice either for itself in its capacity as a company providing administrative services to entities unconnected with the Trusts because it voluntarily placed itself in a conflict of interest position in circumstances which were not necessary to enable it to discharge its duties as Trustee of the Bermuda Trusts; or, alternatively, it may have been required to seek advice on behalf of other entities as to their duties to supply requested material. It is seemingly undisputed that Orconsult SA provided services of some sort to the entities controlled by Dr. Stoffel which

received payments out of trust assets which are now regarded by all parties to the present proceedings as having been fraudulent.

15. The beneficiaries are entitled to adopt a "once bitten twice shy" approach to any claims Orconsult may make and to verify that the expenses claimed were indeed properly incurred on behalf of the Bermuda Trusts. This Court should not, having regard to the background history revealed by the evidence, approve specific amounts without affording the beneficiaries this opportunity.

16. It is clearly arguable that Orconsult was at least careless in the way they dealt with Dr. Stoffel's requests for undisclosed remuneration for services purportedly rendered to the Trusts. While the beneficiaries are understandably highly suspicious of Orconsult's conduct in admittedly concealing from them the true extent of Dr. Stoffel's receipts from trust property, there is (viewed objectively) presently no tangible evidence of bad faith on the Trustee's part. At first blush it may seem perturbing, from a regulatory perspective, that a trustee with foreign principals and no experience of Bermuda or similar trusts was appointed to manage such substantial assets. This had the effect of bypassing, as Mr. Attride-Stirling pointed out, the various safeguards for beneficiaries which would have been brought into play if a regulated Bermuda trust company had been appointed. These matters do not fall for present determination.

17. It is also arguable both that the settlement of the Jersey Trusts and the settlement of the Bermuda Trusts (or, alternatively, the purported asset transfers to the Bermuda Trusts) were invalid. These matters do not fall for determination in the present proceedings, and are issues joined in the Vistra proceedings which may or may not have to be determined in that action. For the reasons set out above, when considering the correct legal approach to applications by trustees for indemnification, the Court is bound to proceed on the assumption that the relevant trusts are valid, particularly where all parties are proposing a course of action

which is designed to sidestep judicial determination of inconveniently complex and thus costly validity issues.

18. Moreover, any misconduct on Orconsult's part was, in my judgment, not (on the material before me) sufficiently linked to the course of conduct to which their present reimbursement application relates to impeach the validity of the present claims. It is possible for the Court to fairly look at the propriety of the manner in which the expenses were incurred without resolving the discrete issue of whether the wider background facts which gave rise to those expenses were caused or contributed to by the Trustee's breach of trust.

19. I am satisfied that Orconsult acted properly in responding to the various disclosure requests and, subject to the directions ordered above designed to afford the beneficiaries an opportunity to verify the specific sums claimed, acted properly in incurring the costs in respect of which this Court is now asked to confirm that the Trustee is entitled to be reimbursed out of the trust assets.

Factual findings: is Orconsult entitled to a secured indemnity in respect of future expenses?

20. It is clear on the evidence that Orconsult in its capacity as Trustee of the Bermuda Trusts is a defendant to pending Swiss arbitration proceedings in respect of which it will incur future liabilities, the precise extent and scope of which are presently unclear.

21. A draft Deed of Indemnity prepared on behalf of the Trustee was placed before the Court. As it appeared to me that the other proposed parties to the Deed had not had an adequate opportunity to consider it, I decline to approve its specific terms. That said, the approach of retaining a fixed sum out of the Trust assets to cover estimated future liabilities "*to the extent required to meet the worst case on the basis of reasonable but not fanciful assumptions"* is plainly appropriate as a matter of principle. If this approach is adopted, preserving the right to seek further

indemnity if the retained sum is exhausted should be of academic interest only, albeit justifiable in principle.

22. The concerns about Holger Blickle having this liability hanging over his head appear to me to be more artificial than real. But unless he formally releases his presently preserved claims to the trust assets, it seems only reasonable that he should offer some form of indemnity as is requested.

Representation of Unborn Children of Beneficiaries/Charities

23. The beneficiaries invited the Court to conclude that their interests were not sufficiently different to their unborn children, in the context of the present application, to justify the appointment of a third party to represent their interests. I see no justification for persons other than the beneficiaries themselves to represent the interests of their unborn children. The present application raises no or no material conflict between the interests of two classes of beneficiary. The net trust assets are proposed to be transferred, not distributed.

24. For the same reasons, no practical question of the need to hear positive representations from the Attorney-General representing the charitable beneficiaries' interests arises[2].

Application to re-amend Originating Summons

25. Orconsult also applies to re-amend its Originating Summons to seek additional relief, namely directions in relation to its defence of the Swiss arbitration proceedings. It appears that when the present proceedings were commenced, the initial Swiss arbitration proceedings did not require Orconsult's active participation. This position changed when the second proceedings were commenced under the arbitration clauses contained in the Bermuda Trusts. I can see no proper basis on which this application could be refused.

[2] Although she did not formally appear, Ms. Maryellen Goodwin, a member of the Attorney General's Chambers, did attend for some of the hearing.

Conclusion: Order Sought

26. I therefore grant the relief, substantially the same as that sought in paragraphs 1-4 and 9 of the draft Minute of Order handed up by Mr. Boyle at the end of the hearing, namely an Order that:

(1) The Plaintiff do have leave to re-amend its Originating Summons in the form of the draft annexed hereto;

(2) The First and Second Defendants are hereby appointed to represent all persons as yet unborn who are interested in or under the Capricorn Trust or the Aquarius Trust;

(3) The Court sanctions the Plaintiff's decision in principle to transfer (at the request of the First, Second, Fourth and Fifth Defendants) such interest as it has or may have in the Relevant Assets to the Fourth Defendant in its capacity as trustee of the Alsam Settlement, the Colleen settlement, and Logany Settlement subject to the First, Second, Fourth and Fifth Defendants entering into deeds of indemnity in such form as may be agreed;

(4) The Court in principle sanctions the Plaintiff recouping itself from the assets mentioned at paragraph 12 of the affidavit of Mr. Guido Banholzer dated 26 February 2008 ("the BVI and Bermuda assets") in respect of the expenses set out below. Adequate particulars of the following expenses should be supplied to the beneficiaries within 14 days or such other period as may be agreed, and the beneficiaries shall have 14 days to seek to resolve any concerns otherwise any dispute shall be determined by this Court, namely:-

(a) the costs of the Plaintiff having provided information to the First and Second Defendants pursuant to the Order of Mr. Justice Bell dated 21 May 2007;

(b) the costs of the Plaintiff having provided further information relating to the Relevant Assets (as defined in the Re-Amended Originating Summons) to the First and Second Defendants since 21 May 2007;

(c) the costs of the Plaintiff incurred in relation to Vistra's proceedings referred to in paragraph 1 of the Re-Amended Originating Summons;

(d) the costs of the Plaintiff incurred to date in relation to the Swiss arbitration proceedings referred to at paragraph 3 of the Re-Amended Originating Summons;

(e) the future costs of the Plaintiff in relation to the Swiss arbitration proceedings referred to at paragraph 3 of the Re-Amended Originating Summons, limited to the costs of taking advice and seeking the further directions of this Court in relation to those proceedings.

(5) In the event that the parties are unable to agree directions for the filing of evidence in relation to the Swiss arbitration proceedings, the Plaintiff shall be at liberty to issue a summons seeking directions in relation thereto[3].

(6) All parties' costs in relation to the present proceedings to be paid from the BVI and Bermuda Assets.

27. I will hear counsel, if necessary, on the precise terms of the above Order.

Dated the 18th day of June, 2008

Kawaley J
Puisne Judge

[3] I do not recall being addressed orally on nor ruling orally upon the directions timetable which was left blank in the draft Minute of Order handed up by counsel for the Plaintiff.