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 1975

B E T W E E N:

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

RULING

Date of Hearing: January 21, 23, 2009
Date of Ruling: February 3, 2009

Mr. David Kessaram, Cox Hallett Wilkinson,
for the Plaintiff
Mr. John Riihiluoma, Appleby, for the 1st-2nd Defendants

Introductory

1. Persons in the business of managing trusts no doubt dream of being appointed as trustee in respect of trusts with substantial assets. The Plaintiff's principals were doubtless delighted to be appointed as trustee of the Aquarius and Capricorn Trusts ("the Trusts") on December 2, 1999. What might have seemed to be a dream assignment has turned into a nightmare because, on the Plaintiff's watch (a) the Trusts have been defrauded of some of their assets, and (b) worse still, a dispute has arisen as to whether any of the original and remaining trust assets were ever validly settled on trust at all.

2. On June 18, 2008, without prejudice to the unresolved dispute about whether the "Relevant Assets" properly belong to the two Bermudian or three Jersey Trusts, this Court granted in principle approval to a compromise which the Plaintiff hoped would be consummated pursuant to which (a) the Relevant Assets would be transferred to the Jersey Trusts and (b) the beneficiaries would indemnify the Plaintiff in respect of, *inter alia*, its costs. That compromise has not been consummated, and it now appears that the fundamental question of the validity of the Trusts may have to be determined by this Court.

3. However, paragraph 4 of the June 18, 2008 Order also provided that subject to the resolution of any apportionment disputes (and without prejudice to the dispute about the ownership of the assets out of which the Plaintiff was to be paid)), the Court sanctioned the Plaintiff's decision to recoup its costs of providing certain disclosure about the Relevant Assets out of certain assets in Bermuda and BVI. Under paragraph 5-7 of the June 18, 2008 Order, the Plaintiffs were directed to provide full particulars of the Plaintiff's expenses which the Court had approved reimbursement for in principle (redacting irrelevant material) to the Defendants, with any disputes which could not be resolved being referred back to this Court. The possibility of apportionment disputes was foreshadowed because the Plaintiff admitted that during the material period it obtained advice from the same lawyers about its own potential liability for breach of trust and advice for the benefit of the Trusts.

4. It is against this background that the Plaintiff applied by Summons dated January 16, 2009 for an Order that, *inter alia*, "*the Court determine under paragraph 7 of*

the Order dated 18 June 2008 a dispute raised by the First and Second Defendants in relation to the Schedules and Invoices provided by the Plaintiff [in] *accordance with paragraphs 5 and 6 of the said Order.*" The June 18, 2008 Order expressly limited the scope of disputes which the Court would resolve to the question of whether the expenses claimed by the Plaintiff to have been incurred by it in its capacity as trustee of the Bermuda trusts were indeed so incurred and not incurred by the Plaintiff seeking legal advice for its own private benefit.

The issues in dispute and findings

5. After 1 ½ days of oral argument (supplemented by fulsome skeleton arguments filed on each side) and a hearing which often resembled a taxation of costs hearing, it was difficult to readily appreciate what disputes were properly placed before the Court. If both parties had regard to the overriding objective embodied in Order 1A of the Rules, one might reasonably have expected such disputes to have been resolved without reference to the Court. Apart from *de minimis* points of detail[1] which could never justify the costs of preparing for and attending the 1 ½ day hearing, one broad issue fell for consideration. I summarily rejected in the course of the hearing the Defendants' contention that the June 18, 2008 Order had contemplated this Court resolving both quantum costs disputes and apportionment disputes as well.

6. I was satisfied that, although Mr. Riihiluoma succeeded in identifying several instances of work descriptions which had been wholly or partially redacted even though reimbursement was sought on the basis that the expenses claimed had been incurred on behalf of the trusts, the overwhelming majority of expenses claimed were indeed properly attributable to the trusts. The only point of principle raised was whether, if the Court felt that there was a *prima facie* case for the Defendants claiming that the disclosure costs were not, because of their quantum, reasonably incurred, the Court should leave the Defendants to raise this issue in a separate breach of trust claim, give directions for such issue to be resolved in the present proceedings or, instead, whether the Court should summarily deal with the issue by way of costs.

7. The broad complaint made by the Defendants was that the Court should reject a significant proportion of the costs said to have been incurred by the Plaintiff for the benefit of the trusts on the grounds that it was not credible that the costs were properly incurred (a) because portions of work descriptions on lawyers' bills in respect of which reimbursement was claimed had been redacted, and (b) the sheer quantum of costs claimed could not credibly be attributable to the comparatively straightforward disclosure exercise. This broad traverse was itself not sustainable because the apportionment of lawyer-time attributable to the Plaintiff and the trusts was carried out by the lawyers themselves, in Bermuda, Britain and Switzerland. No possible motive could be imputed to these professionals to carry-out this administrative exercise otherwise than in good faith. Moreover, subject to

[1] Any obvious arithmetical errors can be resolved out of Court.

one exceptional aspect of the disclosure which I will come to, the range of questions posed by the Defendants' lawyers to the Plaintiff's advisers in relation to disclosure made the general level of costs incurred seem unsurprising.

8. It was unclear why in several cases the references to persons whom various lawyers spoke to by telephone or in conference were redacted, however in my judgment this did not undermine the assertion that the lawyer-time in question was incurred for the benefit of the Trusts. When fraud is being investigated, it is possible that persons may speak to lawyers on condition of anonymity and provide information in the hope that they will not themselves be brought to account for their own involvement in the impugned transactions. In any event, in his reply, Mr. Kessaram offered to disclose the redacted portions of bills so that full descriptions of any work done on behalf of trusts could be seen by the Defendants.

9. Mr. Riihiluoma complained that L. 24, 816.62 sterling was claimed in respect of disclosing documents supplied under covers of Withers' letters dated February 28, 2008 and March 25, 2008, respectively. Twelve pages were attached to the latter letter and 28 pages were attached to the former letter. Both letters were only two pages long each and the disclosed material. The disclosed material consisted of bank statements and related correspondence of the sort which one might reasonably expect to be contained in one or more files relating to the two companies concerned (Maytown and Plympton). This meant that the disclosed material cost L.620.00 sterling per page. This pithy observation, repeated by the Defendants' counsel throughout the hearing, had a resonance that I found difficult to ignore.

10. On the face of this category of documents, the expenses claimed for producing them seem somewhat high. However, bearing in mind the Plaintiff's right to be indemnified, the burden of proof would be on the Defendants to prove that the relevant costs were unreasonably incurred. It seems obvious to me that the costs of any breach of trust application in relation to any potentially unreasonable aspect of these particular costs would be disproportionate to the amount of money which might potentially be held to have been unreasonably incurred. It seems unlikely that the Court would end up deducting more than 30% of the relevant costs (if any deductions were found to be required). It is difficult to imagine that the cumulative costs of preparing for and hearing what in Bermudian terms would be a novel application could possibly be significantly less than the approximately $10,000-$12,000 which the Defendants might succeed in having reduced.

11. I therefore refuse the Defendants' invitation to give directions for such a breach of trust application of the Courts own motion. In my judgment any potential breach of trust claim the Defendants might raise in respect of the last tranches of disclosure are not sufficiently substantial to warrant this Court (having regard to the overriding objective) of its own motion directing an enquiry into such a claim. I do take this matter into account when dealing with costs, however.

12. In summary, the governing legal principle, as Mr. Kessaram rightly submitted, is that the Plaintiff is entitled to indemnify itself out of the assets of the Trusts in respect of all out of Court expenses which are not subject to taxation by this Court. The only issue properly before the Court is whether the expenses were indeed incurred for the benefit of the Trusts and, in my judgment, the Defendants have not shown otherwise. I rule that the Plaintiff is entitled to recover all of the discovery costs out of the Bermuda and BVI assets, subject to the proviso with which the June 18, 2008 Order was made. In other words, this Order is without prejudice to the determination of the ownership of the Bermuda and BVI assets.

Costs of the present application

13. Order 1A of the Rules of the Supreme Court provide in relevant part as follows:

> "***1A/1 The Overriding Objective***
>
> 1 *(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
>
> **(2) Dealing with a case justly includes, so far as is practicable** —
>
> *(a) ensuring that the parties are on an equal footing;*
>
> **(b) saving expense***;*
>
> **(c) dealing with the case in ways which are proportionate** —
>
> **(i) to the amount of money involved***;*
>
> *(ii) to the importance of the case;*
>
> *(iii) to the complexity of the issues; and*
>
> *(iv) to the financial position of each party;*
>
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
>
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*
>
> ***1A/2 Application by the Court of the Overriding Objective***
>
> **2 The court must seek to give effect to the overriding objective when it** —
>
> **(a) exercises any power given to it by the Rules***; or*

(b) interprets any rule.

1A/3 Duty of the Parties

3 The parties are required to help the court to further the overriding objective." [Emphasis added]

14. I am satisfied that the Trustees acted reasonably in making the present application, bearing in mind that the beneficiaries are effectively depriving them of the ability to reimburse themselves for expenses this Court has held they have properly incurred for the benefit of the Bermuda trusts, by refusing to consummate the agreement which was contemplated when the parties were last before the Court. Moreover, if the Defendants have no evidence to suggest that the Plaintiff is implicated in the fraud, surely the most commercially sensible approach is for the beneficiaries to work with the Plaintiff to recover the proceeds of the fraud. If the ownership of the assets purportedly settled on the Bermuda trusts must be determined, all parties concerned must expedite the necessary judicial determination.

15. On balance I consider that the parties to the present application ought properly to have compromised the disputes after exchanging evidence in relation to the Plaintiff's application once it was filed. The Plaintiff's advisers could have made the offer they made at the end of the hearing to disclose the redacted portions of bills in respect of which no deductions were made. They might also have offered to make some reduction of the expenses claimed (in particular the January and March 2008 disclosure which cost L.620 sterling per page at a time when all legal controversies appear to have been resolved), with a view to avoiding a hearing which would potentially cost more than the amounts which were plausibly the subject of dispute.

16. It is clear from letters dated January 19 and 20, 2009 which were placed before the Court that some negotiations took place, with Appleby observing that "*there remains a very considerable dispute between us*" and Cox Hallett Wilkinson responding: "*this matter will have to be dealt with at the forthcoming hearing tomorrow.*" On the material before the Court, both sides appear to have been "playing hardball", with each side doubtless genuinely convinced of the moral justification of their respective positions.

17. The Plaintiff going forward should be more sensitive to the understandable concerns which the beneficiaries (or some of them) will have about the burden of legal costs on the remaining trust assets against a background in which the trustees admit that assets placed with them for safekeeping have been misappropriated by someone with whom they themselves chose to have business dealings. The beneficiaries going forward should be more sensitive to the commercial and legal reality that the Plaintiff cannot be expected to continue as trustee of the Bermuda trusts without reasonable remuneration and that the consequence of adopting a contentious approach to matters which can be compromised will only likely further diminish the remaining trust assets.

18. Having regard to all the circumstances of this case, the following orders are made with respect to the costs of the Plaintiff's application with respect to costs pursuant to paragraph 4 of this Court's June 18, 2008 Order. The Plaintiff is awarded the costs of preparing the present application with respect to disclosure costs on an indemnity basis, out of the Bermuda and BVI assets, subject to the same *caveat* as before (see paragraph 12, above). However I make no order as to the Plaintiff's costs of the hearing itself. No order is made as to the Defendants' preparation or hearing costs.

Dated this 2nd day of February, 2009

KAWALEY J