

In the High Court of Justice of the Isle of Man
Civil Division - Chancery Procedure

Between

Mr AH
and
GREYCO LIMITED
(AS TRUSTEE OF THE BLUE SETTLEMENT)
and
ABC TRUST COMPANY LIMITED
(AS TRUSTEE OF THE OVERSEAS DISTRIBUTORS
BENEFIT TRUST) ("ODBT")

Applicant

First Respondent

Second Respondent

Approved Transcript of Judgment delivered by
His Honour The Deemster Corlett
on 03 June 2020

1. The matter before me is an Application Notice date 16th April 2020. It is brought by Mr AH who is the Applicant and the Respondents are Greyco Limited (as Trustee of the Blue Settlement) and ABC Trust Company Limited (as Trustee of the Overseas Distributors Benefit Trust which I will refer to in the rest of this judgment as "ODBT").
2. The application seeks an order that the First Respondent shall immediately disclose to the Applicant the trust instrument including any variations or deeds of appointment or resignation pursuant thereto and trust accounts in relation to the Blue Settlement which was created on 20th June 1994. And secondly, that the Second Respondent shall immediately disclose to the Applicant the trust instrument including any variations or deeds of appointment or resignation pursuant thereto and trust accounts in relation to the ODBT which was created on 2nd September 2006. Thirdly, it seeks an order that the Applicant shall immediately disclose to Mrs AH all documents disclosed to the Applicant, pursuant to paragraph 17 of an Order of His Honour Judge Rowland dated 18th February 2020 in the Family Court sitting at Birmingham.
3. The order is applied for because the application relates generally to current divorce proceedings in the Family Court sitting in Birmingham before His Honour Judge Rowland. A final hearing in respect of the proceedings is due to take place on 15th June 2020 with eight days allowed, and in those proceedings Mr AH is the Respondent and his wife Mrs AH, who is not a party to this application, is the Applicant.
4. In respect of the order made by the English divorce court on 18th February 2020 it is necessary that I refer to recital 5 to that Order which states that:

"(5) the respondent indicated his intention to seek an order from the High Court of the Isle of Man relating to the production of the documents identified at paragraph

17 below, and (in the event that his application for such an order is unsuccessful) to produce a transcript of the hearing and judgment relating to such application."

5. Paragraph 17 states that:

"The respondent must use his best endeavours to procure and disclose to the applicant copies of the trust instrument (including any variations or deeds of appointment or resignation pursuant thereto) and trust accounts in relation to the Blue Trust and the ODBT."

6. So the court is concerned with two Manx discretionary trusts. One is the Blue Settlement dated 20th June 1994 so that is some 26 years ago. The Applicant, Mr AH, is the Settlor of that trust but according to the evidence before this court he is excluded as a beneficiary, as is the remainder of his family. The ODBT was executed on 2nd September 2006, again some time ago, 14 years ago in this case. Neither the Applicant nor his family are within the class of beneficiaries. Mr AH has however received or owes as at this date including accrued interest, I am told, some roughly half a million pounds. He has received loans from the trustees in I understand 2010 and 2015 but these are repayable and interest has been charged at commercial rates. In addition to that Mr AH was contracted by the Second Respondent to maintain properties which it owns in the Cape Verde islands. Also, Mr AH's son D has received loans amounting to around £50,000. ABC, the trustee, has issued formal demands for repayment of these loans.

7. So far as this application is concerned there is a brief summary of the reasons for the application in the supporting witness statement of Andrew Martin Breakwell who is Mr AH's solicitor, dated 16th April 2020. At paragraph 23 of his witness statement he says this:

"AH's application to this court is therefore for disclosure of the trust instruments, together with ancillary documents such as deeds of variation, appointment and resignation etc, and the trust accounts relating to both settlements. The former will establish beyond argument that he is not a member of the class of beneficiaries, and the latter will demonstrate that the Cape Verde properties are regarded by the trusts as being trust property. Mrs AH's argument within the English proceedings is that the court should draw inferences against Mr AH for his failure to disclose these documents and should conclude that Mr AHs' ability to meet any award the court may make is significantly greater than it otherwise would (sic). Disclosure of these documents will therefore go a very long way towards determining that particular issue."

8. Although Mr AH as I pointed out above has a different relationship with each trust there is in my view no reason in law why the results of the determination of this application should be any different as between the two trusts.

9. I want to touch briefly on the issue of privacy and confidentiality. It is common ground in respect of any disclosure which this court may make that firstly this judgment will be anonymised prior to any publication and in addition the usual provisions concerning the privacy of family financial proceedings in England and Wales will apply combined with the usual implied undertaking preventing the collateral use of such documents. On that basis I

find that it is highly unlikely that any information which this court orders to be disclosed would come into the public arena.

10. So far as the witness statements of the trustees are concerned there are four of those altogether. Mr Copper and Ms Trustee have filed witness statements dated 11th May 2020 and there are supplemental statements which were filed the day before yesterday both dated 1st June 2020. I will refer to those because they are important. So far as Mr Copper is concerned he is a representative of Greyco Limited, the current trustee of the Blue settlement. He says that the settlement was settled by Mr AH on 20th June 1994 and he says that *"since the Blue Settlement was settled by the Applicant with £100, he has not directly, or indirectly, provided any further property or income for the purposes of the Blue Settlement"*. He confirms that within the Deed of Settlement *"the Applicant was classed as an Excluded Person. As such, he has never received any distribution of any nature whatsoever or loans from the Blue Settlement. As current Trustee I do not consider that the Applicant is or ever has been a beneficiary of the Blue Settlement"*. He refers to an offer to have an independent advocate review all documents relating to both the Blue Settlement and the ODBT with the purpose of the advocate producing an independent report to the Applicant, which he could disclose to Mrs AH, to confirm that all trust documents had been reviewed and to set out the Applicant's interests in those trusts.

11. So far as the statement of Ms Trustee is concerned this relates to the ODBT principally. She confirms that the Applicant has never benefitted from the Settlement. She refers to the Applicant having *"previously assisted the Trustee with matters such as maintenance of the Properties [in Cape Verde] and to compensate the Applicant for his service and for ease of operation, the Trustee agreed that he may occupy one of the Properties whilst performing these maintenance services"*. She also refers to the loans to which I have already made reference.

12. The supplemental statements of 1st June, I will refer to those briefly. Mr Copper's second witness statement confirms *that "none of the members of the class of beneficiaries of the Blue Settlement is a member of the Applicant's family or an entity under his control or to which he is connected"*. He also confirms that *"members of the Applicants' family, his issue and his spouse are also Excluded Persons, as well as the Applicant himself"*.

13. Ms Trustee's witness statement is in similar terms and she confirms that *"none of the members of the class of beneficiaries of the ODBT is a member of the Applicant's family or an entity under his control or to which he is connected"*.

14. So that is the evidence which I have before me.

15. So far as the law is concerned, the jurisdictional basis of this application is clearly this court's jurisdiction to supervise the administration of trusts. Mr Coren did refer to Rule 7.45 of the 2009 Rules of Court concerning pre-action disclosure. He did not press this submission with any great force and I very much doubt it has any relevance to this type of application.

16. So far as the law is concerned it is helpfully summarised in Underhill and Hayton, Law of Trusts and Trustees, 19th edition. I refer to paragraph 56.9 and I quote, this being in the

context of a discussion on the law as laid down by the Privy Council in Schmidt v Rosewood Trust Ltd:

"As a general rule, a person who claims to be a beneficiary or an object under a trust must first establish his or her status as such before being allowed to invoke this jurisdiction. Otherwise, any stranger might come and claim the estate and see all the opinions and cases and a very serious injury might be caused to the persons really entitled to the property. Nevertheless, there may be exceptional cases where it is necessary to direct the provision of information to persons before they have established their status as beneficiaries. Indeed, in Jersey it has been held appropriate, as in the interest of trust beneficiaries, to direct the disclosure of trust information to the settlor of a trust (and a person excluded from benefit) so that he could provide it to the English family court, before which he was engaged in divorce proceedings."

And the authority for that proposition is the case of U Ltd v B reported at [2011] JRC 131 and [2013] WTLR 545.

17. I also refer to the Twentieth Edition of Lewin on Trusts at paragraph 51-066 under the heading *"Requests for information by a person who is not a beneficiary,"* and the quote is:

"Where the request for disclosure of information is made by a spouse, or another person who has an interest in matrimonial proceedings, whether or not joined to them as a party, the test is whether it is in the interests of the beneficiaries that the information or documents be provided for the purposes of the matrimonial proceedings. It is immaterial for these purposes that the person making the request has been excluded as a beneficiary."

And once again the authority for that proposition is U Ltd v B.

18. So far as Schmidt v Rosewood is concerned that is an authority well known to all trust practitioners on the Isle of Man and indeed elsewhere. The Respondent's skeleton argument or should I say written submissions refer to this case at paragraph 5.2 and I will just briefly quote from that:

"5.2.1. In the case of Schmidt v Rosewood Trust Ltd [2003] UKPC 26 their Lordships considered discretionary trusts and their powers and then provided guidance as to a beneficiary's right of inspection of trust documents requested from trustees. Their Lordships decided that, although often found, a beneficiary's right of inspection is not based on his proprietary interest in the documents themselves and would depend on the courts' discretion should the court's intervention be sought.

5.2.2. Their Lordships concluded at paragraph 51:

"51. 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 may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion."

19. The trustees then go on to quote from paragraph 54 of their Lordships' judgment and there is a discussion concerning safeguards which might be imposed to limit the use which may be made of documents or information disclosed under the order of the court.

20. They quote also from paragraph 67 of the Privy Council decision and there is reference to the passage which states:

"In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."

21. It follows in my view that a person who is specifically excluded as a beneficiary or at least not within the class of potential discretionary beneficiaries does not fall within the class of persons to whom the court would grant a disclosure order under familiar Schmidt v Rosewood principles. Applications before this court are normally envisaged to be made by a beneficiary or someone within the class of potential beneficiaries. Having said that however I refer to paragraph 10 of the Applicant's written submissions again referring to Schmidt v Rosewood and quoting from paragraph 66 of Lord Walker's judgment:

"There is therefore in their Lordships' view no reason to draw any bright dividing-line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character)."

22. I agree with what the Applicant through Mr Coren goes on to say at paragraph 10 of his skeleton argument and I quote:

"The corollary, however, is surely that if membership of the class of beneficiaries does not automatically entitle an applicant to disclosure, then the mere fact that the Husband is not a member of the class of beneficiaries of the trusts cannot of itself mean that the court should necessarily dismiss any application for disclosure of the documents sought. The legal basis for granting (or refusing) this Application is that the Court considers that disclosure should/should not be made in the exercise of its supervisory jurisdiction over the proper administration of the trusts. The Husbands' status within or without the class of beneficiaries goes to the merits of the Application, not to the Court's jurisdiction. "

As I say, I agree with that proposition. And indeed the case of U Ltd v B is a good example of that type of case and I will come to that in a moment.

23. I will also refer briefly to the Murphy v Murphy decision of Mr Justice Neuberger (as he then was) in 1998, [1998] 3 All ER 1. This is referred to at paragraph 5.3.3 of the trustees' written submissions and it summarises the matter by saying that the case of Murphy regarded:

"... a claim for information asserted against the father of the claimant who had settled the trusts concerned. The court ordered disclosure by the father in respect of a trust of which the claimant could show he was a beneficiary, but not of the trust of which he only speculated that he might be a beneficiary."

24. I return to the facts of this particular case. Here Mr AH and his family are expressly excluded persons under the Blue Trust and neither he nor his family are within the class of beneficiaries under the ODBT. Now in the case of U Ltd v B, the Jersey case decided in July 2011 by Commissioner Clyde-Smith and Jurats, the court was concerned with a settlement called the W Settlement. Mr B was the settlor. This settlement was one of number of trusts created for the benefit of B's wider family. At paragraph 19 of the judgment the court said this:

"B is not and cannot become a beneficiary, although as settlor and with his on-going role in the settlement it would not be accurate to describe him as a stranger to the settlement. Even so, in our view, the role of the court is the same. The issue is one of disclosure of confidential information, in which the court has to weigh his request against the interests of the beneficiaries as a whole. The court will exercise its own discretion, the views of the trustee being no more than a factor to be taken into account by the court in determining the application."

25. In U Ltd v B divorce proceedings were ongoing in England and I note that an order was made against the Husband that he should use his best endeavours to obtain copies of the settlement accounts for the previous three years. That is a similar order to that which applies in the case of Mr AH. In this case the trust concerned was undoubtedly a family trust in the true sense. The family business was owned by the settlement. Mr B was closely and indeed intimately involved in those businesses He was very much an active settlor. The failure to disclose the accounts was disrupting the business through the prolongation of the divorce proceedings. It is similar to this case however in that the settlor was an excluded person and could not become a beneficiary under the settlement. The English divorce court had the financial information for all the family trusts except this particular settlement so it was argued that the English divorce court had an incomplete and inaccurate picture of the family finances. On that basis and as more particularly set out in paragraph 30 of the judgment of the Jersey court it ordered disclosure of the accounts of the settlement for use in the English divorce proceedings.

26. I have also found instructive another decision of the Jersey courts which I will call the Lincoln Trust case which was decided in 2007 by Deputy Bailiff Birt (2007 JRC 173). In this case the court was principally concerned with the question of whether the trustees should submit to the jurisdiction of the English court. At paragraph 16 it said this under the heading "*Provision of information*":

"16. Having directed the Trustees that they should submit to the jurisdiction and participate in the divorce proceedings, it follows that the Trustee should provide all information necessary to ensure that the County Court has an accurate picture of the position. However the Trustees should only disclose what is relevant to the matrimonial proceedings. The position in relation to Andrew's Fund and Andrew's Children's Fund is confidential to Andrews' side of the family and is of no relevance to the matrimonial proceedings between the husband and his wife, because neither of

them nor the children are beneficiaries of Andrew's Fund or Andrew's Children's Fund. In the circumstances we direct the Trustees not to provide any information in relation to those two funds.

17. However, in relation to the General Fund (50% of which will pass to David's Fund on the death of the Settlor) and David's Fund itself, we think it important that the County Court should be fully informed of the picture and we authorise the Trustees to make full disclosure of any financial information necessary to ensure that this is the case. As to David Childrens ' Fund, the husband and the wife cannot benefit from this fund but nevertheless we think it is in the interests of their children that the financial position in relation to this fund should be made available to the County Court, so that it is aware of the assets which may be available to the children both presently and in the future. We therefore authorise the Trustee to make disclosure of the financial position of this fund."

27. So it was very important in that particular case that there should be no disclosure where there was no relevance to the matrimonial proceedings as between the husband and wife because neither of them nor their children were beneficiaries.

28. It seems to me that the decision in U Ltd v B can be readily distinguished on the facts of this particular case. These Manx settlements, the Blue and the ODBT were not created for the benefit of the wider AH family. The children of the parties in Jersey were beneficiaries. This analysis is corroborated or supported by the fact that the loans made to Mr AH were on fully commercial terms. Although it is fair to say that Mr AH is not a complete or total stranger to both Manx trusts he is certainly a great deal further removed than was Mr B in the Jersey case.

29. So I then return to the central issue before the court. Is the disclosure sought beneficial to the beneficiaries? What is or what would be the benefit to the beneficiaries of any disclosure? Mr Coren submitted that disclosure "*would enable the boil to be lanced*" as he rather picturesquely called it. In other words, this long running dispute would be finally resolved and there would be an end to what I understand to have been very lengthy correspondence and an end to litigation.

30. Mrs Christian on the other hand said that that might not necessarily be the case. That Mrs AH may prolong matters and that disclosure might not conclude her search for what she regards as the truth. It may well be, and I accept this, that her suspicions will not be allayed by any disclosure which this court may make and may lead to further trains of enquiry. That is to some extent speculative.

31. So far as detriment to the real beneficiaries of these two trusts is concerned I do accept that there is an obvious detriment to them by this court authorising disclosure because their financial affairs and confidentiality will be breached, albeit with the protections to which I referred at the beginning of this judgment. Confidential financial information will be put in the hands of strangers to the trusts.

32. I conclude that the detriment to the beneficiaries from the breach of their confidentiality outweighs to a considerable degree any discernible benefit to their interests.

Indeed I am unable to detect any measurable benefit to their own interests from an order for disclosure.

33. So far as the procedure adopted in this case is concerned I just want to make one or two observations. First of all it is true to say that the trustees potentially could have applied for directions in their own right as they did in the U Ltd v B case. The trustees have not made any application to this court, however I do not believe that is a significant issue. The issue, whoever makes the application, is what is in the best interests of the beneficiaries as a whole. It is the same test which the court must apply regardless of who makes the application. I also note that this court has not received any letter of request from the English divorce court and there seems to be some suggestion in the papers that this court would have taken an inordinate amount of time to process any such letter of request. That of course is a misapprehension; this court could have dealt with a letter of request as swiftly as I believe it has dealt with this application. But having said that, once again the same principles apply so to that extent nothing has been lost. However, as Mrs Christian pointed out, this court might have taken some additional comfort from a formal request from the Family Court which will obviously have given the matter further additional consideration before the letter of request was issued.

34. It is important before I conclude this judgment to say something about the issue of comity and this is obviously a matter which weighs heavily with this court. The familiar Jersey case of Re H decided in 2006 (2006 JLR 280) is referred to in U Ltd v B at paragraph 27. Re H was a case, and this is important to emphasise, of a husband and wife who were beneficiaries of the trust concerned and in that case the court said this:

"We should add that a decision that the trustee should not submit to the jurisdiction is separate from the question of provision of information. It seems to us important, in this case, that the husband and the wife should have the fullest information concerning the financial affairs of the trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position."

And that is a principle which has been applied in many instances in Jersey and indeed in this jurisdiction.

35. Mr Coren submitted that there would be considerable benefit to the English court if I make an order for disclosure because it would then be making its decision on financial issues between Mr and Mrs AH on a factually sound basis or at least a more factually sound basis than the evidence which is currently before it in the form of the witness statements. As a Family Court judge myself I obviously have a great deal of sympathy with that objective and the fact that the corroborating documents which it is sought be disclosed would be adding weight to the existing witness statements. But in my judgment the English court will have of course the witness statements from professional trustees who in this jurisdiction are subject to rigorous regulation and would undoubtedly face the most severe penalties were it to be the case that they were found to have misled either this court or the English court as to the information which they have provided.

36. I also note that there has been what I would view as a reasonable offer to have the documentation reviewed by an independent Manx advocate. That has been rejected by Mrs AH.

37. Now of course this court recognises that there will be a degree of understandable mistrust and indeed scepticism about offshore trusts, not only on the part of Mrs Jordan but perhaps also the English courts, but once again I emphasise that the word of these professional trustees should suffice to satisfy Mrs AH and the English court. To hold otherwise would amount to an accusation of conspiracy between the trustees and Mr AH which I find most unlikely.

38. There is no doubt that persuasive arguments and detailed submissions have been made by Mr Coren on behalf of Mr AH and for my own part I would have thought that this would satisfy the English divorce court order that Mr AH has used his reasonable endeavours to obtain the documents sought. But in my respectful view the English divorce court has sufficient information to do justice as between Mr and Mrs AH insofar as these two Manx trusts are concerned. The role of this court, that is the Civil Division, Chancery Procedure, is neatly summarised in the Jersey case of Re H which is referred to at page 13 of the trustees' written submissions. This is an extract from paragraph 14 of the Re H judgment and I quote:

"In this respect, it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has, therefore, a very different focus from the Family Division."

39. In conclusion therefore although issues of comity naturally weigh heavily in favour of this application, I find that there is no precedent to support this type of application where the applicant is not a beneficiary and I find that I would be breaking new and possibly perilous ground were I (sitting at first instance) to accede to this application. The strongest authority in favour of Mr AH's application is U Ltd v B the Jersey case decided in 2011 and while I entirely follow and support the logic of that decision the facts are on analysis quite different to this case and it is readily distinguishable. I therefore apply the familiar principles set out in Schmidt v Rosewood together also with the decisions in Murphy and Lincoln Trust and must dismiss this application. The expectation of confidentiality on the facts of this case in my view outweighs the considerations of judicial comity.

40. That concludes my judgment.

His Honour The Deemster Corlett