

**Judgment 1/2006 Hutchinson et al v Spread Trustee Company Limited –
Royal Court (Civil Action File 906) – 16th January, 2006**

Trusts (Guernsey) Law, 1989 – action by beneficiaries – defendant’s request for further and better particulars – procedure in actions for breach of trust – distinct issues of liability and quantum – application rejected

IN THE ROYAL COURT OF GUERNSEY

The 16th day of January, 2006, before Sir de Vic Carey, Lieutenant Bailiff;
sitting alone.

In the matter of

Between: SARAH ANN ACATOS HUTCHESON
AND OTHERS

Plaintiffs

and

SPREAD TRUSTEE COMPANY LIMITED

Defendant

Whereas on 5th January 2006, the Lieutenant Bailiff considered the Defendant’s request for Further and Better Particulars of the Claim and heard thereon Advocates J.P. Greenfield and M.G. Ferbrache, Counsel for the Plaintiffs and Defendant respectively, the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and REFUSED the said request.

S.M.D. ROSS
Her Majesty’s Deputy Greffier.

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

**SARAH ANN ACATOS HUTCHESON AND
OTHERS**

Plaintiffs

and

SPREAD TRUSTEE COMPANY LIMITED

Defendant

Judgment of Lieutenant Bailiff Carey on the Defendant's request for Further and Better Particulars of the Claim

**Hearing date: 5th January 2006
Judgement handed down: 16th January 2006**

Advocate for the Plaintiffs: J.P. Greenfield

Advocate for the Defendant: M.G. Ferbrache

Decision

I indicated at the end of the Hearing that I was rejecting the outstanding requests of Mr Ferbrache in this matter. It followed that Defences must be filed without further delay and I ordered that copies thereof be delivered to Mr Greenfield on or before 4pm 6th February and indicated that I would sit for these to be formally tabled and for any further directions to be given at 4pm on 7th February. On further review of my diary I would wish to bring forward these times by 2 hours namely to 2pm on those days. Mr Ferbrache accepted that the costs of this application should follow the event and accordingly I so order that the Plaintiffs should have their costs associated with this hearing on the recoverable basis. It now falls to me to set out the reasons for my decision.

Background

The Plaintiffs are members of the class of beneficiaries of two discretionary settlements made in 1977 by a Mr Peter Acatos. The main parts of the Trust property in each settlement were substantial holdings of shares in Acatos and Hutcheson Limited (“the Company”).

The original Trustees were members of a local firm of accountants and there were various retirements and replacements of these individuals between the date of the Settlement and the 10th July 1990 when the present Defendant was appointed. The Defendant is a body corporate, one of whose Directors at the time was a Mr John Rowe, who was one of the original Trustees of one of both Settlements and apparently was principally involved in overseeing the management of both Settlements’ affairs.

The Settlor instructed the original Trustees that they were, in exercising their discretion, to take account of the views of his nephew, Mr Ian Hutcheson, father and grandfather respectively of the Plaintiffs. Mr Hutcheson was Executive Chairman of the Company and was originally a beneficiary but was excluded from benefiting from either Settlement after a date in 1983.

In 1986 the Company’s shares were floated on the London Stock Market and so the Trustees, subject to any restrictions that may have been imposed on existing shareholders

on selling their shares immediately, at the time of floatation, were free, if they wished, to cease having “all their eggs in one basket”, as it were, and to reduce the Settlements’ holdings of shares in the Company. They did not do this apparently because they took account of what Mr Ian Hutcheson had requested of them.

The shares after performing very well in the late 1980s, fell in value very substantially. The Plaintiffs’ claim that in 1988 the shares were worth £34.5 million and in 2003 when the Trustees sold the shares, they were worth £7.5 million.

The Plaintiffs have commenced proceedings against the Defendant under Section 63 of the Trusts (Guernsey) Law 1989. The relief sought is spelt out in paragraph 65 of the Cause and includes a request that all proper accounts and enquiries be ordered pursuant to Section 63 (1) (a) of the Trust Law which may be necessary to determine what conversation the Defendant ought now to make to the Settlements in respect of the losses which have occurred to the Trustees.

The basis of the claim is that the Trustees should, on taking over in 1990, have set about diversifying the Settlements’ investment portfolios instead of retaining them substantially invested in one stock. Further they should have investigated whether or not claims could be made against former Trustees for breach of trust, although the Plaintiffs would argue that responsibility for all that has happened should be laid at the door of the present Trustees as they were all members of the same firm of accountants.

The Cause goes on to seek as an alternative damages for breach of trust. Mr Ferbrache is not seeking to strike out the Cause as revealing no cause of action against the Trustees. That is perhaps what he should be doing if he considers that there is a defect in it, resulting from either the way in which the prayer for relief or the way the quantum of the claim is expressed. Instead he is seeking to obtain an order that the Plaintiffs produce further and more detailed particulars as to precisely how they claim the Defendant should have conducted itself in administering the Trust Funds in the years following 1990 and more particularly how the losses which they allege have occurred are to be calculated. I should add that Mr Ferbrache in fact raised five requests for Further and Better Particulars, but I am only asked to rule on requests 4 and 5.

The Law

I remind myself of the principles to be applied in applications of this kind and the previously expressed learning in this Court that in interpreting the provisions of Rule 37 of the Royal Court Civil Rules 1989, I am to have regard to the provisions of Order 18 Rule 12 of the Rules of the Supreme Court 1999 and more particularly the guidance notes thereto. I adopt the first lines of that guidance note (18/12/2):

“ The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs. ”

A further point that is of relevance here is Rule 37(2) of our 1989 Rules:

“An Order under paragraph (1)[i.e. to furnish particulars] shall not be made before the tabling of the defences unless in the opinion of the Court the order is necessary or desirable to enable the defendant to plead or for some other special reason”

In my view therefore there is not an insubstantial burden placed on Mr Ferbrache to persuade me that the furnishing of these particulars prior to his filing any defence is appropriate

The Requests and the answers provided.

These requests were first raised in September 2004 and Mr. Greenfield, in a document sent to Mr. Ferbrache on 5th November 2004, endeavoured to answer them in the following terms:

“Under paragraphs 49(1)(d)-(g) & 54

Of the averment that the Former and/or Retiring Trustees and/or the Defendant wrongly deemed themselves to be insiders.

Request

1. *Please state whether it is the Plaintiffs' case that the Former and/or Retiring Trustees and/or the Defendant were never privy to inside information and prevented from selling shares.*
2. *If it is the Plaintiffs case that the Former and/or Retiring Trustees and/or the Defendant were at times privy to inside information and prevented from selling shares please set out the periods of time during which the Plaintiffs accept that the Former and/or Retiring Trustees and/or the Defendant were privy to inside information and prevented from selling shares.*

Answer

1. ***That the Former and/or Retiring Trustees and/or the Defendant were privy to inside information and thus unable to sell shares is an assertion made by Mr John Rowe as a purported excuse for not selling shares in the Company in evidence given to this Honourable Court in Alan Stuart-Hutcheson -v- Spread Trustees Limited. Ordinarily, however, a shareholder (and even such a large shareholder as the Defendant) would not be or become privy to inside information. As between these Plaintiffs and the Defendant only the Defendant can know whether any of those concerned as Trustees was ever privy to such information and at what times, and hence unable to sell shares (although not, apparently, unable to buy shares). If the Defendant wishes to rely on any assertion that it was at any time possessed of inside information and thus unable to deal in the Company's shares it will be for the Defendant to prove that fact, which the Plaintiffs will not admit. Further, the Plaintiffs make clear their case that it was at no time either necessary or proper for the proper discharge by the Trustees of their duties as such to cause or permit themselves to be in possession of insider information with the resultant fetter on their ability to deal in the Company's shares and that such a course of action was wrong in itself. Further, and in any event, the Trustees can at no time have been insiders to any greater extent than were the Directors of the Company, many of whom at various times sold substantial numbers of shares.***
2. ***This information is exclusively within the knowledge of the Defendant and/or the Former and/or Retiring Trustees. Further, the fact that the Trustees may at any particular time have been possessed of inside information and thus prevented during any period from selling shares by their own decision did not at any time prevent them from instructing independent and professional managers to manage the Settlements' investments who would***

have been obliged and able to manage those investments in the best interests of the beneficiaries.

Under paragraphs 49(9) & 54

Of the allegation that the Former and/or Retiring Trustees and/or the Defendant refused to provide the beneficiaries with any information regarding the affairs of the Settlements and their investments or accounts

Request

3. *Please set out each request that it is alleged was made by a beneficiary for any information regarding the affairs of the Settlements and their investments or account, and, in particular,*

- (1) *set out whether such request was made orally or in writing*
- (2) *if orally, set out where, when, by whom and to whom the request was made and the gist of the words used*
- (3) *if in writing, identify the document or documents relied on*

Answer

3. *The Trustees did not provide or volunteer information concerning the Trust or its investments to the Beneficiaries, and did not hold trustee – beneficiary meetings. The case of Alan Stuart-Hutcheson –v- Spread Trustees Limited is a sufficient demonstration of the Trustees’ practice of not providing information to beneficiaries and of their wish to avoid having to do so. The first briefing given to all beneficiaries by the trustees took place on 30th September 1999. The First Plaintiff believes that she wrote to John Rowe on 26th March 2001, but has not retained a copy of her letter. She also wrote on 14th November 2002 asking for information which had not previously been provided to her.*

Under paragraph 53(2)

Of the allegation that the Defendant is liable to make good to the Settlements for the benefit of the Plaintiffs the monies which would have been recovered had the Defendant pursued timeously a proper complaint against the Former and/or Retiring Trustees

Request

4. *Please set out*

- (1) *the date on which it is alleged the Defendant ought to have instituted a claim against the Former and/or Retiring Trustees*

- (2) *what the Defendant ought to have alleged in relation to the following particular matters :*
- (a) *the date on which shares in the Company ought to have been sold;*
 - (b) *the number of shares that ought to have been sold on each such occasion;*
 - (c) *the proceeds that would have been received in respect of such sales;*
 - (d) *the alternative investments which it is contended: (i) ought to have been made as a result of the receipt of such proceeds and (ii) the dates upon which such alternative investments should have been made;*
 - (e) *the quantum of the claim that would have resulted.*
- (3) *The amount which it is alleged would have been recovered (by way of settlement or enforcement of any judgment).*

Answer

4. Subject to the following please see the answer to Request 5 below:

- (1) ***Had the Defendant acted timeously a programme of diversification would have been instituted within (say) three months of its appointment, which would in itself have avoided and reduced much of the Settlements' eventual loss. Proceedings should have been instituted as soon as possible thereafter claiming the relief sought by the Plaintiffs in this action.***
- (2) ***The Defendant as Plaintiff in such an action would have recovered the then loss, which would depend on the period over which it had in fact diversified the Settlements' holdings in the Company. See below under Request (5) for the manner in which the loss would have been assessed.***

Under paragraph 63(1) & (3)

Of the alternative allegation that after 10th July 1990 the Defendant ought to have instituted a programme of reducing the number of shares held in the Company to no more than 5% of the value of the Settlements

Request

5. *Please set out*

- (1) *each date on which it is alleged shares ought to have been sold under such a diversification programme;*
- (2) *the number of shares that would have been sold on each such occasion;*
- (3) *the proceeds that would have been received on each such occasion;*
- (4) *the alternative investments which it is contended : (a) ought to have been made as a result of the receipt of such proceeds and (b) the dates upon which such alternative investments should have been made;*
- (5) *the resulting quantum of the claim against the Defendant.*

Answer

- 5**
- (1) *It is not the Plaintiffs' case that particular or identifiable parcels of shares could or should have been sold on particular dates and for particular prices. The Plaintiffs' case is that a programme of diversification ought to have been instituted. That is why the Plaintiffs seek an order for all necessary and proper accounts and inquiries to determine the correct level of compensation that ought to be paid.***
 - (2) *The Plaintiffs' contention is that the proper way now of assessing such compensation, as a reasonable proxy for what the Trustees ought to have done, is by assuming the following:***
 - (a) *A fixed period over which the Settlements' holdings should have been reduced – say 2 years.***
 - (b) *Sales would have been made regularly – say at monthly intervals.***
 - (c) *An equal number of shares would have been sold on each occasion.***
 - (d) *The net proceeds of sale would have been immediately reinvested in the FTSE All Share index, with dividends re-invested.***
 - (3) *The Plaintiffs claim is for all necessary and proper accounts and inquiries and the Defendant is not accordingly entitled to this information at this stage. By way of illustration only, however, and on the Plaintiffs'***

present information and subject to taking and making the appropriate accounts and inquiries, such an approach as that set out at (2)(a) to (d) above would have produced an accumulated fund of £74,963,000 as at April 2003, as compared with a fund of £12,042,000, giving rise to a loss of £62,921,000.

(4) Further, the Plaintiffs make clear that this is not an “alternative” allegation: on the facts of this case it is their primary allegation.”

The Arguments of the Parties and my conclusions thereon.

There have been various actions for Breach of trust since the Trusts (Guernsey) Law 1989 was enacted – the long running case of Cross v Benetrust and others [final disposal 15th October 2000] comes to mind as an example where the breach was such that the loss, which was to almost the whole of the trust fund, was clearly capable of immediate ascertainment. This is the first time as far as I am aware that an action has come before the Royal Court presented in this way. The Plaintiffs allege that Trustee in the discharge of its duties as Trustee has committed breaches of trust and as a consequence it should indemnify the Trust Funds so as to restore them to the position that they would be in, had the Trustee conducted itself in the way that the Plaintiffs claim that it should. The plaintiffs are not specifying the amount of the loss. This they say in their the claim for relief is a matter for the production of accounts and enquiries to be undertaken so as to establish what compensation should be ordered.

At first sight it would appear that there are indeed two distinct issues for the Court namely (1) has the Trustee by its conduct failed to act as a Trustee should have done and committed a breach of trust to the extent that the Trust Funds should be compensated in whole or in part for the diminution in value of the Trust Funds resulting from these failures and (2) Having established that the Trustee is at fault, what level of indemnification there should be made by the Trustee in respect of the loss in the Trust Funds.

It is only when a breach of trust is established that these issues of quantum arise, but in Guernsey we have a well established procedure whereby actions are pleaded both as to issues of liability and quantum at the same time.

As I have said Mr Ferbrache is not taking as a distinct issue that the pleadings are inadequate for their failure to specify a liquidated sum by way of damages. That may be for another day. The attraction that I have identified of treating the two issues as distinct is clearly questioned by the Defendant's then Advocate Mr Collas in a helpful letter dated 15th November 2004, which he wrote to Mr Greenfield explaining his position. In particular Mr Collas had researched the way in which these matters which would have been dealt with in the Court of Chancery in the old days and the way he thinks they should be dealt with in Guernsey where issues of quantum are matters of fact for the Jurats. I agree that the procedure outlined by Mr Collas as to how the Court of Chancery dealt with these matters originally and ordered an account once it had established a single breach of trust is not appropriate here. I have noted his own understanding of the position that things have moved on in England and that it would be usual to deal with such cases in one compendious trial unless, applying normal case management procedures, the Court clearly identified preliminary issues that would lend themselves to separate consideration at a separate trial. It is because of the Defendant's anxiety to identify not only issues relating to liability but issues relating to the way in which quantum should be calculated that Mr Ferbrache continues with resisting the adequacy of what Mr Greenfield has so far provided, by way of response to the Request for further and better particulars.

To determine whether Mr Ferbrache on behalf of the Defendant is justified in this submission, I am driven to taking some view as to the way the matter will proceed in the future. It seems to me that in breach of trust cases issues as to the appropriate way in which the Trust Fund should be compensated are very much issues of the Court to decide after due enquiry. I reminded Mr Ferbrache of a case that he and I were both involve in which broke new ground in Guernsey.

I refer to the case of Matheson Securities v Hulme and the final stage in that again protracted litigation, which took place in 1999 or 2000. Put very shortly Matheson Securities who were stockbrokers obtained an injunction against one of their associates, Mr Hulme freezing his assets to meet certain claims that they had against him. The Injunction was extended to cover certain shares held by the Plaintiff's nominee Company, but in which Mrs Hulme was solely entitled as she had actually paid for them. The Royal Court, wrongly as it turned out, was persuaded by

Matheson to continue the Injunction restraining dealing in what I will call Mrs Hulme's shares until that Injunction was set aside by the Court of Appeal. On setting aside the Injunction the Court of Appeal remitted the matter to the Royal Court for the Royal Court to carry out what is called in English Law an inquiry into the damages that flowed as a result of the wrongful grant of the Injunction and the wrongful restraint of Mrs Hulme from dealing in the shares concerned during the months that the Royal Court Injunction had been in place. There was no specific amount of quantum claimed by Mrs Hulme. What the Royal Court did was to engage with the assistance of Counsel for Matheson and Mrs Hulme in an investigation in order to establish what would have happened had the Injunction not been granted and in particular on what date would it have been reasonable for the Court to conclude that Mrs Hulme would have sold the shares – the situation being that the shares in question tumbled in value during the period whilst Mrs Hulme was under restraint. The Court and in particular the Jurats had no difficulty in doing justice despite the apparent novelty of the procedure.

Whilst it is not for me at this stage to be speculating as to the way in which the present proceedings will continue in the Royal Court it does seem to me there is an analogy between the inquiry into damages, which follows the lifting of an Injunction that should not have been granted and the situation here where there must be an inquiry into the damage that a Trust Fund has suffered once the Trustees are shown to be in breach and the precise nature of that breach established.

The crux of the Plaintiffs' claim is not difficult to understand, namely that this Trustee should, notwithstanding the expressed wishes of Mr Acatos at the time the Settlements were created, not have relied on Mr Ian Hutcheson's views that the Settlements should be retaining the substantial holding of shares in the Company particularly after the shares became quoted on the Stock Exchange. They claim that the standing of Mr Hutcheson as an advisor was further diminished by his exclusion from the class of beneficiaries in 1983. The Plaintiffs say that had the Trustee exercised an independent judgment it would have concluded that the holding in the Company should be reduced and the proceeds of sale invested in a more balanced portfolio of quoted investments, which would have not resulted in the steep decline in the value of the investments in the two Settlements. Interesting issues as to the extent

of the liability of the Trustee to beneficiaries will no doubt arise to be determined at a later stage. The Defences will have to concentrate on these issues and whether the actions of the Trustee entitles the Plaintiffs to call for an investigation of the extent of loss to the Trust Funds and appropriate compensation for any such loss, rather than the specifics of the way in which the compensation (if there be a liability to make good) is to be calculated.

The requests which are being challenged concentrate on two issues:-

- (1) The issue of whether Further Particulars should be given as to how the Defendant should institute a claim against the former or retiring Trustees. I have noted that the Plaintiffs would argue that they wish to place the whole of the responsibility for what has happened at the door of the present Trustees. Firstly they say that it is probably going to be fruitless for them to sue individuals who have either died or have long since retired. The Plaintiffs also point to the close professional relationship between the Defendant and the previous trustees. In any event it seems to me that the beneficiaries will not have knowledge at this stage of all that transpired between the present Trustees and their predecessors. Although this point was not touched on in argument before me, it might be possible for the Defendant to apply to have the previous Trustees joined probably as third parties, if this was material to the proceedings. In any event I cannot see how the Plaintiffs can be expected to plead such a point in more than the general terms that they have at the present time
- (2) The next two requests in both 4 and 5 are in very similar terms. The Defendant is asking the Plaintiffs to particularise the course of action which it is said that the Defendant should have undertaken in the proposed diversification exercise with specific dates, numbers of shares to be sold in each stage of the diversification programme and even more difficultly the alternative investments which it is contended ought to have been made as a result of receiving the proceeds of sale of each tranche of the Shares in the Company. This appeared to require the Plaintiffs to go into an exercise of identifying days of sale then looking at whatever advice was then available as to alternative investments and identifying what those investments should be.

Further permutations which are possible: for example, have the Plaintiffs to identify occasions where the sale of a tranche of shares is called for, but where the prognosis on the stock market was such that no immediate reinvestment of the proceeds would have been appropriate. Mr Ferbrache sought to resile a little on the consequences of such a request, but I have got to look at these requests in the round and the weakness of what he is asking is best illustrated by Request 4 (2) (d) and request 5 (4).

Mr Greenfield has tried to amplify the answers to these requests in correspondence. Mr Ferbrache then complains that the voluminous correspondence discloses contradictions and inconsistencies in the Plaintiffs' case. It is not in my view incumbent on me to go through these exchanges line by line and analyse all that is written therein. As I indicated at the hearing if Mr Greenfield has indeed usefully amplified some part of his previous answers in one of his many letters, which will assist the progress of the action then let the text of the replies be amended by agreement. However quite rightly in my view Mr Greenfield cannot be drawn in pleading into a detailed critique of what the Trustee should or should not have done. These matters can only go to quantum and compensation. He has gone as far as producing a worse case scenario from the point of view of the Trustees and come out with a figure of £60,000,000, but this is clearly very speculative and edged with uncertainties so as to make it almost meaningless.

Although, as I have already said, I am not seeking in any way to predict how this matter will proceed it does seem to me that one can only get down to the specifics of quantum and compensation to the Trust Fund once one has identified precisely what the breach of trust is.

I reject the Defendant's submission that it is in some way essential to deal with the details of quantum in order to show the extent of the alleged breach of trust. Accordingly Mr Ferbrache has not satisfied me that I should be ordering the answering of his request to the Plaintiff's Advocate at this stage. It is quite possible that at a later stage the issues that he seeks to have amplified will properly have to be defined in expert reports or other documentation to be placed before the Court if and when the question of compensation is addressed. It is for those reasons that I have rejected this application.