

Judgment 13/2009

Thommessen v Butterfield Trust (Guernsey) Ltd and the International Committee of the Red Cross (in re the Mischca Trust) – Royal Court (Civil Action File 1041) – 19 March 2009

Civil Procedure - Royal Court Civil Rules, 2007 (Rule 71) – application for specific disclosure – legal advice privilege and litigation privilege relied upon – application dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1041

19th day of March 2009 before Richard John Collas, Esquire, Deputy Bailiff

Between

MR OLAF MICHAEL LIE THOMMESSEN

Applicant

AS SETTLOR OF THE MISCHCA TRUST

AND

BUTTERFIELD TRUST (GUERNSEY) LIMITED

First Respondent

AS TRUSTEE OF THE MISCHCA TRUST

AND

BUTTERFIELD TRUST (GUERNSEY) LIMITED

Second Respondent

AS TRUSTEE OF THE INTERNATIONAL FOUNDATION

AND

INTERNATIONAL COMMITTEE OF THE RED CROSS

ICRC

AS THE BENEFICIARY OF THE TRUST

Whereas on 5th March 2009 the Deputy Bailiff considered an application pursuant to Rule 71 of the Royal Court Civil Rules 2007 and/or the inherent jurisdiction of the Court for an order for disclosure of five categories of document, identified in sub paragraphs (a) – (e) of paragraph 1 of the said application and heard thereon Advocates J P Greenfield and C H Edwards counsel for the Applicant and First & Second Respondents respectively and Crown Advocate W P T Nicol-Gent Representing the *Partie Publique* the Deputy Bailiff this day handed down judgment in the terms attached hereto and dismissed the said application save in so far as the documents requested have already been disclosed.

S M D ROSS
H M Deputy Greffier

Introduction

1. By application dated 30th October 2008 the Applicant, who I will refer to as Mr Thommessen, applied pursuant to Rule 71 of the Royal Court Civil Rules 2007 (“RCCR 2007”) and/or the inherent jurisdiction of the Court for an order for disclosure of five categories of document, identified in sub paragraphs (a) – (e) of paragraph 1 of the application.
2. In support of the application, a lengthy skeleton argument was filed on behalf of Mr Thommessen dated 30th October 2008. The Respondent filed a skeleton argument in opposition to the application and Mr Thommessen filed a further skeleton argument in reply to the Respondent’s (BT’s) skeleton argument dated 10th December 2008.
3. At the hearing before me, I was advised that the document requested in paragraph (e) of the application, namely the opinion of Robert Ham QC, had been supplied and so was no longer an issue.
4. The request for documents in paragraphs (a) and (b) relate to a legal opinion provided by Andrew Mitchell QC in writing dated 1st September 2008 which the First and Second Respondent (who I will refer to as “BT”) disclosed and relied upon at a hearing before me on 3rd September 2008 when BT applied to adjourn a two week hearing listed to commence on 15th September 2008. The request is for specific disclosure of the instructions given to Andrew Mitchell QC including any terms of reference, documents and other papers provided to him by BT in connection with a consultation which took place on 24th July 2008 and in connection with his written opinion dated 1st September 2008 together with any attendance notes of the consultation or of any other consultation, communication or discussion in connection with his written opinion.
5. At the hearing of the present application, Advocate Edwards advised that all the documents and other papers (apart from the instructions) provided to Mr Mitchell have already been disclosed to Mr Thommessen. The documents that have not been disclosed to which this application therefore relates are the written instructions given to him and any attendance notes of the consultation on 24th July 2008. I will refer to these documents as the “Mitchell Documents”. BT claims it is not required to disclose them because they are all protected by privilege.
6. Paragraph (c) of the application requests:

“all communications, including any letters, or attendance notes of any meetings or conversations, and letters of instruction or advice, passing between any of (A) [BT] and their Advocates and (B) (i) HMRC, (ii) the Charity Commissioners, (iii) Bircham Dyson Bell, (iv) any specific charities nominated by Bircham Dyson Bell or otherwise as actual or potential recipients of the Trust or IFAS asset, and (v) any other person in each case in connection with the intended transfer of the assets of and underlying the Trust and IFAS to the United Kingdom.”

7. For convenience, I will refer to these as the “BDB Documents”. Advocate Edwards confirmed that documents relating to each of the sub-paragraphs in paragraph (c) are in existence but privilege is claimed in respect of them all. I will not deal with paragraph (d) because it was agreed at the hearing that the request in paragraph (d) added nothing to the request in paragraph (c).

Substantive Applications

8. The application for specific disclosure relates to two substantive applications made by each of BT and Mr Thommessen. BT applied to the Court as trustee of the Mischca Trust and as trustee of The International Foundation for Arts and Sciences which it created on 20 December 1995 (“IFAS”). Its substantive application is dated 16th August 2006 and was made under Section 63 of the Trusts (Guernsey) Law 1989 as amended (now replaced by Section 69 of the Trusts (Guernsey) Law 2007 (“the 2007 Law”) and in so far as it related to costs, under Section 65 of the 1989 Law (now replaced by Section 71 of the 2007 Law). The substantive relief sought by BT in paragraphs 3 and 4 thereof is to approve the creation by BT of IFAS, to approve a Deed of Confirmation pertaining thereto and to approve the transfer of the trust funds of the Mischca Trust to an English charity subject to the jurisdiction of the Charity Commission.
9. Mr Thommessen’s substantive application dated 21st December 2006 seeks a number of Orders, including that BT be removed as trustee and replaced by Credit Suisse Trust Limited.

Background

10. The factual background has been set out in great detail in the Affidavits and documents produced to the Court. I will endeavour to summarise briefly the pertinent facts that relate to this application for specific disclosure.
11. Mr Thommessen created the Mischca Trust on 29th December 1987 to receive income from a successful designer of theatrical sets (who I will call the “Economic Settlor”). The Economic Settlor and her mother were named as beneficiaries and both of them have subsequently died. There are no other individuals named as beneficiaries and Mr Thommessen is not a beneficiary; the only other named beneficiary is the International Committee of the Red Cross (“ICRC”) although there is power (in Clause 6 of the Mischca Trust Deed) to apply the capital and income of the trust fund for charitable purposes in the absolute discretion of the trustee. Mr Thommessen now disputes the manner in which BT proposes to exercise its powers and to give effect to such charitable purposes.
12. At an early stage, HM Procureur was given notice of BT’s substantive application and Crown Advocate Nicol-Gent has appeared on his behalf as *partie publique* to represent the general charitable intent. Carey Olsen later gave notice of the proceedings to the ICRC and ICRC has instructed that firm to represent it in the proceedings. Carey Olsen have said that there is no conflict of interest between Mr Thommessen and the ICRC.

13. The IFAS was established by BT on 20th December 1995 in terms identical to the Mischca Trust; its beneficiaries are ICRC and any person added as such by the trustee.
14. On 20th December 1995, BT purportedly added IFAS as a beneficiary of the Mischca Trust. Mr Thommessen disputes the validity of that addition and, as part of its substantive application, BT is seeking the Court’s approval of the creation of IFAS.
15. Expert evidence tabled in connection with the substantive applications has identified some potential UK tax issues. HM Procureur, through Crown Advocate Nicol-Gent, suggested it would be sensible to bespeak the views of HMRC rather than ask the Royal Court to take a view of the tax consequences with which HMRC might later disagree. BT then took advice from Mr Mitchell at a consultation on 24 July 2008 which he confirmed in his written opinion of 1 September. That has led to BT instructing BDB to enter into discussions with HMRC and also to engage with the Charity Commission. Hence, the BDB Documents have come into existence.
16. In support of the adjournment application heard on 3rd September 2008 Paul Hodgson, the Managing Director of BT, swore his fourth affidavit in this matter in which he explained why BDB were instructed and he concluded his affidavit by saying at paragraph 19:

“I therefore respectfully ask that the hearing of the Applications be vacated and be set down for a time no less than 6 months subsequent to that. That will, upon the advice which I have received, allow sufficient time for the disclosure to have taken place, and for dialogue to have taken place with HMRC in order for any issues to be resolved.”

17. The hearing was adjourned, as requested. Six months have now elapsed but I am told BT will be asking for a further adjournment as its enquiries are still continuing. Advocate Edwards says on behalf of BT, in his skeleton argument, that when the enquiries have been completed it may put before the Court a report which will explain the outcome of the approaches to HMRC and the Charity Commissioners.

The Mitchell Documents

18. Advocate Greenfield, on behalf of Mr Thommessen, submits that the BDB Documents should be disclosed to enable the Court properly to consider whether to approve the decisions proposed by BT. He referred me to the judgment of Lord Oliver in *Marley v Mutual Security Merchant Bank [1991] 3 All ER 198*, including this passage at page 201:

“If, however [the Trustee] seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put into possession of all the material necessary to enable that discretion to be exercised.”

19. Unlike the trustee in the *Marley* case, BT is not surrendering its discretion to the Royal Court. However, the Royal Court of Jersey has applied the same approach to disclosure in cases where the Court is being asked by a trustee to approve a decision it proposes to make. I respectfully agree with Commissioner Clyde Smith who, in *Re Representation of Lincoln Trust Company (Jersey) Limited and in the matter of the A and B Trusts [2007] JRC 138* said:

“It must follow as a matter of general principle that if a trustee wishes the court to approve a decision it proposes to make, it must provide the court with all of the information that the trustee has or ought to have in relation to that decision.”

20. Advocate Greenfield referred to the four categories of application that may be made to the court by a trustee as set out by Hart J in the well known case of *Public Trustee v Cooper [2001] 1WTLR 901*. The application by BT is an example of the second category:

“where the issue is whether the proposed course of action is a proper exercise of the trustees’ powers where there is no real doubt as to the nature of the trustees’ power and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.”

21. I entirely agree that the proposed distribution or resettlement of the assets of the Mischca Trust is a momentous decision and that it falls within the second of the categories in *Public Trustee v Cooper*.

22. It follows that, in order to deal with BT’s substantive application, the Court will require full disclosure of all the relevant material available in order to decide what would be in the best interests of the charitable beneficiaries.

23. Unfortunately, that does not give me much assistance in deciding how to deal with this application for specific disclosure because Mr Thommessen is applying to have BT removed as a trustee and in support thereof he has made a number of criticisms of BT’s ability to manage the Mischca Trust and, for example, he summarised his concerns as follows in paragraph 9.13 of an affidavit sworn on 22nd December 2006 :

“It follows from all the above that I have totally lost faith in Butterfield’s ability to manage the Trust in a professional and independent manner.”

24. Consequently, BT is defending its competence and professionalism and is responding to hostile litigation of the nature identified in the fourth category of applications identified in *Public Trustee v Cooper*.

25. It is apparent from the written opinion of Mr Mitchell dated 1st September 2008 that the advice he gave included advice relating to issues concerning BT. For example, one of the specific questions upon which he said his opinion was sought

was “*has BT committed a money laundering offence?*”. In his written opinion, Mr Mitchell also comments upon the merits of Mr Thommessen’s application and, in the words of Advocate Greenfield, he makes a number of comments which amount to a gratuitous attack on Mr Thommessen which is prejudicial to him. I can assure Mr Thommessen, and his advisors, that I attach no weight, and will totally ignore, any and all such comments made by Mr Mitchell. They will not influence my decisions on the issues I will have to determine.

26. Advocate Edwards said Mr Mitchell will not be called as a witness at the trial so BT will not be relying upon his opinion. At the hearing of the adjournment application in September 2008, the opinion was disclosed in order to inform the Court as to the advice BT had received and to explain why it was seeking to carry out further investigations. When I am deciding the substantive applications, Mr Mitchell’s opinion will not be relevant but what I will have to consider will be the advice that will be given as a result of the conclusions that are drawn from the investigations.
27. In my view, Mr Mitchell was consulted for the purpose of giving legal advice and hence the Mitchell Documents are protected by legal advice privilege save to the extent that BT has waived such privilege. His written opinion was produced for a limited purpose only and it is not to be relied upon at the trial. I am satisfied that BT has not waived privilege in respect of the documents of which disclosure is now sought and which I have referred to as the Mitchell Documents.
28. Even though at the hearing in September Advocate Ferbrache chose to quote extensively from Mr Mitchell’s opinion when he could have been more selective and he could have produced, as Advocate Greenfield suggested, a redacted copy of the opinion, I do not accept that the Mitchell Documents have thereby lost their privileged status. I reach that conclusion having regard to the purpose for which the document was produced at the September hearing and to the fact that BT is defending itself against hostile litigation.
29. Advocate Greenfield also argued that the Mitchell Documents may be relevant in showing that BT are acting with improper motives in promoting their own interests above those of the trusts and the charitable beneficiaries. If so, that would support Mr Thommessen’s application for the removal of BT as trustee. I reject that as a reason for disclosing the Mitchell Documents because BT is facing, as I have said, hostile litigation and is entitled to defend itself against the allegations of a serious nature that Mr Thommessen has made in support of his application.
30. I therefore dismiss the application for specific disclosure of the Mitchell Documents identified in paragraphs (a) and (b) in so far as they have not already been disclosed.

The BDB Documents

31. In Paul Hodgson’s fourth affidavit sworn on 22nd August 2008, he explained that BDB were instructed after the consultation with Mr Mitchell in order to engage with HMRC and to enter discussions with HMRC on taxation matters so as to

identify and deal with any taxation issues which may be said to arise and to ensure that the distribution of the assets of the Mischca Trust and IFAS to charity would be able to take place without further investigation, hindrance or charge on the part of HMRC and also to ascertain the views of the Charity Commissioners. BT hopes that at the end of this process it will be able to confirm to the Court that the proposed distribution would not be subject to any hindrance or further charge on the part of HMRC.

32. In BT's skeleton argument filed in opposition to the application for specific disclosure, Advocate Edwards claims the BDB documents are subject to litigation privilege and goes on to say that if BT subsequently elect to put material before the Court as to the outcome of its approaches to HMRC and the Charity Commissioners, then that material will likely be in the form of a further report(s) which the Court will be called upon to consider when deciding the substantive applications. My understanding of his argument is that the expert witness who will produce such report(s) is to be treated the same as any other expert witness who may be instructed and in respect of whom communications are privileged until such time as the witness' report is disclosed when privilege is waived.
33. It is undoubtedly true that the tax consequences of BT's proposals have become an important issue in the case. I have no doubt that the Court will require a report or reports on the outcome of the present investigations. When such report(s) is produced and disclosed, disclosure will have to be made of all relevant documentation and it seems inevitable that will include correspondence with HMRC and the Charity Commissioners with the possible exception of correspondence relating only to the position of BT personally (in respect of which I express no definitive view at this stage and reserve comment). Otherwise the Court will not have before it all the relevant material necessary to decide whether to approve the course of action proposed by BT.
34. So, are there grounds for ordering disclosure at this stage or, is BT's application for specific disclosure of the BDB document premature?
35. It is to be noted that BT is claiming litigation privilege, not legal advice privilege. As to the meaning of litigation privilege, Hancox LB in *Ashton v Ansol Limited* (16th October 2002) said:

“The position in my mind is well explained in this passage from Hollander on Documentary Evidence page 127, which was cited by Mr. Isaacs in argument before Morritt V-C:

“In order for litigation privilege to apply, there must be a confidential communication between client and lawyer or lawyer and agent, or between one of these and a third party made for the dominant purpose of use in litigation; that is to seek or provide information or evidence to be used in or in connection with litigation in which the client is a party.”

36. What then is the dominant purpose of the BDB documents? On the information I have been given, I am persuaded that their dominant purpose is for use in connection with this litigation.
37. There could be correspondence with, or documents emanating from, HMRC and the Charity Commission that would not be privileged. For example, if HMRC assessed BT as trustee of the Mischca Trust, or as trustee of IFAS, to liability for payment of UK income tax and/or commenced an investigation into the Mischca Trust or IFAS, I do not believe that the notice of such assessment or investigation would be privileged. BT must consider carefully each of the BDB Documents carefully to ensure that it is properly privileged and not subject to disclosure in accordance with BT's ongoing duty to disclose.
38. I accept that at this stage in the proceedings, privilege has not been waived and so the BDB Documents are not presently disclosable. I am also satisfied there is no specific power under the Trusts (Guernsey) Law 2007 to require disclosure of the BDB Documents to Mr Thommessen as settlor.
39. Advocate Greenfield has pointed out that a claim for privilege should be supported by affidavit. I am satisfied that the affidavit evidence already before the Court is sufficient.
40. It seems to me to be inevitable that the BDB Documents, or a substantial portion of them, will have to be disclosed in due course and I am somewhat surprised that BT has not been keeping Mr Thommessen aware of the progress of its enquiries. An explanation may be that, because of the adversarial nature of Mr Thommessen's application and the hostility that has been generated between the parties, BT has concluded it would prefer not to copy all documents to him or his Advocates during the conduct of the investigations. If that is the reason, I doubt whether it justifies not keeping Mr Thommessen aware of progress or even as to the precise issues that are being investigated. He will eventually be told the outcome of the enquiries and I question whether there is any good reason for not keeping him advised of the issues that are being discussed and the progress, if any, that is being made.
41. I wish to draw these thoughts to the attention of Counsel so they may consider them before we next review the case. Advocate Edwards has indicated there will be an application for a further adjournment. I put him on notice that I would expect a full explanation as to what has taken place over the last six months and why BT has not concluded the investigations within the period envisaged by Mr Hodgson when he swore his fourth affidavit. I anticipate that some, at least, of the BDB documents may have to be disclosed in support of an application for a further adjournment. If I am persuaded that a further adjournment is to be granted, I will be considering whether to attach conditions to that further adjournment. One of the conditions I might have in mind could be a requirement that BT keep Mr Thommessen informed as to the future progress of the investigations. I invite Counsel to consider what conditions would be appropriate.

42. Even though I can see reasons why I would like the BDB Documents to be disclosed to Mr Thommessen, I have to conclude that I must dismiss the application for specific disclosure of the BDB Documents at this stage.

Conclusion

43. The application dated 30th October 2008 brought by Mr Thommessen for disclosure of specific documents and specific categories of documents is therefore dismissed save in so far as the documents requested have already been disclosed.