

Judgment 14/2005

**Hill Samuel Offshore Trust Company Ltd (in re the
Tubuoh Trust) – Royal Court (Civil Action File
914) – 11 March, and 12 May 2005**

- (i) Trust – proceedings against the original trustee (a company) in the English High Court – the business of the original trustee had been transferred to the present applicant, Hill Samuel – Beddoes application by Hill Samuel – adjourned sine die**
- (ii) Trusts (Guernsey) Law, 1989 – Beddoes application by the trustee company – applicant directed to send a report to all the discretionary beneficiaries on the action taken and the extent of the indemnity sought – any application by a beneficiary, to restrain the trustee from paying out the monies, to be considered within eight weeks of posting of the report**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 11th day of March, 2005 before Sir de Vic Carey, Bailiff; sitting alone

**IN THE MATTER OF AN APPLICATION BY
HILL SAMUEL OFFSHORE TRUST COMPANY LIMITED**

and

IN THE MATTER OF THE TUBUOH TRUST

On the application of HILL SAMUEL OFFSHORE TRUST COMPANY LIMITED for directions in relation to its intention to bring a Beddoe application, the Bailiff, having heard from Advocate J.P. Greenfield, Counsel for the applicant, gave judgment in the terms attached hereto and ADJOURNED the said application sine die.

S M D ROSS
Her Majesty's Deputy Greffier

FRIDAY 11TH MARCH, 2005

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

Edited Judgment of Sir de Vic Carey, Bailiff

**IN THE MATTER OF AN APPLICATION BY
HILL SAMUEL OFFSHORE TRUST COMPANY LTD.**

and

IN THE MATTER OF THE TUBUOH TRUST

1. In 1994 Mr. Joseph Ansah settled certain funds on Lloyds Bank (International) Guernsey Limited (the “Original Trustee”) on the terms of what was a fairly standard discretionary trust. He identified certain people whom he wished to be discretionary beneficiaries and put very loosely they were the members of his extended family.
2. Since 1994 the affairs of the Original Trustee have become a little complicated. Put very briefly, the company changed its name on two occasions and then migrated to Jersey. Once it was in Jersey legislation there permitted the re-organisation of the affairs of Lloyds TSB Group, and so the business of the Original Trustee, was transferred to the Applicants, Hill Samuel Offshore Trust Company Limited.
3. In July last year proceedings were issued against the Original Trustee, in England, by a company called Nabb Brothers Limited, ("the Plaintiff Company") which is incorporated in Ghana, from which country all the persons involved in this particular matter seem to have originated.
4. The allegations contained in the Particulars of Claim were stark and simple. They were basically that according to the Plaintiff Company Mr. Ansah put into this Trust money which truly belonged to the company, and which he had, through a dishonest method of working, managed to get into his own hands. Neither I, nor the Original Trustee, are in any position to say whether this allegation has any foundation to it or not.
5. The Original Trustee has chosen to defend the proceedings in England because what was being asked was a declaration that the Trust funds were indeed the property of the Plaintiff

Company and the basis of the Defence was first of all that England was not the appropriate forum and that also the Original Trustee was no longer the appropriate person to be sued.

6. These issues are currently before Mr. Justice Lawrence Collins for resolution and I must be careful not to usurp the role of the English Court. I am told that there have been a number of hearings before the Judge; he has investigated a number of matters in connection with the claim and he is shortly to hand down a judgment in connection with the matter as it has gone so far.
7. Whilst the decision of the Court in England will not be of concern to me, the conduct of the Applicant in respect of the way in which the English proceedings have been handled may become relevant if it seeks an order of the Court permitting it to indemnify itself in respect of the costs of defending the English proceedings, particularly as at the moment I am not entirely clear as to the precise legal relationship between the Applicant and the Original Trustee. I have been told by Mr. Greenfield, and I accept so far as it goes, the proposition that the Original Trustee albeit that it is dormant and may not have any assets, was in duty bound to defend the English proceedings because the effect of an order there that the funds were in fact the property of the Plaintiff Company rather than part of the Trust would have led to a situation that might have caused unfairness and great difficulty for the current Trustees.
8. If the Plaintiff Company is right, the result of the claim might be that the Applicant will be found to be the Constructive Trustee for the Plaintiff Company and not for the beneficiaries of the Trust. It is a sad fact of life that, unwittingly becoming Trustees of monies that turn out not to be those of the Settlor, is an industrial disease from which offshore trust companies can find themselves suffering all too often. It is also a fact of life, as Mr. Greenfield has clearly claimed this afternoon, that offshore trust companies find themselves as innocent parties in the middle of bitter family disputes. This, apparently, may be one of those.
9. The Court will always seek to protect innocent Trustees, carrying on legitimate business in Guernsey, from unjustified attack and the incurring of unnecessary expenditure in the furtherance of such disputes. However, there must also on the other side be a duty on Trustees to be pragmatic and to be conscious that the Trust funds are not there for them to draw on at will is purportedly protecting their position. They and their legal advisors must think carefully, before taking any step which is going to cause a likely depletion of the Trust funds in substantial legal expenses.
10. A number of features trouble me about this matter on reading the file, but what I say is qualified by the fact that Mr. Greenfield says there is a lot more material which he did not include in the file. I would like to make it clear that I am not criticising the fact that not every

bit of paper was produced for me to try and digest today, and so the comments that I make may be coloured by anything I hear further, but I think I will put the points that trouble me down on record because I hope they will be of assistance to those advising the present Trustees.

11. Three of the possible beneficiaries of the Trust are directors of the Plaintiff company, which claims to have been defrauded. It is natural that their interests are going to be contrary to other beneficiaries who have got no such involvement; but it does seem to me that the usual rules about not disclosing the strength of the Trustees cases to beneficiaries who are on the other side are not necessarily so compelling in this type of case because there really is not very much that is up the sleeve of the Trustee in the defence of a claim such as this. There again, it may be that other information has come out in the English proceedings of which I am not aware, of which only the present Trustees would have special knowledge.
12. From what I have seen there has been no investigation by the Trustee of the merits of the claim. I have noted from the file that there is a rather curiously worded letter from a firm of lawyers in Ghana, indicating that the family have bypassed the Trustee in resolving their differences and as a result the consequences will be that the English proceedings are to be withdrawn.
13. There seems to be some suggestion that such a step is not in order. Of course, it is not in order so far as disposing of the Trust assets are concerned, but if the beneficiaries of a Trust decide between them that they wish to reorganise the affairs of the Trust and if they have power to arrange for it to be wound up or to be dealt with in a different way, the Trustee has got to respect that: at the end of the day the Trustee is the servant of the present and future beneficiaries of the Trust and so I do not want to support the suggestion that it is wrong that the family should have been talking to each other and trying to resolve their differences. Any direction to the Trustee will, of course, be a matter for the Trustees to consider and for this Court to approve, if necessary.
14. It would seem also reasonable that if this matter has been settled, and we do not know whether it has, and if there is to be any discontinuance of the English proceedings, the Plaintiff company should be asked to withdraw any claim relating to Constructive Trusteeship, because that is a serious and worrying claim to be made against a Trustee who may be doing its best to look after the interests of the beneficiaries identified in the Trust document.
15. If the matter is settled there may remain the issue of what fees can properly be charged by the Trustee in respect of the English proceedings, and there will then be some type of retrospective Beddoes application to be made, and I would emphasise the general principle

must be that the Trustee must be indemnified in respect of all his reasonable expenses in a matter such as this.

16. If the matter is not, as is suggested by the Ghanaian lawyers, settled, then there is a clear conflict amongst the beneficiaries between those who are interested in the Plaintiff Company's claim against the Trust and those who are not. In my view the Trustee has no inherent duty to take sides. It is there to conserve and look after the Trust property, but in a case such as this it may well be that if no beneficiary comes forward to take responsibility for arguing the case of those who wish to challenge the claim that the assets of the Trust are, in fact, subject to a Constructive Trust in favour of the Plaintiff company, the Trustees will have to leave it to the Court to decide whether there is any justification for the Trustees continuing to expend funds in defending the claim. I would not expect the Trustees to have to go through a line by line challenge of a claim of somebody who is claiming a Constructive Trust of funds which form part of the Trust, when the beneficiaries themselves are not prepared to take responsibility for challenging that claim. Otherwise one could get the situation where stolen money could be put in to an offshore trust and the Trustee sits there putting the claimant to proof at every stage running up expenses both in time of his own officers and, lawyers defending the Trustee. Therefore, this is a matter that needs careful consideration and may involve a careful balancing exercise.
17. I am sure that Mr. Greenfield has done what he can and what he felt right in advising the Trustee in this case, but at the end of the day, the Court may be in difficulty in deciding the issue of indemnity of the Trustee out of the funds of the Trust without giving the opportunity to any other party to be heard as to the reasonableness of the way in which the Trustee chose to conduct its business.
18. Another aspect of all these cases is that sometimes certain expenses which Trustees legitimately wish to incur in order to protect their reputation and their position as Trustees are expenses that are more properly born by the Trust company as part of its general business expenses, rather than being set against a particular Trust fund. Again, I am speaking in the most general terms and I am not drawing any conclusion at this stage that this is such a situation.
19. Mr. Greenfield, I propose to adjourn this matter sine die.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 914

The 12th day of May, 2005, before Sir de Vic Carey, Bailiff; sitting alone.

HILL SAMUEL OFFSHORE TRUST COMPANY LIMITED

Applicant

and

THE BENEFICIARIES OF THE TUBUOH TRUST

Respondents

In the matter of an application dated 6th April, 2005, by HILL SAMUEL OFFSHORE TRUST COMPANY LIMITED for Directions in the matter of the Beddoes application which was adjourned sine die on 11th March, 2005;

WHEREAS on the 21st April, 2005, THE COURT having heard Advocate J.P. Greenfield, thereon; and on the 6th May, 2005, heard from Advocate C.A. Tee, RESERVED JUDGMENT;

THE COURT this day handed down judgment in the terms attached hereto and DIRECTED that the Applicant prepare a report to all the discretionary beneficiaries, such report to be sent by ordinary post to those beneficiaries for whom the Trustee has an address, and that a date, not less than 8 weeks after the date upon which the said report is posted out to the beneficiaries, be identified – upon which date the Trustees propose to appropriate the monies expended from the Trust account, such monies to include the reasonable costs of the Trustee in making the various applications to the Court on 11th March, 2005.

M A TOSTEVIN
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF AN APPLICATION BY

HILL SAMUEL OFFSHORE TRUST COMPANY LIMITED

and

TUBUOH TRUST

**SUPPLEMENTAL JUDGMENT OF THE BAILIFF ON THE TRUSTEE'S APPLICATION
FOR DIRECTIONS**

Date of Hearing: 21st April, 2005 and 6th May, 2005

Date judgment handed down: 12th May, 2005

Introduction

1. It will help if I summarise the actual application that is before me which is made "pursuant to section 62 and/or section 64 and/or 65 and/or other enabling or relevant provisions of the Trusts (Guernsey) Law, 1989, as amended and/or the common law" for orders permitting the Trustee to take all reasonable steps necessary to protect the assets of the Trust in respect of proceedings issued by NABB Brothers Ltd. in England. There is a further application for the Trustee to be indemnified on a full indemnity basis out of the assets of the Trust in respect of all costs properly incurred by it in connection with steps taken under the authority sought to it to defend the NABB Brothers proceedings.
2. This matter first came before me on the 11th March and at that stage I had some anxiety as to whether this was going to be a case where the Trustee should in effect be retrospectively indemnified in respect of costs which had clearly been incurred defending proceedings in England and which were then awaiting the judgment of Mr. Justice Lawrence Collins. What was troubling me was the situation where an offshore trust company had inadvertently accepted responsibility for administering a trust where the whole of the trust funds were not those of the settlor but somebody from whom the settlor had improperly acquired the funds in circumstances where the trustee was a constructive trustee for the original owner, if I can put it that way.
3. Things have clearly moved on. I now have the judgment of Lawrence Collins, J. from which I can understand that any anxiety I had that the Trustee might inadvertently have been wrongly defending the proceedings in England, which of course were not the principle proceedings, but

connected with the application of NABB Brothers to serve notice of proceedings outside the jurisdiction, may have been misplaced. Put briefly Mr. Justice Lawrence Collins took the view that the Master who had granted leave for proceedings brought against the Applicant in England to be served on it outside the jurisdiction had not had been given the full picture and that his decision should be set aside.

4. The costs of the Applicant have been ordered to be paid on a recoverable basis by NABB Brothers Ltd., but I do not know whether that order will be complied with.
5. There is a brief letter from Howes Percival who are the Solicitor Advocates who have been dealing with this matter on behalf of the Applicant dated 1st April, 2005, and that succinctly records where the Applicant is as the result of the judgment of Lawrence Collins, J. It also indicates that as I surmised in March, a great deal of work has been done by Howes Percival on this matter as no doubt also has been done by Carey Olsen.
6. It is not unreasonable for the Applicant to be asking that it should be permitted to pay to the lawyers for what it has asked for is that it be indemnified for so doing out of the trust funds.
7. It is also apparent to me from having read through the judgment of Lawrence Collins, J. that this was one of those cases where the judge was engaged in a certain amount of novel consideration of the rules concerning service outside the jurisdiction, and no doubt that involved extra work for the lawyers concerned.
8. Normally in dealing with an application like this for indemnity out of trust funds one would be seeking to canvass the views of the beneficiaries who would have the opportunity of being heard as to whether there were grounds for refusing indemnity to the trustee. There is enough material on the file to show that the beneficiaries are currently not ad idem on these matters and indeed the views of individual beneficiaries may be changing as events develop. As was clear from the previous remarks I made some of the beneficiaries appear to be principals of NABB Brothers Ltd. who started all this litigation whereas others are not. The beneficiaries with the exception of a local church in Ghana seem to be members of the extended family of the settlor. There was as I indicated previously a suggestion that these individuals had got together and reached some compromise in Ghana. I do not think it will be fruitful to try and bring the beneficiaries together in groups to be heard on an application to undertake a line by line review of the conduct of the Applicant and its advisors in this matter and indeed Mr. Greenfield is not urging me to take that course. Certainly it can be in no one's interest that the trust fund is further dissipated by the costs of further litigation.

9. The question is where do we go from here. I could deal with this matter on an ex parte basis and invite Mr. Greenfield to take me through the history and explain all the money that has been expended on behalf of the trustee in defending these proceedings. This would inevitably be time consuming and further because I would be concerned with proceedings in a foreign jurisdiction, namely England I would not be able to validate in any substantive way Carey Olsens or the English solicitor's bills of costs. That said, there must be strong grounds for the Trustee to be arguing that, just as I cannot decide whether or not their legal advisors have provided an efficient and economic service, neither can it. The Trustee has a contractual duty as any trustee in such circumstances will have to pay its legal advisors on time and I cannot see that it can be criticised for so doing. However I cannot without more approve such a course as an extension of the Re Beddoe principles that this Court has come to espouse.
10. What I propose to direct is that the Applicant prepare a report to all the discretionary beneficiaries and send it to those for whom it has an address indicating the action it has felt obliged to take in connection with the English proceedings and the costs to which it is advised that it is entitled to be indemnified out of the Trust Fund. The beneficiaries will be advised of a date when this payment will be made by the Trustee unless restrained by an order of the Guernsey Court. It will then be up to one or more of the beneficiaries to apply to the Court if they are so advised, but there should be no expectation that the costs of so doing will be recoverable from the Trust Fund.
11. The report can be sent by ordinary post to those beneficiaries for whom the Trustee has an address. I do not propose directing that the courier service be used in view of the costs thereof, but it would be helpful if the beneficiaries who receive the report be invited to check with any other beneficiaries known to them that the report has reached those beneficiaries. Perhaps a list of persons to whom the report is being sent could be appended to the report sent on behalf of the Applicant.
12. So far as the date of appropriation of funds to meet the expenses is concerned I direct that the Trustees should indicate the date upon which it proposes to appropriate the monies expended from the Trust account. That date will be identified, but should not be less than eight weeks after the date upon which the report is posted out to the beneficiaries. It will then be up to any beneficiary who wishes to restrain the Trustee from paying out these monies to start proceedings in Guernsey before that date rather than for the matter to come back to Court at the behest of the Trustee. In this way I hope that further expense will be kept to a minimum. I also confirm that included in the monies which the Trustee may expend are the reasonable costs of the Trustee in making the various applications to this Court on Friday, 11th March, 2005.