

Judgment 52/2004

In re Triangle Loans Trust – Rysaffe Trustee Company (CI) Limited (Applicant) v. Hexagon Trust Company (CI) Limited – Royal Court (Civil action file 881) – 2 November, 2004

Proceedings between trusts – trustee companies in common ownership – application by Rysaffe for direction to implement a proposed compromise of these proceedings – challenged by the beneficiaries of the Triangle Loans Trust – application granted

IN THE ROYAL COURT OF GUERNSEY

The 2nd day of November, 2004 before the Bailiff, present:- Stephen Edward Francis Le Poidevin and Michael John Wilson, Esquires, and Susan Mowbray, Jurats.

In the matter of a Declaration of Trust dated the 17th September, 1996, between Adelaide Holdings Limited and Rysaffe Trust Company C.I. Limited and in the matter of a Third Party Notice issued by Hexagon Trust Company (C.I.) Limited in Cause No. 316 of 1999 in the Grand Court of the Cayman Islands.

Whereas on 27th, and 28th September, 2004 the COURT considered an application for a direction that the Applicant, Rysaffe Trustee Company (CI) Limited, the trustee of the Triangle Loans Trust, should be directed to implement a proposed compromise of proceedings issued against it by Hexagon Trust Company (CI) Limited as the Trustees of the Hexagon Welfare Trust, and heard thereon Advocates J M Wessels and R Clark, Counsel for the Applicant and Beneficiaries respectively, the COURT this day gave judgment in the terms attached hereto and APPROVED the said application as sought.

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

Approved Text

IN THE ROYAL COURT OF GUERNSEY

ORDINARY COURT

BEFORE THE BAILIFF AND JURATS LE POIDEVIN, WILSON AND MOWBRAY

In the matter of a Declaration of Trust dated the 17th September, 1996, between Adelaide Holdings Limited and Rysaffe Trust Company C.I. Limited and in the matter of a Third Party Notice issued by Hexagon Trust Company (C.I.) Limited in Cause No. 316 of 1999 in the Grand Court of the Cayman Islands

Date of Hearing: 27th and 28th September, 2004
Judgment handed down: 2nd November, 2004

Introduction

1. The problems of the Triangle Loans Trust have concerned this Court on a number of previous occasions. The background to this application is set out in an affidavit of Mr. Kelvin Hudson ACA of Saffery Champness supported by a helpful skeleton from Mr. Wessels. Put very shortly when the Bank of Credit and Commerce International and its associated companies across the world became insolvent in 1991, it was discovered that certain trust funds, mainly in the Cayman Islands, that had been set up to benefit employees across the group had apparently been dissipated in order to meet the trading debts of the group.
2. Liquidators were appointed to the various Bank of Credit and Commerce International companies, the principal of whom appear to have been insolvency practitioners from a leading firm of London Chartered Accountants. The matter was extremely complex as there were a number of different companies involved operating in different jurisdictions and subject to control by different courts and regulators. As we have said, there was an issue that arose as a result of the disappearance of the staff benefit funds and along with other creditors of the group, a number of ex employees who had also lost their jobs by the collapse of the group, began to press for compensation in respect of the benefits which they said they had lost. As with any corporate insolvency the money available to meet debts was not going to be sufficient to meet all claims, although in this case, as we heard, the liquidators were successful in collecting 1.8 billion U.S. dollars from the government

of Abu Dhabi, who were the principal shareholders of the Bank, in order to provide funding for the meeting of claims against the constituent companies.

3. However ex employees were not given any special consideration until such time as they gained the wherewithal to mount legal proceedings against the liquidators who, it appears, were not going to come up with any payment until they were forced into the situation where they were facing expensive litigation. That situation was achieved by the ex employees who had established a Campaign Committee led by a Mr. Qayyum, a Mr. Malik and others. This body, with the assistance of two other gentlemen who were professional negotiators or go betweens, a Mr. Hameed and a Mr. Rees succeeded in mounting a claim in the Cayman Islands the situs of the Bank of Credit and Commerce International Group staff benefit funds which resulted in US\$70,000,000 being put into trusts for the benefit of ex employees. \$50,000,000 came from the liquidators of the companies and \$20,000,000 from an unidentified third-party.
4. Again for reasons that do not concern us two trusts were established, the Hexagon Welfare Trust in Cayman and the Triangle Loans Trust in Guernsey the trustees of which were companies controlled and managed by Saffery Champness. The Triangle Trust in Guernsey was comprised of \$10,000,000 of "liquidators" funds and \$20,000,000 from the unnamed third-party. The Hexagon Trust in Cayman contained \$40,000,000 all of which was put up by the liquidators.
5. At the time of settlement Mr. Qayyum and his colleagues sought to have provision made for the not inconsiderable expenses to which they had been put in getting this matter to the door of the Court. That request appears to have been rejected by the Cayman Court. Indeed Mr. Malik we are told brought proceedings in the Cayman Courts against the trustees and was told that the action was premature, as the trusts had not been established. Mr. Qayyum's claim continued to be on the table in the Cayman Courts from 1999 until 2003 when, as we shall see, it was settled. Initially leading counsel in London advised that there was no liability on the trustees to meet a claim of this nature.
6. We have however heard more as to the legal basis of the claim. The lawyers acting for Mr. Qayyum (when he and his colleagues were in a position to have legal representation) pursued it as what is loosely called a "salvage claim". This is based on a principle, which has evolved in equity mirroring maritime principles that somebody who has incurred expense in order to obtain or conserve trust property has a moral and legal claim to compensation out of that property. The case that has been cited to us in support of this is

a decision of Mr. Edward Nugee, Q.C. sitting as a Deputy Judge of the High Court in 1987 in the matter of Berkeley Applegate (Investment Consultants) Ltd. [1989] Ch 32.

7. An attempt was made by Hexagon in the Cayman Court to strike-out the Qayyum claim, but although the Chief Justice struck out parts of that claim he considered that there was an arguable case in respect of the "salvage" claim that was being mounted against the Trust. Hexagon then obtained the services of a leading Chancery silk, Mr. Lancelot Henderson, Q.C. and he advised that company to settle the salvage claim in the sum of US\$1,900,000. This was considerably less than the amount that was being claimed by Mr. Qayyum. Again we do not have to review precisely how the claim was compromised, as that was a matter entirely between Hexagon and the claimants. We have however noted that a great deal of work was done by Mr. Arundale of Saffery Champness (Guernsey), who as we shall see are the principals of Hexagon Trust Company as well as Rysaffe, to verify the claims of Mr. Qayyum and his colleagues. We have noted that there is large provision for fees for Mr. Rees and Mr. Hameed who were acting in a quasi professional way as paralegals on behalf of the ex employees.
8. Once it had settled the claim, Hexagon Trust Company then wished to get a contribution from Rysaffe as trustee of Triangle. It could have been that a joint action was brought against Hexagon and Triangle trustees, but that would have probably involved proceedings in two jurisdictions rather than one. It is also probable that Mr. Qayyum and his colleagues did not want to press their claim too far against Triangle because the principle purpose of the Triangle Trust was to purchase from the liquidators of the various companies en bloc the outstanding loan book in respect of staff loans. Any large provision for the salvage claim could have prejudiced the amount of money available to complete this transaction which was highly advantageous to many of the ex employees including, we are told, Mr. Qayyum.
9. Be that as it may the claim was made in the Cayman Court against Hexagon who then, when it was settled, turned round and asked for a contribution from Triangle. As we have already indicated the Hexagon and Triangle trustees albeit that they are different companies, one in Guernsey and one in Cayman are in fact both creatures of Saffery Champness. The two trusts have intentionally been run in tandem and we are told that when the Hexagon trustees come to make awards under their somewhat wider powers in respect of the Hexagon Welfare Trust they will be taking account of what benefits have been obtained by the beneficiaries concerned under the Triangle Scheme. Therefore it appears that there is a potential conflict of interest between the two trustees. They cannot

be said to be independent of each other and therefore any settlement of Hexagon's claim has had to be carefully managed.

10. What Saffery Champness in effect did was to separate the teams of lawyers in dealing with interests of the Triangle beneficiaries from those dealing with the interests of the Hexagon beneficiaries in order to decide what a fair apportionment of the liability for the salvage action compensation should be. The principle protagonists in the "contest" were on the Hexagon side Mr. Henderson to whom we have already referred and on the Triangle side a Miss Shan Warnock-Smith, Q.C. another well-known Chancery barrister who between them produced opinions in support of the arrangements that they had negotiated. Put simply the proposal is that Triangle should be contributing one-quarter of the Hexagon compromise claim plus one-quarter of the not inconsiderable costs that Hexagon has incurred in defending it. This comes to a figure of approximately US\$800,000.

The reason for this Court's involvement

11. Mr. Wessels has brought this application on behalf of Rysaffe Trustee Company (C.I.) Ltd. for the reason that we have already alluded to, namely, that as that company and Hexagon Trust Company (C.I.) Ltd. are in common ownership, the Triangle Trustees need the support of this Court for the compromise that they recommend and which has been negotiated on their behalf between the two sets of lawyers referred to. Again diverting to the law we have had the benefit of having quoted to us a decision of Mr. Justice Hart in the case of The Public Trustee v. Cooper 20th December, 1999. In that judgment the learned judge quotes from a Chambers judgment of Robert Walker J as he then was, given in 1995, in which he identifies the various categories of application that will be made to the court by trustees. We accept Mr. Wessels' submission that this is a case where it is appropriate for an application to be made to this Court in the situation that trustees have already decided how to exercise their powers, but where they wish to obtain the blessing of the Court for the action which they have resolved to take. As the judgment outlines, sometimes these applications will be made because of the momentous nature of the decision, such as selling a family estate. There can be other situations, as there are here, where the Court, without accepting a surrender of the discretion of the trustees, can reasonably be asked to say to the trustees that in the light of potential conflict of interests, it approves the way in which the trustees propose to deal with a matter. Accordingly we are being asked to give the Court's blessing to the compromise proposed.

Enter Counsel for the Triangle beneficiaries

12. In the Cayman action there were two parties, Hexagon Trust Company and the Claimants led by Mr. Qayyum. Hexagon were acting for its beneficiaries in resisting the claim and concluding in the end that it was right to compromise it. There was no separate interest of the beneficiaries requiring them to be represented. In Guernsey the situation is different. Here we have the two trust companies in common ownership trying to reach a fair accommodation between themselves in respect of Triangle's contribution to the money that Hexagon has had to pay out. Clearly the Triangle beneficiaries should be heard and therefore an order was made by me at an earlier stage in these proceedings directing that Mr. Russell Clark be appointed Counsel in a representative capacity to all the beneficiaries of the Triangle Trust of whom there are in excess of 1,000. He has had some limited contact with some of these beneficiaries, but they themselves have conflicting interests. Some are also beneficiaries of the Hexagon Trust. Others have received all that they are likely to receive out of the Triangle Trust so have no particular interest in the matter. Mr. Clark has however mounted a carefully constructed challenge to the whole basis of the settlement proposed by Triangle. We propose to deal with these points separately:-

- (1) The failure of the Campaign Committee to ensure that their claim for costs was addressed at the time that the original compromise was achieved. As was suggested in an earlier judgment in this matter it does seem that as soon as the compromise was reached in Cayman and the two Trusts established everybody breathed a sigh of relief and not all the outstanding issues were fully addressed. We can see that the dilemma that Mr. Qayyum was placed in that he did not want to jeopardise the establishment of the Trusts by pressing for costs. The Trusts were established for the benefit of the employees as a whole, not just Mr. Qayyum and his colleagues on the Campaign Committee. Our view on this point is that whilst it would have been better for this matter to have been sorted out when the Trusts were established, it was not, and that fact does not block any claim being made by Mr. Qayyum at this stage.
- (2) The fact that leading counsel, originally instructed by Hexagon, thought that Mr. Qayyum's claim was not sustainable, although he did advise that once the liquidators were satisfied that he had the ability to proceed with his claim it ought to be compromised. The answer to that is that legal advice changes. The current legal advisors to both parties are satisfied that Mr. Qayyum and his colleagues

would have had a good chance of success a claim against both Hexagon and Triangle and that accordingly the claim should be compromised.

- (3) Mr. Malik was unsuccessful when he tried to pursue this matter in the Cayman Courts. He apparently was told that the action he was proposing was premature. We have not heard all about this, but again we do not think that whatever happened at an early stage of the Cayman proceedings is material. Far more material is that the attempt to strike-out was unsuccessful and that the Cayman trustees by 2003 were facing a potentially costly and difficult claim by Mr. Qayyum and his colleagues.
- (4) The Triangle Trustees are now being faced with a *fait accompli*. Hexagon has gone off and settled the claim without consulting them and now expects the Triangle Trust to contribute. This is perhaps Mr. Clark's strongest point. Ideally both claims should have been pursued at the same time. Even if the Hexagon claim was a matter exclusively for the Cayman Courts, the contribution proceedings could have been run alongside them and approval of the contribution action could have been reached at the same time as that of the main claim. This however is a counsel of perfection. We can see the difficulties in which the both sets of trustees were in. We are satisfied that the point that is raised here by Mr. Clark has been addressed by leading counsel and that has been taken into account in deciding the level of the proposed contribution by Triangle.
- (5) The level of fees run up by Hexagon. Hexagon's own fees for dealing with the claim of Mr. Qayyum came to around \$1m and the compromise envisages Triangle picking up one-quarter of these expenses as well as the one-quarter of the Qayyum claim. Counsel for Triangle Miss Warnock-Smith was herself troubled by the amount of these fees but at the end of the day she was satisfied with the compromise. Whilst again we have some sympathy with Mr. Clark's argument we do not think that it is reasonable or necessarily fair in all the circumstances to reopen this payment as a separate issue. Just as some of the constituent parts of the claim being made by Mr. Qayyum seem high (for example the fees paid to Hameed and Rees) we consider that these figures must be looked at in the round.
- (6) The flood gates argument. What Mr. Clark is saying is that there will be other "salvage type" claims brought by other ex-employees who have been engaged in getting this matter before the courts and that these people will come forward once they see that Mr. Qayyum has been successful. We think it highly unlikely that people who have not been identified as being entitled to consideration by the trustees will be able to overcome issues of delay in making their claim. However,

Mr. Wessels has made it clear that there is one group of people who may wish to make a claim on rather a different basis from that made by Mr. Qayyum and the Campaign Committee. He is referring to Mr. Siddiqui who represented a number of members of the staff with loans. Mr. Siddiqui's contribution to the negotiations appears to have been that he persuaded those involved to transfer \$10m of the liquidator's money into the Triangle Loans Trust rather than leaving it with Hexagon. He does not seem to have participated in the action which resulted in the \$70,000,000 being put up. He has merely encouraged re- apportionment of the funds between the trusts. We will say no more on our view as to the merits of Mr. Siddiqui's claim. Mr. Wessels' real answer to this is that in any event whatever he is claiming is not as large an amount as the claim of Mr. Qayyum and, yes, the trustees will have to consider any other claims that may come forward, but that does not in itself mean that the trustees should not be negotiating this particular compromise.

13. We are grateful to Mr. Clark for his submissions, but at the end of the day Mr. Wessels has persuaded us that the proposal of the Trustees is correct, particularly in the light of the advice of leading counsel and Mr. Wessels to make the contribution, which has been negotiated between them and their fellow trustees at Hexagon. We accept that we have a discretion to cut down the amount of the payment by Triangle and there is little doubt that if a fairly small reduction was involved Hexagon would probably be forced into the position of having to accept what we were proposing because to do otherwise would involve costs disproportionate to the money involved. Tempting as such an action is in the light of Mr. Clark's comments we do not think that it is appropriate for us to be tampering with the decision of the Trustee in this way.
14. The application is therefore approved.