

Judgment 55/2004

Bathurst v. Kleinwort Benson (Channel Islands) Trustees Limited et al – Royal Court (Civil Action file 780) - 12 November 2004

Trusts (Guernsey) Law, 1989 – applications for further stay in which to provide trust accounts – granted until 7 January, 2005

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 12th day of November, 2004 before Patrick John Talbot, Q.C, Lieutenant Bailiff; sitting alone.

GLORIA WESLEY, COUNTESS BATHURST

Applicant

and

(1) KLEINWORT BENSON (CHANNEL ISLANDS) TRUSTEES LIMITED

(2) CAREY OLSEN TRUST COMPANY (GUERNSEY) LIMITED

(3) RUSSELL CLARK

Respondents

The Lieutenant Bailiff having considered in writing an application by the Second Respondent dated 5th November 2004 for an Order extending for a further period of 2 months the stay of execution granted on the 10th November 2004 in respect of the order drawn up to give effect to the Lt Bailiff's Judgement of 9th August 2004 as amended on 14th September 2004

This day GRANTED in the terms attached hereto, a further stay of execution to the Second Respondent until 4.00 pm on Friday 7th January 2005 but only to that part of the Order which requires the Second Respondent to provide trust accounts of the Second Wheatland Trust for the period between the appointment of the Second Respondent as trustee on 31st August 2001 and the termination of the trust on 20th November 2001.

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

ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

B E T W E E N:

GLORIA WESLEY, COUNTESS BATHURST

Applicant

- and -

(1) **KLEINWORT BENSON (CHANNEL ISLANDS) TRUSTEES LIMITED**
(2) **CAREY OLSEN TRUST COMPANY (GUERNSEY) LIMITED**
(3) **RUSSELL CLARK**

Respondents

Advocate Paul Richardson for the Applicant
Advocate Iain Harris for the Second Respondent

DECISION

**of Lieutenant Bailiff Patrick John Talbot QC dated 11 November 2004
on the application of the Second Respondent dated 5 November 2004**

Introduction

1. I gave judgment in this case on 9th August 2004. After a further oral hearing on 10th September 2004, I delivered an Amended Judgment dated 14th September 2004, (“the Amended Judgment”).
2. In the Order drawn up to give effect to the Amended Judgment, (“the Order”), provision was made, *inter alia*, in relation to the matters with which I dealt in paragraphs 134 to 136 (letters of wishes, etc.), and 140 and 141 (company documents and trust accounts). Additionally, on 10th September 2004 I granted the Second Respondent a

stay of execution for a period of two months, in which to take all necessary steps to comply with each of those paragraphs of the Amended Judgment.

3. At the oral hearing on 10th September 2004, I read, and took into account, inter alia, the 1st affidavit of Mrs Jane Duchemin, (“Mrs Duchemin”), a director of the Second Respondent, sworn on 9th September 2004, in which she explained the circumstances in which the Second Respondent had been appointed trustee of the Second Wheatland Trust, the manner in which the Second Respondent had acted as such trustee in the period up to the termination of that trust on 20th November 2001 and, to some extent, the manner in which the views and intentions of Mr Clarry, in relation to the keeping of company and trust accounts, had been considered by the Second Respondent during that period.
4. I now have to rule on the Second Respondent’s application dated 5th November 2004 seeking a further stay of two months in which to provide trust accounts and also, it seems, to comply further with the Order.
5. So as to ensure that the Second Respondent was not out of time in complying with the Order, on 8th November 2004 I granted *ex parte* a further stay of 7 days, to expire on Wednesday 17th November 2004, and took steps to inform the parties, (for this application “the parties” meaning the Applicant and the Second Respondent only,) that I would deal with the Second Respondent’s application on paper, without the need for an oral hearing.
6. The Second Respondent’s reasons for seeking an extension of the stay appear in Mrs Duchemin’s 2nd and 3rd affidavits, sworn respectively on 26th October 2004 and 5th November 2004. In these affidavits she has explained the steps already taken by the Second Respondent so as to comply, in so far as it claims to have been possible for it to do, with the Order.

7. I have also received a letter from Adv. Richardson, on behalf of the Applicant, dated 10th November 2004, in which he left it to the Court to decide whether or not to grant an extension of time and, if one be granted, the length of any such extension, so long as any such extension be for a finite period. Obviously, an indefinite stay would be out of the question.

The Approach to be taken to the Application

8. It is, in my view, important to distinguish between, on the one hand, an application by the Second Respondent for a further stay, (which is the relief claimed in the application dated 5th November 2004,) and, on the other hand, a statement on affidavit by Mrs Duchemin that steps have been taken by the Second Respondent to see whether any trust accounts or company accounts or any minutes of company meetings and board meetings, to which the relevant paragraphs of the Amended Judgment relate, are, or have been, in its possession or control.
9. On an application for a further stay, the Court would usually expect evidence dealing with the nature of any further information which is being searched for and providing an explanation of why the further stay for the chosen length of time is being sought. A statement on affidavit of the attempts made to comply with the Court's Order would also often need to be given to explain the extent to which a party, *e.g.*, in this case the Second Respondent, has been able to comply with the Court's Order by the date of the affidavit. In so far as the party seeking an extension of a stay of execution claims to have performed all, or a relevant part, of the order in question, a further stay would not, of course, be required.

Short Summary on a trustee's duty to account

10. It is, in my judgment, clear under both Section 21 of the Trusts Law and the general trusts law relating to Guernsey trusts that one of the main duties of trustees is to keep adequate trust accounts and to supply copies to beneficiaries on reasonable demand being made. This obligation on trustees forms, in my judgment, a principal part of a trustee's duties, part of what Millett LJ in Armitage v Nurse [1998] Ch. 241 described, at p253 G/H, as

“an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.”

It is, as I see it, a necessary incident of a trustee’s personal obligation to hold and deal with the trust property for the benefit of the beneficiaries that the trustee also accounts for receipts and payments. I consider that this is the context in which Sections 21 and 22 of the Trusts Law are to be read.

Why is a further stay requested by the Second Respondent?

11. When I directed the Second Respondent to provide trust accounts relating to the Second Wheatland Trust, I also directed that the accounts should include a valuation, at or about the date of the end of the period to which they relate, of each of the shares then held as part of the trust assets and I further directed that, if no such accounts were already in existence, they were to be produced by the Second Respondent, and then disclosed to the Applicant. I considered at the time when I delivered the Amended Judgment that, although it might prove difficult for the Second Respondent to provide trust accounts, such a difficulty would not release it from its obligation to provide accounts. It now seems that this direction is causing the Second Respondent difficulty.

11. As I understand paragraphs 3 to 5 of Mrs Duchemin’s 3rd affidavit sworn on 5 November 2004, some company minutes have been provided to the Second Respondent by Mrs Christina Clarry (exhibit JD3), and some letters of wishes or similar documents have been discovered (exhibit JD2) and disclosed to Collas Day, the Applicant’s Advocates. So far, so good. But no trust accounts or company accounts have been found within the possession or control of the Second Respondent and, in paragraph 5 of her 3rd affidavit Mrs Duchemin, has deposed that

“During the period between 31st August and 20th November 2001 the Second Respondent never had in its possession the information it required to enable it to prepare accounts of the Second Wheatland Trust or any of the four companies in question. It remains the case that the Second Respondent is not in a position to prepare such accounts.”

12. Furthermore, in paragraph 8(iv) of her 3rd affidavit Mrs Duchemin has said that
“It remains impossible for the Second Respondent to prepare accounts of the Second Wheatland Trust or to state the true value of the shares previously held

by that trust. *It is not anticipated that that position will change.*” (my emphasis)

13. It seems, therefore, that the Second Respondent’s position is that it has complied with most parts of the Order, but that it claims it is unable to provide trust accounts for the Second Wheatland Trust for the period of its appointment as sole trustee of that trust between 31 August and 20 November 2001.
14. Nevertheless, the Second Respondent seeks a further stay of execution of two months in order to obtain such further information as may be available, presumably to enable it to produce some form of trust accounts of the Second Wheatland Trust. In paragraph 11 of her 3rd affidavit Mrs Duchemin has listed three outstanding requests made by the Second Respondent for information which, as I understand it, might assist it in the preparation of trust accounts. Although the dates on which these requests were made are not given in the affidavit, I shall assume, I hope correctly, that they were made reasonably soon after the oral hearing on 10th September 2004. I shall deal with each of these three requests separately.
15. First, Mrs Christina Clarry has been asked by the Second Respondent for further information about the three companies, whose shares were trust assets of the Second Wheatland Trust during the relevant period in 2001. As to this request, I doubt whether any further information is really required, since the company documents in exhibit JD3 to Mrs Duchemin’s 2nd affidavit seem to me to provide the Second Respondent with sufficient information to describe the assets of each of the companies at or near to 20th November 2001 and to attribute some value to each of the three shareholdings and to include such valuation in trust accounts of the Second Wheatland Trust for the period between 31st August and 20th November 2001. Accordingly, I would not have thought it necessary to provide a further stay, if this were the only outstanding request for information.
16. Secondly, a request has been made to a firm of property consultants in Gloucestershire about the uplift or overage provision contained in a transfer of agricultural land in that county owned by Moore Wilson & Blair Limited, one of the company investments of the Second Wheatland Trust, under which the company would, it seems, receive further payment from the purchaser on any development of the land for commercial purposes over the period of 30 years from the date of the transfer. I assume that the consultants have been asked to advise on the prospects, as at 20th November 2001, of such commercial development and on the size of any possible payment under the uplift or

overage provision. In principle, it seems to me that a further, short period should be allowed to see if the consultants can provide any useful advice to the Second Respondent.

17. Thirdly, a request has been made of a representative of Boulevard Investments Limited for valuation details as at 20th November 2001 of its office building in Nassau, together with details of liabilities of that company, shares in which were held by Atlantic and Caribbean Trust SA, a company investment of the Second Wheatland Trust. Again, in principle, it seems to me that a further, short period should be allowed to see if the representative of Boulevard Investments Limited can provide any useful information to the Second Respondent.

18. I have decided, in the further exercise of my judicial discretion, that I should allow the Second Respondent a further stay of execution, but only of that part of the Order which requires the Second Respondent to provide trust accounts of the Second Wheatland Trust for the period between the appointment of the Second Respondent as trustee on 31 August 2001 and the termination of the trust of 20th November 2001. In my judgment, taking into account the Christmas and New Year breaks and the stated desire of the Second Respondent to comply with this part of the Order so far as it possibly can, I shall allow such a further stay until 4pm on Friday 7 January 2005. I add that I it is unlikely that I would allow any further stay of execution thereafter.

Patrick John Talbot QC

Lieutenant Bailiff

12 November 2004