



**Investec Trust (Guernsey) Limited et al & Glenalla
Properties Limited et al**
Court of Appeal
11th September, 2014

**JUDGMENT
39/2014**

Applicants' applications to be joined as parties to the proceedings, application from Former Trustees to strike out the applications, and an application by the BVI Companies for security for costs of the Applicants' applications.

**Approved Text
11.09.2014**

**IN THE COURT OF APPEAL
(CIVIL DIVISION)**

(On appeal from the Royal Court of Guernsey Ordinary Division)

Appeal No. 467

11th September 2014

Before:

**Sir Richard Collas, Bailiff
James Walker McNeill, QC
John Vandeleur Martin, QC**

BETWEEN

- (1) INVESTEC TRUST (GUERNSEY) LIMITED
(2) BAYEUX TRUSTEES LIMITED**

Plaintiffs

and

- (1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED**

Defendants

- (5) RAWLINSON & HUNTER LIMITED**

Defendant/Third Party Claimant

and

- (1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED**

Defendants to Third Party Claim

Advocate J Wessels for the Plaintiffs
Advocate JP Greenfield for the First to Fourth Defendants
Advocate IC Swan for the Fifth Defendant
Advocate C J Hay for the Proposed Intervener
Advocate P Richardson for the Proposed Intervener

JUDGMENT

Martin, JA

Introduction

1. In the week commencing on 23 June 2014 this Court (composed of McNeill, Martin and Logan Martin JJA) (“the June Court”) dealt with one aspect of the substantive appeals in this matter. Those appeals arise in litigation concerning the liability of the Former Trustees of a discretionary trust known as the TDT to repay substantial loans to certain BVI Companies, and the ability of the Former Trustees to recoup any liabilities by way of indemnity from the trust assets. The current parties to the litigation, which has been continuing since March 2010, are the Former Trustees, the BVI Companies (acting by their joint liquidators) and the Current Trustee of the TDT.
2. On 20 June 2014 (that is to say on the Friday immediately preceding the Monday on which the June Court was to sit to hear the substantive appeals) Robert Tchenguiz (“RT”) and Heather Bird (“HB”) (in her capacity as legal guardian of Violet Tchenguiz and Victor Tchenguiz) (together “the Applicants”) each applied to the June Court to intervene in the appeals (in the case of RT “by way of oral submissions at the hearing” of the appeals, and in the case of HB by joinder to the proceedings “as an intervenor”). RT and his children Violet Tchenguiz and Victor Tchenguiz are members of the discretionary class capable of benefiting under the trusts of the TDT. HB is the mother of Violet Tchenguiz and Victor Tchenguiz, but is not herself a member of the discretionary class. RT is also the protector of the TDT, and he and his family occupy under licence a substantial building forming part of the trust assets.
3. As a consequence of the applications, it was necessary to adjourn part of the appeals. By an order dated 1 July 2014 the June Court gave directions that any application by the Applicants for permission to participate in the appeals must be made with reasons and substantiation by 12 noon on 8 August 2014, failing which the applications would be dismissed with costs. The June Court made consequential directions in the event that applications were made, including provision for a directions hearing this week at which (as paragraph 3.3 of the order of 1 July 2014 makes clear) there would be consideration of whether the Applicants’ applications would be allowed to proceed.
4. The Applicants did lodge applications on 8 August 2014, although not before 12 noon. There has been no explanation for the failure to meet the 12 noon deadline. Compliance with that deadline was not intended to be optional. However, the delay was not substantial (being just over half an hour), and I do not think it would be right to treat the applications as automatically dismissed, despite our being invited to do so by the BVI Companies. I would therefore extend the time for making the applications to the extent necessary to mean that they were lodged in time.
5. We also have before us an application by the Former Trustees to strike out the applications, and an application by the BVI Companies for security for costs of the Applicants’ applications.

6. The background to the applications is as follows. RT has been party to well-publicised proceedings in England in which he has claimed damages against the Serious Fraud Office (“the SFO”) in connection with an investigation carried out by it into aspects of his affairs. That investigation related among other things to RT’s part in dealings between companies controlled by the Former Trustees and Icelandic banks. The proceedings have now been settled; but in the course of them a large amount of documentation was disclosed by the SFO as part of the litigation process. Documents disclosed in English litigation are subject to an implied undertaking by the recipient that they will not without leave of the court be used for purposes extraneous to the litigation in which they were disclosed. RT formed the view that some of the documents disclosed by the SFO were relevant to these appeals. Although she was not herself able to see those documents, HB took the view that her children’s interests required her to adopt the same approach as RT.
7. The preliminary applications made by the Applicants on 20 June related to 22 documents (“the 22 Documents”). Leave to deploy those documents in this litigation had not then been obtained from the English High Court, so RT was unable to produce them to the parties or the Court, or make reference to their content. What he was able to do, however, was to produce a letter from Lord Goldsmith QC (who had acted for RT’s brother in the SFO litigation and so was entitled to see the documents), although even that letter was substantially redacted. In the letter, Lord Goldsmith expressed the following view:

“It is a fundamental fact that oral evidence had to be given in order to explain away inconvenient accounting records and that the Judge was deprived of material which, at the very lowest, would have provided a very different account of the circumstances surrounding the book entries and the likely reliability and credibility of that limited testimony upon which the Judge relied. In that respect, the position is even more fragile and finely balanced because the Judge’s actual findings on this particular issue, although there were others, was not that he was satisfied by [the Former Trustee’s] evidence that the senior management had not known or approved the book entries, but rather that he was “not satisfied, from the evidence that was adduced at the trial” (paragraph 162 of the Judgment).

In these circumstances, had there been other significant evidence bearing on the likelihood that senior management had known and approved these transactions, but the relevant witnesses subsequently had a reason to take a different position, the Judge would have had to take it into account. At the very lowest, the recently provided documentation could very well have filled the evidential gap that the Judge perceived and as such may have led him to reach a different conclusion.”

8. The June Court took the view that that statement raised enough of a possibility that the 22 Documents might have sufficient relevance to justify allowing the Applicants a chance to introduce them by a properly made and substantiated application. The timetable the June Court set was fixed with a view on the one hand to giving RT sufficient time to obtain (if he could) leave to use the 22 Documents in Guernsey and on the other to minimizing disruption to the proper progress of the appeals.
9. The current position is this.
 - (1) An application was made by RT to the English High Court on 23 June 2014 for permission to use the 22 Documents in these appeals. That application was refused by Eder J on 21 July, as also was permission to appeal. Permission to appeal was, however, given by Laws LJ on 6 August, with a direction for expedition. The appeal is due to be heard on 13 and 14 October 2014.

- (2) A separate application was made by RT to Eder J on 30 June for permission to allow a review team appointed by RT to consider all the documents disclosed by the SFO. That application was granted on 16 July 2014, subject to confidentiality terms being agreed with the SFO. That was done on 22 July, and the review was completed on 7 August – 16 days later. The review identified a further 58 documents (“the 58 Documents”) that are said to be relevant to these appeals. An application to the English High Court for permission to deploy them in these proceedings was made on 8 August, but has not yet been heard (and is unlikely to be heard until after the appeal decision relating to the 22 Documents).
 - (3) The application made to this Court by RT on 8 August relates not only to the 22 Documents but also to the 58 Documents and to six documents described as the Public Documents. None of the 22 Documents, and none of the 58 Documents, is available to this Court. Of the Public Documents, two (a draft witness statement of Robert Clifford, and a witness statement of Gudmundur Thor Gunnarsson dated 24 June 2014) are documents that this Court has already refused the Current Trustee leave to adduce.
10. In these circumstances, the Applicants' applications have been modified so that they now both seek to be joined as parties to the proceedings, and to adduce the 58 Documents and the Public Documents as well as the 22 documents; and they seek directions that the time for the Applicants to file any applications for permission to adduce new evidence and/or to file notices of appeal be extended to 14 days after the decision of the English Court of Appeal, with the hearing of these appeals being adjourned to the first available date after 16 January 2015.
11. Unless the Applicants are added as parties to the appeals, they will not be in a position to adduce any of the documents. Accordingly, the first question that arises is whether or not they should be added.
12. Section 14 of the Court of Appeal (Guernsey) Law 1961 gives to this Court all the powers of the Royal Court. By rule 37 of the Royal Court Civil Rules 2007 (“the RCCR”),

"the Court may in any proceedings order that any person (i) who ought to have been added as a party, or (ii) between whom and any party to the proceedings there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the proceedings which, in the opinion of the Court, it would be just and convenient to determine as between him and that party as well as between the parties to the proceedings, shall be added as a party”.
13. In *HMRC v Gresh* [2009-10] GLR 239, this Court identified three matters to be established if a person is to be added as a party: there must be a question or issue between that person and a party to the action; the question or issue must arise out of or relate to or be connected with any relief or remedy claimed in the proceedings; and it must be just and convenient to determine the issue as between that person and the party as well as between the parties to the proceedings. Even if these three requirements are satisfied, the court retains an overriding discretion.
14. Thus the first thing that the Applicants must establish is that there is a question or issue between them and one or more of the existing parties to the proceedings. There is no issue between them and the Current Trustee, so they must show that there is a question or issue between them and either or both of the Former Trustees and the BVI Companies.

15. Advocate Hay, for HB, referred us to *Sanders Lead Co v Entores Metal Brokers* [1984] 1 WLR 452, cited with approval in *Gresh*. In that case Kerr LJ considered a provision of the English Rules of the Supreme Court worded similarly to rule 37 of the RCCR, saying the following (at p460):

“In my view the rule requires some interest in the would-be intervener which is in some way directly related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough. It may well be impossible, and would in any event be undesirable, to attempt to categorise the situations in which the interests of would-be interveners are sufficient to satisfy the requirements of the rule. The authorities show that the existence of a cause of action between the intervener and one of the parties is not a necessary prerequisite for this purpose. But they also go no further than to show that there must be some direct interest in the subject matter, such as an alleged infringement of a patent, trademark or copyright with which the intervener is concerned, though even in such cases the interest of the intervener must raise an existing issue and not merely a contingent one” (internal citations omitted).

16. While bearing in mind that the wording of this citation is not closely related to the wording of rule 37 of the RCCR, and that the test it propounds may be rather more relaxed than that set out in the rule itself, I accept that a cause of action between the proposed party and an existing party is not necessary; that a mere commercial interest is not enough; and that a direct interest in the subject matter of the proceedings is required.

17. Both Advocate Hay and Advocate Richardson (for RT) submitted that there was a question or issue between their clients and the existing parties, and that each of their clients had a direct interest in the subject matter of the proceedings going beyond a mere commercial interest in the outcome. As Advocate Hay put it in his skeleton argument:

“The present claim is in essence a dispute about property subject to a discretionary trust between trustees and third parties. In such a case, the application of parts (i) and (ii) of the *Gresh* test to the joinder of a beneficiary is straightforward. The issue between any beneficiary and a third party is the same as that between trustee and third party, namely the dispute about the property in which the beneficiary has an interest. That issue is clearly connected with the relief claimed in the proceedings.”

18. In my judgment, there does not exist a question or issue between the Applicants and any other party to the proceedings. It is incorrect to say that the issue between beneficiary and third party is the same as the issue between trustee and third party. The trust estate is vested in the trustee, not the beneficiaries. It is the trustee that manages the trust estate, and conducts any necessary dealings in relation to it with third parties, doing so on behalf of the beneficiaries as a whole. None of the beneficiaries has any direct relationship with third parties who deal with the trustee. None of the beneficiaries incurs direct liability as a result of third-party transactions entered into by the trustee. None of the beneficiaries has a direct interest in the outcome of a dispute between the trustee and a third party: their interests are indirect only, deriving from their right to require the trustee to perform the trust. That right may enable a beneficiary to require a trustee to take offensive or defensive action against a third party; but the beneficiary is not normally entitled to take such action directly. As Lord Templeman said in *Hayim v Citibank* [1987] AC 730 at 748, after considering the relevant authorities:

“These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the

beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate”.

Moreover, as Nourse LJ pointed out in *Parker-Tweedale v Dunbar Bank* [1991] Ch 12 at 19,

“It is important to emphasise that when a beneficiary sues under the exception he does so in right of the trust and in the room of the trustee. He does not enforce a right reciprocal to some duty owed directly to him by the third party”.

The subsidiary position of the beneficiary in relation to dealings with third parties is also the reason why beneficiaries are treated as privies of their trustees and so bound by decisions that are binding on the trustees: see *Gleeson v Wippell* [1977] 1 WLR 510 at 515G. Put shortly, external relationships are for the trustee, and the beneficiaries have no status in them.

19. RT relied also on his positions as protector of the TDT and licensee of a building forming part of the trust property. Neither of these gives rise to a question or issue between him and the Former Trustees or the BVI Companies, or means that he has a direct interest in the disputes between them or between them and the Current Trustee. His position as protector gives him the right to remove trustees, so that he might be in a position to procure that new trustees are appointed to make the arguments he wishes to make; but his powers are matters of the internal administration of the trust, and give him no standing in relation to its external affairs. His position as licensee might, depending on its terms and effect, give him a right to maintain an action in trespass, but it gives him no status in disputes about the liability of the trustees to third parties.
20. It is clear that the application in relation to the 22 Documents seeks permission for the documents to be provided to and used in these proceedings by lawyers acting for the Current Trustee (as well as for RT and the minor beneficiaries of the TDT). I can see no reason why the English Court of Appeal would exclude the Current Trustee from any permission it was otherwise prepared to give, so that RT cannot claim to be in a unique position in relation to the 22 Documents.
21. For these reasons, I would refuse the Applicants’ applications to be joined as parties to these proceedings. I acknowledge, however, the possibility that some of the 22 Documents and the 58 Documents may turn out to have some relevance to the appeals, and I would not rule out – although I certainly do not encourage – the making of an application by the Current Trustee to adduce additional evidence, and perhaps to amend its grounds of appeal. I would discuss with counsel a suitable timetable for the prosecution of the appeals that leaves room for that possibility. I of course say nothing about the chances of success if any such application is made.
22. In the circumstances, it is unnecessary to consider the other grounds (such as delay and relevance) on which objection was made to the Applicants’ applications, and the applications to strike out and for security for costs do not arise.

COLLAS, Bailiff

23. I was not a member of the Court of Appeal that sat on the 23rd June and so I cannot comment on what was in the minds of the judges on that occasion. Subject to that qualification I agree with the judgment of my brother judge Martin JA.

McNEILL, JA

24. And I agree with the judgment delivered by Mr Martin.