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ROYAL COURT
(Samedi Division)

10th September, 1996

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Before: F.C. Hamon, Esq., Deputy Bailiff and
Jurats Blampied and Herbert

Between: Lloyds Bank Private Banking (Channel Islands) Limited (formerly Lloyds Bank Trust Company (Channel Islands) Limited) — Applicant

And: Cala Cristal S.A.
Capocorp S.A. — Respondents

Application by the Applicants for an Order that their costs, incurred in relation to their Representation seeking directions under Articles 47 and 49 of the Trusts (Jersey) Law, 1984, should be paid out of the Trust Fund.

Application by the Respondents that their costs in relation to the said Representation should be paid by the Applicants.

The Court had previously made an agreed Order in relation to the application for directions.

Advocate M.J. Thompson for the Applicants.
Advocate A.D. Robinson for the Respondents.

JUDGMENT

THE DEPUTY BAILIFF: The first part of this action was settled between the Court and counsel within a few minutes of the commencement of proceedings this morning. Orders have been made and the form of these Orders will be settled by counsel and filed with the Judicial Greffier in due course. We need only to deal with the question of costs which - because it raises some interesting points - we will deal with now.

By way of background and in brief by a declaration of trust executed on 18th February, 1986, by Lloyds Bank Trust Company (Channel Islands) Limited now known as Lloyds Private Banking (Channel Islands) Limited ("LPBCI"), LPBCI became Trustees of the Santiago Trust, the settlor of which was Mr. Martin Ferriol Font

("the Settlor"). The beneficiaries are defined in the second schedule of that declaration of trust as being Martin Ferriol Font; any spouse or widow of Mr. Font; and all lawful children and remoter issue of Mr. Font whether now or hereafter born or adopted (and so that an adopted person shall for this purpose be treated as if he were the lawful natural child of his adoptive parents or parent).

Then there were two other classes of beneficiaries, namely such other person or persons who may from time to time during the trust period be designated as a beneficiary hereunder pursuant to the provisions in that behalf hereinbefore contained; and such charitable purposes as the Trustees may from time to time by revocable or irrevocable instrument in writing appoint. No appointments have in fact been made under the last two classes and we should add that the Trustees also have the power at any time by revocable or irrevocable instrument to add persons as beneficiaries pursuant to clause 6(a)(i) of the declaration of trust, but have not done so. That is significant in one regard to which I shall return later.

Prior to October, 1992, the Lloyds Bank group and in particular Lloyds Private Banking Limited, in Mayfair, London ("LPB"), held substantial balances amounting to approximately £11 million on a number of accounts in the name of or for the benefit of the Santiago Trust and its company Baramgia.

In September, 1992, Lloyds Bank was served with a High Court injunction in England freezing the accounts of the companies. The Plaintiffs in those proceedings were two Spanish companies, Cala Cristal S.A., and Capocorp S.A., who alleged that the settlor had misappropriated substantial funds from them.

The Santiago Trust as we have seen owned a Panamanian company known as Baramgia Inc ("Baramgia") which had as its directors John William Margison, the senior manager of Lloyds Bank International (Guernsey) Limited ("LBIG") which company administered the Panamanian company; Phillip Murray Stokes, a Sark based individual nominated by LBIG, and Stephen Peter Harvey, manager of LBIJ, now known as Lloyds Bank International Private Banking. We should merely add in passing that there is no legal requirement for the directors of a Panamanian registered company to submit annual accounts.

On 7th October, 1992, at a meeting held in London, the litigation was compromised on the basis of an agreement dated 6th October. It is to us significant that the Trustees were not at the meeting. Significant but not surprising because, as far as we can see, they were not even consulted.

The substantial accounts amounting to approximately £11 million were administered by Lloyds Bank and not by the Trustees.

The letter of Mr. Font was an instruction to the Trustees of the Santiago Trust to transfer all balances (less the sum of £1,000 to cover bank expenses) on the Trustees accounts as listed on the Trust's accounts (listed in the attached documents) into the name of Mrs. Fawzeyah M.A. Al-Hasawi and then to act on her instructions once the interlocutory order made in the High Court had been discharged.

Baramgia was specifically mentioned in the instructions. There was apparently in the Baramgia account Japanese Yen and ECU totalling approximately £700,000. It is quite clear to us and we made it very clear to counsel, as we started the proceedings this morning, that the settlor intended all the monies to be transferred. The Trustees had already acted on Mr. Font's instructions for - if they were not to be treated as instructions - the Trustees would surely have made the recipient of the £11 million, Mrs. FMA Al-Hasawi, a beneficiary before appointing this not inconsiderable sum to her.

It seems to us that the Trustees seem to be washing their hands of any responsibility for what has become an embarrassment to them. We say this particularly because on 6th October, 1992, a letter was sent by LBIJ on behalf of the Trustees to the directors of Baramgia in these terms:

> *"Dear Sirs*
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> *Please transfer full legal and beneficial title to all assets of Baramgia Inc held by Lloyds Private Banking Limited, 50 Grosvenor Street, London, into the named account of Mrs. Fawzeya MA Al-Hasawi and Mr. Nabil Khalid Jaffar.*
>
> *In return for this transfer of legal title, we agree that the Directors of Baramgia Inc are given a full and complete discharge of any claims against them by the plaintiffs Cala Cristal SA and Capocorp SA or the beneficial owner of the above company".*

The letter is dated 9th October, 1992, and it is signed by a Mr. A.B. Howells and Mr. N.A. Howarth for and on behalf of Lloyds Bank International (Jersey) Limited acting on behalf of Lloyds Bank Trust Company (Channel Islands) Limited as Trustees of The Santiago Trust.

Nothing happened as a result of that letter because, we surmise, the directors had no idea that the money was there.

Further, the Trustees, on their own admission, had paid off the £11 million without ascertaining who the beneficiaries of the Trust that they were administering were, or how they were to be

located. It was said on behalf of the Trustees that the class of beneficiaries is wide and not ascertainable. They could have asked Mr. Font for better details. A letter of wishes dated 19th May, 1986, should, we think, have alerted the Trustees to a problem that they might face if Mr. Font were to die. The letter of wishes expressed the wish that on the settlor's death the Trustees make the Trust Fund available for the benefit of Mrs. Juana Camps Real and after her death to Maria Mag and Gabrielle A or their issue per stirpes. Maria Mag and Gabrielle A are described as the children of the settlor. Mr. Font died on 25th July, 1994, and we have to point out that the letter of wishes - that is the original letter of wishes - was written eight years' earlier.

It is important also to note that the Trustees paid away a very substantial sum of money without having made any attempt to ascertain who the beneficiaries were. We realise that we have made this point before but we cannot over-estimate its importance. Now that Mr. Font has died the group legal adviser to the bank required in June, 1996, *"a bond in a form and from an institution acceptable to Lloyds Private Banking indemnifying Lloyds Private Banking without financial or time limit against any claim to the Baramgia monies which might be made against Lloyds Private Banking by any third party including all legal costs and disbursements whether the claim is successful or not"*. In fact, Mr. Font's former legal representative who attended the meeting on 7th October, 1992, and who apparently now acts for the Font family has in a notarised letter from Majorca dated 7th September, 1996, stated that he has instructions that the beneficiaries - that is the widow, son and daughter of the deceased, and both the son and daughter are, apparently, of full age - have no claim and wish the monies to be transferred.

The Trustees did nothing for a very considerable time. Worse, they clearly allowed their nominees in London (the banking division) to run the deposited funds. There are no Trust accounts prepared and how the Sark director could be paid his annual director's fee knowing we have no doubt even less about the company than the Trustees that purported to run it is to us surprising.

There is a postscript to a letter on Lloyds Private Banking notepaper dated 8th October, 1992, signed by a Mr. Moxon, which leaves us in no doubt that our view of the way that this Trust was administered is correct and it reads:

> *"Jersey have confirmed that they will follow the instructions given to them.*
>
> *"G. MOXON"."*

We must also recall that on 7th October, 1992, the Trustees received a letter from the plaintiffs in the English action which was compromised which said this and nothing in our view could have been clearer:

> *"We refer to the instructions given to you by your customer, Martin Ferriol Font to transfer certain balances into the names of Cala Cristal SA and Capocorp SA or Mrs. Fawzeyah M.A. Al-Hasawi on discharge of the interlocutory order made in proceedings between Cala Cristal SA and Capocorp SA as plaintiffs and Martin Ferriol Font as defendant.*
>
> *We warrant that I am duly authorised on behalf of the said plaintiffs to receive such monies and subsequently to deal with them as I think fit and that I and the said plaintiffs hereby waive all and any claims that I or the plaintiffs might have against you, Baramgia Inc. or its directors in any way in connection with your or their having held the monies or transferred them into the company names.*
>
> *Yours faithfully,*
>
> *"MRS. FAWZEYAH M.A. AL HASAWI"*
>
> *Administrator for Cala Cristal SA and Capocorp SA".*

The other letter which is on Baramgia Incorporated notepaper says:

> *"Dear Mr. Moxon,*
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> *.....*
>
> *Whilst writing, I should be grateful if you would accept this letter as your authority to transfer full legal and beneficial title of all assets held with yourselves, in the name of Baramgia Incorporated, into the named account of Mrs. Fawzeya M.A. Al-Hasawi and Mr. Nabil Khalid Jaffar.*
>
> *We look forward to receiving your confirmation of this instruction in due course.*
>
> *Yours sincerely,*
>
> *"J.W. MARGISON". "D.J. GAVEY".*
>
> *Director. Secretary".*

Indeed, Mr. Gerard Moxon, who we should perhaps point out is the former manager of International Private Banking with LIB at the relevant time says in his affidavit of 3rd September, 1996, these words:

> *"Whatever the explanation as to why the Baramgia portfolio 171369 was excluded I can confirm as the representative of the bank charged with carrying out the instructions of Mr. Font in October, 1992, that the account should have been included and the funds therein transferred to Cala Cristal/Capocorp".*

Earlier, Mr. Moxon speaks of an administrative oversight which may have occurred because of the - as he describes it - *"frantic activity"* of the meeting of 7th October, 1992. He says that in essence the transfer of the funds *"slipped through the net".*

We also have to say this: that from October, 1992, the Trustees apparently had in their possession and control some £700,000 and they apparently failed to account for it to anyone. It again appears to us that only when the summonses appeared did that act as a catalyst to them.

Let us for a moment examine the Law which is really perfectly straightforward but we have been greatly helped by both counsel in both their addresses to us this morning.

Mr. Thompson has reminded us that Clore -v - Stype Trustees (Jersey) Ltd & Ors. (1984) JJ 13, is the first judgment in Jersey where the costs of all parties were paid on a full indemnity basis from the Trust Funds. The Trustee has of course an absolute right to apply to the Court for directions under Article 47 of the Trusts (Jersey) Law, 1984 and the application will normally be made for the costs to be paid out of the Trust Fund. We have seen that happen in a case cited to us, Channel Islands & International Law Trust Co. Ltd -v- Pike & 5 Ors. JLR N.14. There is really nothing in the Jersey approach to costs which in our view militates in any way against this passage from 4 Halsbury Vol. 48: Trusts, where it says at 788:

> ***"Where, however, a person is or has been a party to any proceedings in the capacity of a trustee, he is, unless the court otherwise orders, entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the trust fund, and the court may otherwise order only on the ground that the trustee has acted unreasonably or has in substance acted for his own benefit rather than for the benefit of the fund".***

And, at 789:

"The restrictions on the power to deprive a trustee of his costs out of the trust fund in effect embody the general principle that, as it is an implied term of the contract between a trustee and the author of the trust that the trustee should be indemnified in respect of all his costs and expenses properly incurred in the execution of the trust, a trustee is entitled to be paid out of the trust property his full costs of legal proceedings which he has properly instituted or defended on behalf of the trust".

We also have to consider briefly the passage from Underhill & Hayton: Law Relating to Trusts & Trustees (15th Ed'n): Chapter 18, where the learned authors state at p.791:

"Where the court, on the hearing of a summons for administration, 'does not think fit to make any order as to costs', that is merely a euphemistic way of depriving the trustees of their costs of the summons, and they cannot afterwards claim them as 'costs, charges, and expenses' incurred in the execution of the trust. To deprive a trustee of his costs has, however, been called 'a violent exercise' of the court's discretion, and, contrary to the usual rule of the court against appeals in respect of costs, an order depriving a trustee of costs, or limiting him to a particular fund, is appealable by him on that ground. On the other hand, if he be allowed costs, the beneficiaries cannot appeal against such allowance. Nevertheless a trustee, who acts unreasonably, may not only be deprived of costs, but be ordered to pay those of the plaintiff. For instance, in one case a trustee whose trust had become a simple trust, and who neglected for twenty-eight days after demand to transfer the trust property to the beneficiary, was not only deprived of costs, but ordered to pay those of the plaintiff".

We remind ourselves that this is an application by Trustees who, in different circumstances, might in our view have had some difficulty in sustaining the efficacy of the Trust which they controlled. They kept no accounts, they accordingly did not know of the assets that they held and they virtually delegated their responsibility to their banking division in London while still paying themselves from the Trust Fund. For eight years they showed no interest in ascertaining any better details of the beneficiaries or whose interest they were acting in other than the settlor beneficiary, but even when he died they did nothing and were not even certain as to the status of the lady named as one of his principal beneficiaries.

There seems no doubt that the intention of the meeting in October, 1992 - and we have said it I think twice already - was to

make over all the assets originally appropriated by Mr. Font and it little behoves them in the circumstances to blame the late Mr. Font's former legal advisers in London for not disclosing details of account 171369 in the name of Baramgia which that firm had at one time held. We have to say this in passing that it does seem to us that there is nothing in the letter from those solicitors to say that they actually knew of the amount in the Fund.

We have reached our conclusion in this way: the Trustees may have their disbursements in Baramgia Inc amounting to £310 and $1,205 but in the particular circumstances of this case, we are not prepared to allow them the costs of their application.

On the second point raised by Mr. Robinson we have thought long and hard but on reflection we are not going to give costs against the Trustees; that would, in our view, be too Draconian and in that regard the Respondents must pay their own costs.

Authorities

Showlag -v- BankAmerica Trust & Ors. (16th February, 1995) Jersey Unreported.

T.A. Picot (CI) Ltd -v- Michel & Ors. (17th February, 1995) Jersey Unreported CofA.

Showlag -v- BankAmerica Trust Company (Jersey) Ltd. & Anor. (6th July, 1995) Jersey Unreported.

Core -v- Stype Trustees (Jersey) Ltd & Ors. (1984) JJ 13.

Channel Islands & International Law Trust Co. Ltd. -v- Pike & Ors. (1989) JLR N.14.

Rahman -v- Chase Bank (CI) Trust Company & 5 Ors. (1990) JLR 136.

Underhill & Hayton: Law Relating to Trusts & Trustees (15th Ed'n): Chapter 18: pp.787-791.

4 Halsbury 48: Trusts: p.788.