

1. ARVIND PATEL
2. CHIMAN MOTIBHAI PATEL

v

1. NODHANA LIMITED
2. MAHENDRA MOTIBHAI PATEL
3. PRABHUDASLAL MOTIBHAI

[HIGH COURT, 1994 (Fatiaki J), 26 August]

Civil Jurisdiction

Estate-trusts-application for accounts-whether applicants beneficiaries-duty of trustees-Trustee Act (Cap 65) Section 90(1)-High Court Rules 1988 Order 85.

The Plaintiffs, claiming to be beneficially entitled under a trust sought accounts. The Court examined the duties of trustees towards beneficiaries and granted the orders sought.

Cases cited:

Brooks v Boucher (1862) 136 R.R. 450
Freeman v Fairlie (1812) 17 R.R.7
Kemp v Burn (1863) 141 R.R. 225, 226
Re Watson (1904) 49 Sol. Jo. 54

Interlocutory application in the High Court.

P. Knight for Plaintiffs
M. Narsey for Defendants

Fatiaki J:

On the 25th of March 1993 the above-named plaintiffs issued separate originating summonses out of the High Court in Suva seeking the determination of various questions relating to the actions, decisions and/or omissions of the first defendant trustee company and its directors in their administration of the affairs of the MBPB trust.

The applications are intituled in the matter of Section 90(1) of the Trustee Act (Cap.65) which provides (so far as relevant for present purposes) :

“Any person who has, directly or indirectly, an interest whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee in the exercise of any power conferred by this Act, ... may apply to the Court to review the act, omission or decision ; and the

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A Court may require the trustee to appear before it and to substantiate and uphold the grounds of the act, omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require.”

The present interlocutory application however is brought by the plaintiffs pursuant to Order 85 r.2(3)(a) of the High Court Rules 1988 for :

B “an order that the defendants furnish and verify accounts of Nodhana Limited and Kum Kum Limited from the dates of their respective incorporations to the present ...”

Order 85 r.5(2) reads : (so far as relevant)

C “Where an administration action is brought ... a person claiming to be beneficially entitled under a trust, and the plaintiff alleges that no or insufficient accounts have been furnished by the ... trustees, ... then, without prejudice to its other powers, the Court may -

D (a) order that proceedings in the action be stayed for a period specified in the order and that the executors, administrators or trustees, as the case may be, shall within that period furnish the plaintiff with proper accounts ;”

E In support of their applications both plaintiffs (besides their originating affidavits) have filed shorter broadly similar supplementary affidavits in which they depose to being beneficiaries named in a Deed of Trust dated 30th November 1976 which set up a family trust entitled the MBPB Trust of which the first defendant company is named as Trustee. They also depose that the second and third named defendants are the sole directors and shareholders (in trust) of the first defendant company.

F As for Kum Kum Limited the plaintiffs depose to their belief and understanding that the 2nd and 3rd defendants hold the two issued shares in the company “... on trust for Nodhana Limited”. This has not been denied.

Finally, both plaintiffs deposed that :

G “... (they) on numerous occasions asked for copies of accounts for both Nodhana Limited and Kum Kum Limited but have never been provided with any accounts.”

The defendants for their part in opposing the application have filed an affidavit deposed by the Company Secretary of the first defendant company and although no attempt has been made to deny the various assertions made in the plaintiffs

affidavits there is annexed to the defendants' affidavit a Deed between (amongst other named parties) the first defendant company and both plaintiffs and which is described in defence counsel's submissions as "the 1981 Deed".

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In his submissions Counsel claims the 1981 Deed has the dual effect (subject to the fulfillment of certain specified conditions as to employment or directorships) of releasing the first defendant company from its trusteeship towards such (dis)qualified persons and amounting to a disclaimer of an interest in the MBPB Trust by such (dis)qualified persons.

B

The deponent then deposes that the plaintiffs have both left the employ of Motibhai & Co. Ltd. which it is said is a (dis)qualifying condition under the 1981 Deed and therefore presumably the above-mentioned consequences necessarily follow, with the result, that neither plaintiff may be described as a beneficiary or person beneficially entitled under the MBPB Trust. I note however that both the affidavit and the 1981 Deed are silent as to the claimed directorships of the 2nd above-named plaintiff in both Nodhana Limited and Kum Kum Limited.

C

Clearly the defendants are challenging the assertion or claim by the plaintiffs that they are and remain beneficiaries of the MBPB trust. The challenge is mounted on 2 fronts as summarised in Counsel's written submissions as follows:

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"6.03 The defendants submit that the Plaintiff is not entitled to an order under Order 85 r.5(2) because the plaintiff has failed to establish that he is beneficially entitled under the Trust. If however, the defendants' submissions as to the effect of the 1981 Deed are not accepted, the Plaintiff may only be within the potential class of beneficiaries under the Trust. That is to say, the defendants submit that the plaintiff is a discretionary object. As a discretionary object he would have no interest in the Trust in the sense of any legal or equitable estate."

E

In dealing with the latter submission, learned counsel for the plaintiffs submitted that a contingent or potential beneficiary under a discretionary trust must be entitled to accounts. If not, the trustee is uncontrolled in respect of the accounts. I agree.

F

In Vol.48 of Halsburys Laws of England (4th ed.) the learned authors set out the duty of a trustee to provide information to a beneficiary in the following paragraph:

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"830. A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information ... as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is and full accounts

by Nodhana Limited to the plaintiffs (none furnished), it is impossible for the plaintiffs to quantify or verify either their entitlements under Clause 2 of the 1981 Deed or any payments received thereunder from Nodhana Limited.

A

On this score alone the plaintiffs in my view are entitled to the accounts of Nodhana Limited.

I am fortified in this by the decision in Brooks v. Boucher (1862) 136 R.R. 450 where beneficiaries of a trust sued representatives of the trustee alleging breaches of trust and seeking amongst other reliefs an admission of assets or a set of accounts and a defendant answered that accounts had already been settled and a release given in the life time of the trustee and therefore he refused to admit assets or set out accounts, in requiring the defendants to furnish accounts before trial Wood V.C. said at p.452 :

B

“But on the other hand, it is said that the plaintiffs ought to be informed if there exists the means to pay them what shall be found due if they succeed in their suit, because it might be, after they have established their case, that the defendant has nothing at all in hand to make good their loss. I think myself that the plaintiffs are entitled to information on this head.”

C

That a trustee has a duty to provide beneficiaries with accounts there can be no doubting. In Re Watson (1904) 49 Sol. Jo. 54 Kekewich J. speaking of the duty said :

D

“The duty of a trustee is three-fold : there is a duty to keep accounts, the duty to deliver accounts and the duty to vouch accounts ... The duty to keep accounts is an essential duty, he must keep such accounts so as to be able to deliver a proper account within a reasonable time showing what he has received and paid ...”

E

In similar vein and a good deal earlier Stuart V.C. said in Kemp v. Burn (1863) 141 R.R. 225, 226:

F

“... where an account is demanded of trustees ... by a residuary legatee, there seems no doubt what the duty of the (trustee) is. Their duty is to keep proper accounts, and to have them always ready when called upon to render them.”

G

Learned Counsel for the 1st defendant company submits however that the order sought by the plaintiffs is not properly limited to the accounts of the MBPB Trust as it should have been or to Nodhana Limited in its capacity as trustee of the MBPB trust. Whilst I recognise the technical nature of the submission I cannot accede to it.

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A Not only is Nodhana Limited specifically named in the Deed as the Trustee of the MBPB trust but its date of incorporation suggests that that would be its principal if not sole function. Certainly the contrary has not been deposed as it could have been. But in any event a similar submission was emphatically rejected by Lord Eldon L.C. in Freeman v. Fairlie (1812) 17 R.R.7 when he said:

B “It is, and must be understood to be, the bounden duty of an executor, to keep clear and distinct accounts of the property which he himself is bound to administer; and I have not the slightest difficulty in saying that, if all these books were the books of a banking house in London, and an executor thought proper to put the accounts of a testator’s estate into his banking books, he shall not be allowed to tell me, the cestui que trust, that I have no right to see his original accounts of my property.
C To an executor so acting I should say, they shall see every part of these original books which contain any part of this transaction.”

D In this case in the absence of any evidence of a separate and unrelated commercial activity on the part of the first defendant company or the existence of a distinct account for the MBPB trust, the plaintiffs as beneficiaries are entitled to the accounts of the trustee company Nodhana Limited.

E In the case of Kum Kum Limited in the absence of any denial of the plaintiffs sworn belief that the 2nd and 3rd defendants hold its shares “... on trust for Nodhana Limited” or of the second above-named plaintiffs’ assertion that he remains a director of Kum Kum Limited or of the undisputed relationship that exists between it and Becharbhai Holdings Limited and the acknowledged indebtedness of the latter company to the plaintiffs in terms of the 1981 Deed, I find that the plaintiffs are also entitled to the accounts of Kum Kum Limited.

F In passing I note that under Section 149(4) of the Companies Act 1983 the books of account of a company incorporated in Fiji “... shall at all times be open to inspection by the directors”.

G For the foregoing reasons the plaintiffs applications are granted and it is hereby ordered that these proceedings be stayed for a period of 1 month from the date hereof and that the defendants furnish to the plaintiffs within 1 month proper certified accounts of Nodhana Limited. Likewise within 1 month, the 2nd and 3rd defendants are hereby ordered to supply certified accounts of Kum Kum Limited to the plaintiffs or their solicitors. The plaintiffs are awarded the costs of this application.

(Application granted.)