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**15 pages**

# Royal Court
**(Samedi Division)**

**18th December, 1997.**

**Before : B.I. Le Marquand, Greffier Substitute**

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| **Between** | **Leo Nabarro and Alexei Nabarro (Minors, acting by their guardian ad litem Victoria Butler)** | **Plaintiffs** |
| **And** | **Axco Trustees Limited** | **Defendant** |

**Application by the plaintiffs for summary judgment in relation to certain of the claims in the Order of Justice, for an order for an account and for an order that the defendant be removed forthwith as Trustee of the Lelex Trust.**

**Advocate M. H. D. Taylor for the Plaintiffs**
**Advocate R. J. Michel for the Defendant**

**JUDGMENT**

**THE GREFFIER SUBSTITUTE:** This action relates to a Trust governed by English Law in relation to which Mr Nabarro, the father of the plaintiffs, was settlor and the defendant was originally the sole trustee. At all material times the Trust owned a company, Lelex Investments Limited.

The plaintiffs allege breaches of trust on the part of the defendant in that Trust assets were allegedly applied for the benefit of a non-beneficiary of the Trust, namely Mr. Nabarro. The plaintiffs as children of Mr. Nabarro are within the class of beneficiaries.

The defendant denies the alleged breaches of trust and in addition claims the benefit of an exoneration or exculpation clause contained in paragraph 22 of the First Schedule to the Trust Deed which reads as follows: -

> ***"In the execution of those trusts no trustee shall be liable for any loss to the Trust Fund arising by reason of any improper investment made in good faith or for the negligence or fraud of any agent employed by any such trustee or by any of the Trustees although the employment of such agent was not strictly necessary or expedient or by reason of any mistake or omission made in good faith by such trustee or by any of the Trustees or by reason of any other matter or thing except wilful fraud or dishonesty on the part of the trustee who is sought to be made liable".***

In the context of this action the parties agreed that the defendant's liability under the exoneration clause was limited to "wilful fraud or dishonesty on the

part of the trustee".

There are a number of helpful passages in the case of Armitage -v- Nurse [1997] 2 All ER 705 as follows:-

(1) In the summary of this decision on page 705:

> ***"Held - The words "actual fraud" in cl 15 excluded constructive fraud and equitable fraud and simply connoted dishonesty. Accordingly, the clause exempted a trustee from liability for loss or damage unless caused by his own dishonesty no matter how indolent, imprudent, lacking in diligence, negligent or wilful he might have been, and it was not void for repugnancy or on the grounds of public policy. Furthermore a trustee acted dishonestly if he acted in a way which he did not honestly believe was in the interests of the beneficiaries, whether or not he stood or thought he stood to gain personally from his actions. In the instant case, however, the statement of claim did not allege dishonesty on the part of the Trustees and therefore they were absolved from liability by cl 15.".***

(2) The following passage commencing on the second line on page 711 -

> ***"The expresssion "actual fraud" in cl 15 is not used to describe the common law tort of deceit. As the Judge appreciated it simply means dishonesty. I accept the formulation put forward by Mr Hill on behalf of the respondents which (as I have slightly modified it) is that it -***
>
> > ***"connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not."***
>
> ***It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests then he is acting dishonestly. It does not matter whether he stands or thinks he stands to gain personally from his actions. A trustee who acts with the intention of benefiting persons who are not the objects of the trust is not the less dishonest because he does not intend to benefit himself.***
>
> ***In my judgement cl 15 exempts the trustee from liability for loss or damage to the trust property no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he has not acted dishonestly.".***

(3) The following section beginning on the 5th line of page 712 -

*"The trustee must be -*

> *"conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not.". (See Re Vickery [1931] 1 Ch 572 at 583, [1931] All ER Rep 562 at 567 per Maugham J).*

*A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interest of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default.".*

**(4) This section commencing with the final paragraph on page 715 -**

*"The general principle is well known. Fraud must be distinctly alleged and as distinctly proved: Davy -v- Garrett (1877) 7 Ch D 473 at 489 per Thesiger L J. It is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct complained of fraudulent are pleaded; but if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud. As Buckley L J said in Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] 1 All E R 118 at 130 - 131, [1979] Ch 250 at 268:*

> *"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word "fraud" or the word "dishonesty" must be necessarily used.*
>
> *The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, where the facts are complicated this may not be so clear, and in such a case it is incumbent on the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."".*

On page 389 of Royal Brunei Airlines -v- Tan [1995] 2 A.C. 378 there is the following helpful passage:-

*"Thus for the most part dishonesty is to be equated with*

***conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.***

***In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions less he learns something he would rather not know, and then proceed regardless.".***

Because the relevant trust in this action is governed by English law, the English law authorities which I have quoted above in relation to exoneration clauses are directly relevant. In this particular action the issue arises as to whether any payments which were made which benefited Mr Nabarro and did not benefit people within the class of beneficiaries under the Trust were made either knowing that they were contrary to the interests of the beneficiaries or being recklessly indifferent whether they were contrary to their interests or not. Advocate Taylor argued that the test of recklessness was an objective test but Advocate Michel argued that it was a subjective test and that the defendant must have considered the risk that moneys were being applied other than for the benefit of the class of beneficiaries and gone on to take that risk. I shall return to this issue at a later stage.

The principles in relation to Summary Judgment in Jersey, in general follow those in England and in a number of cases I have referred to various sections of the White Book to which I referred in the case of Hambros Bank (Jersey) Limited v. Jasper (27th April, 1993) Jersey Unreported and which read as follows:-

***"(1) The first two paragraphs of section 14/3-4/4 read as follows:***

***"Defendant's affidavit - The defendant's affidavit must "condescend upon particulars," and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part.***
***A mere general denial that the defendant is indebted will not suffice unless the grounds on which the defendant***

*relies as showing that he is not indebted are stated. If the affidavit commences with a statement that the defendant is not indebted to the plaintiff in the account claimed, or any part thereof, it should state why the defendant is not so indebted, and state the real nature of the defence relied on."*

*(2) The text of the opening paragraphs of section 14/3-4/8 reads as follows:-*

*"Leave to defend - unconditional leave - The power to give summary judgment under 0.14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay". As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.*

*Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.*

*In an action by a bank claiming to recover sums due under a guarantee 0.14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the Court, or to make him liable in such a case to be put on terms of paying into Court as a condition of leave to defend. Thus in an action on bills of exchange, where the defendant set up the plea that they were given as part of a series of Stock Exchange transactions, and asked for an account, it was held to be a clear defence, and entitled the defendant to unconditional leave to defend. "The summary jurisdiction conferred by this Order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion." Summary judgment under this Order should not be granted when any serious conflict as to matter of fact or any real difficulty as to matter of law arises; but however difficult the point of law is, once it is understood and the Court is satisfied that it is really unarguable, it will give final judgment. And in cases arising out of stock transactions, especially, the Court should be very slow in allowing the plaintiff to take judgment without trial or in making payment into Court a condition of leave to defend.*

*Where the defence can be described as more than shadowy but less than probable, leave to defend should be given, especially where the events have taken place in a country with totally different mores and laws."*

*(3)* *Continuing with a quotation from section 14/3-4/8 further down -*

*"On the other hand, a complete defence need not be shown. The defence set up need only shown that there is a triable issue or question or that for some other reason there ought to be a trial; and leave to defend ought to be given unless there is clearly no defence in law such as could have been raised on the former demurrer to the plea and no possibility of a real defence on the question of fact. Where there are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and disreputable business dealings and questionable conduct, the Court should not make tentative assessments of the respective chances of success of the parties or the relative strengths of their good or bad faith, and should not on such an examination grant the defendant conditional leave to defend, but should give unconditional leave to defend.*

*In an action by a bank claiming to recover sums due under a guarantee of a company's indebtedness, allegations by the guarantors, who were directors of the company, that the receiver appointed by the bank under a debenture issued by the company was guilty of negligence in realising the company's stock at a gross undervalue because the sale had been at the wrong time, and had been insufficiently advertised and poorly organised and that the bank had interfered with the conduct of the receivership raised triable issues and the defendants were entitled to unconditional leave to defend."*

*(4)* *The fifth paragraph on page 150 of the 1993 White Book of the same section commences as follows:-*

*"Where there is a "fair probability of a defence" unconditional leave to defend ought to be given."*

*(5)* *The penultimate paragraph of section 14/3-4/8 commences as follows:-*

*Even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given."*

*(6)* *Section 14/3-4/9 commences as follows:-*

*"Some other reason for trial - The former O.14,r.1, provided that the defendant should have leave to defend if he "shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally."*

*These words were replaced in r.3(1) by the words that the defendant should have leave to defend if he satisfied the court "that there ought for some other reason to be a trial" of the claim or part to which the summons for judgment relates. These words, if anything, are wider in their scope than the former. It sometimes happens that the defendant may not be able to pin-point any precise "issue or question in dispute which ought to be tried," nevertheless it is apparent that for some other reason there ought to be a trial."*

*(7) Section 14/3-4/10 commences as follows:-*

*"Question of fact - The following principles are laid down in cases decided under this Order. Leave to defend should be given where the defendant raises any substantial question of fact which ought to be tried; or there is a fair dispute to be tried as to the meaning of the document on which the claim is based; or uncertainty as to the amount actually due; such as alleged deception in the prospectus of the plaintiff company; or non-delivery of all the goods, and excessive charges; or whether there had been misrepresentation by the plaintiff; or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witness on his affidavit; or alleged fraud; or whether the plaintiff has fulfilled his part of the contract; or inferiority of work done; or against a surety where there is a reasonable doubt of his liability; or as to the amount of his liability; or where on the facts sworn to there is a prima facie case on both sides."*

*(8) Next section 14/3-4/11 commences as follows:-*

*"Question of law - Leave to defend should be given where a difficult question of law is raised; e.g. whether the claim is in respect of a gambling transaction; or depends on foreign law.*

*Nevertheless, if the point is clear and the Court is satisfied that it is really unarguable, leave to defend will be refused. Thus, e.g. where the words of the statute under which the action was brought clearly made the defendants liable, the court refused to give leave to defend."*

The applications for summary judgment in relation to sums of money were in respect of paragraphs 7 (1) and 7 (3) of the Order of Justice. 7(1) relates to an allegation that the defendant has made payments out of the Trust Fund to or for the benefit of Mr. Nabarro or otherwise not for the benefit of any of the beneficiaries amounting to at least £119,051. The claim in respect of 7.3 relates to a claim that a one-half share in a yacht which was owned by the Trust was sold for the sum of £20,000 and that the Trust only received the sum of £8,200.

There was no doubt that Mr Nabarro was not a beneficiary of the Trust because he is specifically excluded under the Trust Deed from ever being such a beneficiary and that was well known to the defendant.

The basis for the claim for the sum of £119,051 is the mysterious appearance in the draft but unaudited accounts of Lelex Investments Limited, the company owned by the Trust, for the year ended 31st March 1993, of an alleged loan of that sum to Mr Nabarro. There was no mention of that debt in the audited accounts for the year ended 31st March, 1992.

On 16th February, 1994, Mr E S Axford, a Director of the defendant, wrote to Mr Nabarro and the terms of that letter were most enlightening and the relevant parts read as follows:-

> ***"It has been some two weeks now since we met and in recent days I have been dealing with my co-trustee once again on matters relating to the Trust and in particular the sizeable sums that were made available, either as yacht expenses or travel expenses in 1988/89.***
>
> ***It is imperative therefore that I receive some input from you, as hard as that may be, in determining exactly how and for who's benefit the expenses were incurred. In addition there is still the question mark over the purchase of the yacht as a "trust asset" and the diminished proceeds of sale. In particular I need more detail on the deduction amounting to £8,413 in the final proceeds described as "mooring, maintenance and storage".***
>
> ***I am not going over old ground again with regard to the rights and wrongs of all of the payments other than to say that if the trustees have to raise funds by way of the sale of the property occupied by Joshua and his mother this may cause you personal problems in other ways. Would it not therefore be better if we were to consider, as discussed, placing certain of these historical payments to a loan account in your name and for you to arrange for a repayment of the same over a period of time and on a regular basis to help with the payment of the educational needs of your other two children?"***

On the 6th May, 1994, Mr. Axford wrote to Advocate David Petit, who was by then the co-trustee of the relevant Trust and the fourth paragraph of that letter is enlightening and reads as follows:-

> ***"Turning to the question of the loan arrangements he has suggested that perhaps we could write back, into a loan account, from earlier expenses £35,000 and he would endeavour to pay them off over the next five years or earlier. I believe this represents, more or less, 50% of those "holiday" payments excluding moneys expended on the yacht (including capital cost)."***

On the 10th December, 1993, a meeting was held in Dublin in order to discuss the problems in relation to the Trust and Mr Axford was present on behalf of the defendant and Miss Sarah Grundy, an English lawyer, on behalf of the plaintiffs. Miss Grundy kept a note of the meeting and has sworn an affidavit to the effect that the note is accurate. According to the note, at one point in the meeting Mr Axford was asked "What happened to the money?" The note then continues as follows:-

> ***"There were large travel expenses E A (Eric Axford) remembered safari holiday, Caribbean holiday and expensive holidays in the South of France.***
>
> ***He confirmed that D N (Mr Nabarro) would telephone him and ask him to organise the travel arrangements. He usually paid for DN and a "nanny". He did not "give it much thought".***
>
> ***When E A was told that D N never took a nanny only girlfriends he seemed surprised. He stated that as far as he was concerned his client was D N Provided D N mentioned something about connecting the payment with the boys then he felt that he had done his duty.***
>
> ***He confirmed that it was Stephen Arthur of T K B who had referred D N to him as a "client". He confirmed that even paying £15,000 for six weeks in a villa in the south of France was not really questioned by him as D N had told him that the boys would be there for some of the time".***

The basis of the plaintiffs' claim for summary judgment for the said sum of £119,051 was that the defendant had estimated that this was the sum in relation to which Mr Nabarro had benefited and that the inclusion of this sum in the draft accounts for the year ended 31st March, 1993, was therefore an admission.

However, there were various figures available in various documents which were before me and it very soon became clear to me that the plaintiffs were unable to tie this total figure of £119,051 into individual claims for breach of trust.

On 18th February, 1994, Advocate Petit wrote to Miss Grundy sending her documentation which according to Advocate Petit was prepared by Mr Axford relating to travel expenses for the years 1989 and 1990. These figures were available to me and there are in fact two categories, the first being an analysis of travel expenses which totals £48,420.36 for the period ending 31st March, 1989, and the second being

an analysis of travel expenses which totals £29,508.91 for the period ended 31st March, 1990. However, both parties were agreed that the Trust did not come into existence until the 26th September, 1988, and £25,989.79 of the analysis for the period ended 31st March, 1989, was prior to that date.

Even if I were to be satisfied that the test in relation to summary judgment had been satisfied on the matters of breach of trust and non operation of the exoneration clause, I could not possibly be satisfied that the sum of £119,051 was due.

I have considered whether it would be possible for me to examine the various figures and draft accounts which were before me and from them to deduce which items had been spent for the benefit of the plaintiffs and which for the benefit of Mr. Nabarro. However, there are a number of difficulties in relation to this course of action.

(1) Firstly, paragraph 7.1 of the Order of Justice does not contain any details of particular holidays or particular items of expenditure but merely claims for a global sum of £119,051 and the relevant part of the application for summary judgment is also in relation to that global sum.

(2) Secondly, I simply do not have any evidence before me other than the limited details which have been provided by the defendant as to who benefited from particular holidays. For example, there is an expenditure of £7,000 dated 6th December, 1988, with Fortune Travel and the defendant's note indicates that relates to a trip to Kenya for December 1988 for Master A. Nabarro for Master L. Nabarro and nannies Ms S. Murreybutt and Ms P. Mendy. The plaintiffs allege that Ms S Murreybutt is very similar to the name of a mistress of Mr Nabarro at the relevant time. However, even if this is so, how am I to be certain as to whether this holiday was not really for the benefit of the plaintiffs. A second example relates to the renting of a villa in Chateauneuf on the 29th March, 1989, for the sum of £3,450 and on the 24th May, 1989, for the sum of £12,130.89. Although these amounts appear to be very suspicious and appear to tie in with the notes of the Irish meeting to a certain extent, how am I to know that the plaintiffs were not there on holiday for a substantial part of the relevant periods, and if so, how am I to apportion the sum which could properly be paid out of the Trust Fund and the sum which was for the benefit of Mr Nabarro?

(3) There are also items on the various accounts and figures which would appear to relate to expenses in relation to a boat. These may well relate to mooring charges or maintenance charges but the figures are substantial and it may be that these included sums of money which were drawn from the particular Bank mentioned in the notes namely, Banque Paribas. I do not know whether these relate to the boat which the Trust acquired or to some other vessel which may have been specifically hired. I do not know whether the plaintiffs gained any benefit from the expenditure of these sums.

Accordingly, I have decided that it would be completely unsafe and unsatisfactory for me to give summary judgment in favour of the plaintiffs in relation to any of the individual items which may make up the £119,051.

The second part of the claim for Summary Judgment is for a sum of money relating to paragraph 7.3 and to the sale of the half share of the boat. As with many other aspects of this case, the acquisition and sale of the boat are shrouded in mystery. Indeed, it would appear that legal title to the boat was never vested either in Lelex Investments Limited or in the defendant. Nevertheless, there is no doubt that the boat represented a Trust asset. It is referred to in the audited Trust Accounts and the defendant has never argued that it was not a trust asset. At the time when the boat came to be sold it was apparent that the Trust only owned one half of it, the other half being owned by a Mr. Graham. The basis of the plaintiffs' claim for £11,800 is that the boat was sold for £40,000 with the half share being £20,000 and that the only amount credited to the Trust in relation thereto was the sum of £8,237. The audited accounts for the year ending 31st March, 1992, contain a statement that the yacht was sold during the year for the sum of £20,000 and this sum is included in the balance sheet under current assets as a debtor.

However, the boat had clearly not been sold by 31st March, 1992, because there is a letter from Mr. Nabarro to Mr. Graham dated 16th October, 1992, in which he is suggesting that the valuation of £40,000 for the boat would be acceptable to the Trust. However, according to the defendant the half share of the boat was eventually sold for £16,650 and the sum of £8,237 was only received from Mr. Nabarro on 9th December, 1993. It appears to me to be very strange that Mr. Nabarro was apparently able to sell the half share of the yacht which really belonged to the Trust and there was also clearly an issue as to the basis upon which the sum of £8,413 was deducted from the sum of £16,650. Indeed, it is precisely this issue to which Mr. Axford is referring in the second paragraph of his letter dated 16th February, 1994, addressed to Mr. Nabarro.

For the purposes of Summary Judgment I cannot work on any other basis than that the half share of the boat was only sold for £16,650. What then do I make of the deduction of £8,413 by Mr. Nabarro. If this relates to legitimate expenses in relation to the boat then if this sum were properly due by the Trust then it may well not be wrong that Mr. Nabarro pay it on behalf of the Trust. The problem which I have is that all these transactions are shrouded with considerable mystery. It may well be that the acquisition of the boat was a breach of trust but the acquisition itself is surrounded in mystery. It would appear that the initial deposit in relation to the boat was paid before the Trust was formed. Although it may well be that there has been a breach of trust relating to the said sum of £8,413 and that the defendant is not protected by the exoneration clause, there are so many aspects of the matter which are shrouded in mystery and I am not satisfied, applying the summary judgment test, that I can give judgment in relation to that sum.

Accordingly, I am dismissing the application for summary judgment under paragraph 7.3 of the Order of Justice and granting the defendant unconditional leave to defend the action.

I have come to the decision of dismissing the two applications for summary judgment without determining the question as to whether or not the exoneration clause provided the defendant with relief. However, as it will assist the parties if I express a view on this, I shall now do so. The actions of the defendant, insofar as they

may have involved advancing monies to a non-beneficiary, would clearly involve a breach of trust. However the question arises as to whether they amount to wilful default as defined as wilful fraud or dishonesty. In particular, in this case the question comes down to whether the defendant committed any breaches of trust "knowing that they were contrary to the interests of the beneficiaries or recklessly indifferent as to whether they were contrary to their interests or not". Although it appears to be likely that, in relation to any such breach of trust, the defendant's level of conduct was low, I am not satisfied that the test required for the purposes of summary judgement has been met here either by the plaintiff. The defendant may, in my view, succeed at trial in sheltering behind the exoneration clause. Accordingly, I have also dismissed the application upon this ground as well as upon the grounds relating to the quantification of any liability which I have set out above.

The second paragraph of the plaintiffs' summons dated 22nd August, 1997, sought an order that an account be produced of what has happened to the residual trust fund (as defined by Clause 1.10 of the order of justice). Although, as originally worded, this was not being made as a summary judgment application, Advocate Taylor during the course of the hearing asked me to treat it as such. He brought to my attention the following brief paragraph from page 148 of the 1997 White Book:

> ***"O.14 applies to an action for an account (see also O.43, r.1 (summary order for account))."***

Advocate Taylor also drew my attention to a section on page 420 of the case of the Attorney General -v- Cocke and another [1988] 1Ch.414 which reads as follows:

> ***"As it seems to me, however, it has always been the law that persons in a fiduciary position are bound to account to those for whom they are fiduciary, and that extends beyond pure trust claims to such matters as agents who hold property which is the property of their principals and who have long been held liable to account and liable to a summary account under R.S.C., 0rd 43, a procedure which is often resorted to. The basis of the duty to account is the fiduciary relationship. It is important to notice that the court in a case where there is no allegation of any impropriety but merely an allegation of a relationship of a fiduciary and an object of the fiduciary duty, will frequently make a common form order for an account (unless indeed it be oppressive or for some other good reason the court in its discretion thinks it wrong to make an order) but will not make any order in respect of the costs of that application, reserving those costs until the account has been taken. That is because the duty to account arises, but if the accounting party is innocent and produces a true and good account, it would be quite wrong that the cost of carrying out that duty should be thrown upon the innocent accounting party".***

In England it would appear that the account can either be ordered in common form or upon the wider footing of wilful default. Advocate Taylor drew my attention to a quotation from page 284 of Snell's Equity 29th Ed'n which reads as follows:-

> ***"If the complaint is that the trustee has omitted to do something which a prudent trustee ought to have done, an account on the footing of wilful default will be ordered, that is an account of what he might have received but for his wilful default".***

It appears to me from this that the difference between the wilful default based account and the common form account is that the trustee has to account for what he might have received but for his wilful default. However, in this case the complaints against the defendant do not relate to failures to collect in assets or failures to invest the same properly but rather to paying out moneys for improper purposes.

Advocate Taylor also asked me to order a separate account as to how the figure of £119,051 in the draft accounts had been calculated.

I have no doubt that I have a power to order an account in a suitable case both under Rule 7/1 and also under the inherent jurisdiction of the Court. Where an allegation is made that moneys have been used for improper purposes, it is often impossible for the plaintiff to know precisely what has been used for what purpose and where the plaintiff is a beneficiary or a potential beneficiary the defendant must be under a duty to account for what it has done. In my view, in a case such as this, the provision of the account is part of the interlocutory proceedings and is necessary by way of preparation of the case for trial. Accordingly I am ordering that the defendant furnish to the plaintiffs an account relating to the trust fund from its commencement to the date hereof and what I am seeking to do is to provide the equivalent to the account in common form in England. I am not satisfied that it is appropriate, at this point in time, to make an order upon a wilful default basis for the simple reason that it does not appear to me that the complaints of the plaintiffs justify this for the reasons which I have given above. Similarly, it does not seem to me to be appropriate to make an order for an account in relation to the sum of £119,051 mentioned in the draft accounts. I say this because it appears to me that this was an estimation made by the defendant for certain purposes at a certain time. The plaintiffs are of course free to seek to apply for further information in relation to this in other ways and I am not prejudging any further application for particulars, interrogatories or discovery relating to the calculation of £119,051.

During the hearing I indicated that it would not be appropriate for me to make the order in question under paragraph 3 of the summons that whatever be found due to the trust fund (as defined by paragraph 1.7 of the order of justice) be restored. Such an order cannot be made until the trial of the action as only then will it be known as to what amount, if any, ought to be restored.

Paragraph 4 of the summons requested an order that the defendant be removed forthwith as trustee of the Lelex Trust. The power to remove a trustee under Article 15 (4)(a) of the Trusts (Jersey) Law, 1984, is vested in the Inferior Number of the Royal Court and not in the Judicial Greffier. Accordingly, during the hearing, I indicated that I did not have the power in relation to an application for the removal of a trustee to make such an order. However, although the wording of paragraph 4 does not indicate that such an application was being made under the summary judgment power Advocate Taylor again asked me to treat the application as if it were being made under that power.

Although the power which is vested in the Judicial Greffier to deal with summary

judgment allows him to make orders which would normally only be made as a final judgment, the question arises as to whether that power includes the removal of a trustee. The question I had to ask myself was whether the Judicial Greffier could make such an order in a case in which he was satisfied that the Inferior Number of the Royal Court could not come to any other decision.

It does not seem to me that it would be correct for me to exercise this jurisdiction under summary judgment. The matter of the removal of a trustee was clearly intended by the States of Jersey to be dealt with by the Inferior Number of the Royal Court. Furthermore, it is a discretionary power and one which will only be exercised with great care. It seems to me that the plaintiffs ought to pursue this matter by an application directly to the Inferior Number and not by means of an application for summary judgment to the Judicial Greffier. Accordingly, I declined to make the order for the removal of the defendant as a trustee of Lelex Trust. I have not considered the merits of the application for the removal as Trustee.

Finally, I shall need to be addressed both in relation to the time period for the provision of the account and in relation to the costs of and incidental to the plaintiffs summons dated 22nd August, 1997.

## Authorities

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Royal Brunei Airlines -v- Tan (1995) A.C. 378.

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Attorney General -v- Locke & Anor [1988] 1Ch. 414.

Snell's Equity (29th Ed'n) p.284.

Trusts (Jersey) Law, 1984: Article 15 (4) (a).