

EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0039

BETWEEN:

RAWLINSON & HUNTER TRUSTEES S.A.
(in its capacity as Trustee of the Tchenguiz Family Trust)

Appellant

and

MR. ROBERT TCHENGUIZ

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Anthony Gonsalves, QC
The Hon. Mr. Eamon H. Courtenay, SC

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Richard Wilson, QC, with him, Mr. Mo Haque, QC for the Appellants
Mr. Terence Mowschenson, QC, with him, Mr. Stuart Cullen for the Respondent
Mr. Ben Mays for the Liquidators

2018: July 12.

Commercial appeal – Trust – Trustee – Exercise of discretion – Entitlement of beneficiary – Claim against trustee for disclosure of documents – Right to disclosure of trust documents – Findings of fact – Whether trial judge findings of fact were wholly unjustifiable on the basis of evidence that was before him – Unchallenged evidence – Costs

REASONS FOR DECISION

Introduction

- [1] COURTENAY JA [AG.]: This is an appeal by Rawlinson & Hunter Trustees S.A. (“the Trustees”) the trustee of the Tchenguiz Family Trust (“the TFT”) against a judgment of

Chivers J (“the Judgment”) delivered on the 21st March 2018, by which the Trustees were ordered to disclose certain documents to the Respondent. The Respondent Robert Tchenguiz (“Robert”) is a beneficiary of the TFT.¹

[2] The central issue on this appeal can quite easily be understood by quoting from the Judgment of Chivers J:²

“The grounds set out in the application include the following, the reference to “BVI Claims” being to the claims in the liquidation referred to above:

[6] [Robert] has learned from an email from Mr. Hillier, a director of the Trustee, that the Trustee is making allegations in the BVI Claims which may be premised on an incorrect or false factual basis and he understands that this concerns allegations as to [Robert's] conduct of a serious nature, namely an allegation that [Robert] may have made false statements.

[7] If the allegations are without foundation, then the Trustee will be pursuing baseless BVI Claims at the expense of the Trust and putting the Trust assets at risk of a significant adverse costs order.

[8] Despite having requested copies of the claims made in the Companies' liquidation, from the Trustee, the Trustee has refused to provide copies of the Claim Documentation to [Robert], so that he can consider whether or not the allegations are baseless.

[9] [Robert] wishes to ensure the due administration of the TFT in light of the foregoing matters and is unable to do so without sight of the Claim Documentation **which the Trustee has refused to disclose.”**

[3] The documents sought in the disclosure proceedings will, for convenience, be referred to as the Claim Documentation.

[4] Put simply, the Trustees were pursuing claims in certain insolvency proceedings. Robert was given to understand that the claims might have been based on allegations relating to

¹ See judgment in related appeal - BVIHMAP2018/21-38 for a detailed explanation of the facts and matters in dispute.

² Mr. Robert Tchenguiz v Rawlinson & Hunter Trustee SA BVIHCM 2017/0026 (delivered 21st March 2018, unreported) para 20.

him, which were possibly false. Naturally, Robert wanted to see the allegations and requested them from the Trustees. They refused to hand them over, so he moved the High Court for relief.

High Court Proceedings

- [5] **Robert's** application to the High Court for disclosure of the Claim Documentation was pursuant to sections 60 and 82 of the Trustee Ordinance³ (As amended), Part 67 of the **Civil Procedure Rules, 2000, and the Court's inherent jurisdiction. The Claim** Documentation included the claims submitted by the Trustees to the Mr. Stephen Akers and Mr. Mark McDonald of Grant Thornton in their capacities as liquidators of 16 **companies incorporated in the British Virgin Islands (Commonly referred to as "the Oscatello Companies")**.
- [6] Before Chivers J it was common ground that the High Court had undoubted jurisdiction to order the Trustees to disclose the Claim Documentation.⁴ The Privy Council has held that:
- "Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary, to intervene in, the **administration of trusts**".⁵
- [7] Chivers J properly found that Robert had sufficient interest to ground his claim for disclosure.⁶ He ordered the Trustees to disclose the Claim Documentation to Robert. In doing so he accepted **Robert's undertaking, given through Counsel, that the disclosed** documents would not be used for any purpose other than the due administration of the TFT. Importantly, the documents in the Claim Documentation are not internal trust documents, but documents disclosed by the Trustee to Mr. Akers and Mr. McDonald in the High Court proceedings.

³ Trustee Ordinance 1961.

⁴ Tchenguiz v Rawlinson Judgment (n 2) para 3.

⁵ Schmidt v Rosewood Trust [2003] UKPC 26 at para 51.

⁶ Tchenguiz v Rawlinson Judgment (n 2) para 39.

[8] On 28th March 2018, Chivers J ordered a stay of his disclosure order.

[9] Being dissatisfied with the disclosure ordered by Chivers J, the Trustees filed a Notice of Appeal dated 26th April 2018 in which it sought to overturn the Judgment of Chivers J. The relief sought was:

1. **“An order allowing the appeal and**
 - a. **Dismissing the Respondent’s application; alternatively**
 - b. **Remitting the Respondent’s application to the Commercial Court for a rehearing.**
2. **An order that the Respondent pay the Appellant’s Costs.”**

The Appeal

[10] We heard this appeal on the 12th July 2018. After hearing Counsel, we dismissed the appeal and lifted the stay. We also invited Counsel to assist us with submissions as to the appropriate costs order in this appeal which they quite helpfully did.⁷ We promised to give reasons for our decision and do so now.

Issue on Appeal

[11] Notably, the Trustees relied on two related grounds of appeal: (i) the Learned Judge made findings of fact that were wholly unjustified on the basis of the evidence that was before him (and could therefore not properly be made by him); and (ii) the Learned Judge then took those erroneous findings of fact into account when exercising his discretion to order disclosure. These two grounds can conveniently be considered together.

[12] It is recalled (see paragraph 2 above) that Robert sought disclosure primarily on the basis that he had reason to believe, based on information he had received, that the Trustee had made serious allegations against him in the liquidation proceedings, he needed to see these allegations in order to determine what if anything he needed to do personally, and to assess the potential impact on the TFT. According to the Trustees, its witness, **Hardeep Singh Nahal’s affidavit evidence, had specifically disputed the evidence in**

⁷ See paras 26-28 below.

Robert's affidavit on the question whether the allegations, which he was told were made against him, were true or not. Essentially, Mr. Nahal's evidence was that there was no basis for Robert's belief that there were improper allegations made against him in the Claim Documentation filed in the liquidation proceedings. On appeal, the essence of the Trustees' complaint was that the learned trial Judge stated that the evidence relied on by Robert was "unchallenged". The Trustees contend that although Chivers J made reference to Nahal's evidence, he fell into error by arriving at his decision relying on supposedly "unchallenged" evidence. Arguing that Chivers J did err, the Trustees say that he made an error of law which entitles us to intervene and to correct that error by setting aside the decision below and allowing this appeal.

[13] Two points are to be made. First, the Judge clearly had in mind the two versions of the evidence.⁸ **It seems to me that the use of the word "unchallenged" in the two instances identified by the Trustees may have been, at most, unfortunate, but this argument fails to address the fundamental issue that was before Chivers J. The second point is that there was no cross-examination of the witnesses. Therefore, this Court is in the same position as Chivers J was to assess the evidence and draw inferences of fact therefrom.**

[14] It is important to emphasise that we felt able to dismiss this appeal immediately after **hearing counsel because it was clear that the Trustees' forensic guns were aimed at the wrong target.** The question on this appeal, as it is on many appeals, is whether the decision of the trial Judge was wrong in light of the evidence before him as applied to the law. **In this context, the "unchallenged" evidence argument, with respect, misses the point.**

[15] The grounds of appeal were framed very narrowly. With good reason. The entire appeal is based on the Trustees contention that the trial Judge reached his decision on the basis of **"unchallenged" evidence. There is no direct challenge to the trial Judge's conclusion**

⁸ Chivers J specifically points to Nahal's contrary evidence in paragraph 22 (n 4).

that Robert had made out a proper case for disclosure. Further, there is no direct challenge to the trial Judge's exercise of his discretion on the "three discretions" as stated in Schmidt v Rosewood Trust Ltd.⁹ The Trustees have sought to undermine these important conclusions of the trial Judge by relying solely on the "unchallenged" evidence argument.

[16] Essentially, by its appeal the **Trustees challenged the correctness of Chivers J's decision** to order disclosure of the Claim Documentation. The real question before this Court was: assuming that there was disputed evidence before the trial Judge, and that he therefore erred in relying on "**unchallenged**" evidence, **was there nevertheless evidence in the affidavits that supported Robert's application for disclosure and entitled him to the relief sought?** The answer was clearly yes.

[17] Even if the Judge fell into error by relying on what he regarded as "**unchallenged**" evidence, and we have concluded that he did not so err, we were faced with untested affidavits with two versions of evidence on the allegations. What was not disputed is that there were allegations made against Robert, the dispute was whether they were untrue or false.

[18] But there was, in this case, no need to resolve any dispute of fact or determine which version of events was true or not. The question was whether Robert made out a basis for the disclosure orders he sought. On the basis of Schmidt, we are satisfied that the judge was right to find that such a case was made out by Robert. Once that conclusion was **reached then the Court's mind was properly directed to the exercise of the "three discretions" identified in Schmidt.**

[19] The jurisdiction which Chivers J was exercising was described in Schmidt **as "one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in the**

⁹ [2003] 2 AC 709 at para 54.

administration of trusts". There was credible evidence before Chivers J that Robert was a beneficiary of the TFT, he was concerned whether the Trustees were exposing the assets of the TFT to significant claims by pursuing the liquidation claims on the basis of unfounded allegations, and that Robert wanted to hold the Trustees to account with respect to its management of the TFT. In such circumstances, it is difficult to impeach **Chivers J's conclusion that Robert had a good basis for seeking disclosure of the Claim Documentation** from the Trustees.

[20] The trial Judge dismissed the assertion deployed by the Trustees that Robert was motivated by an improper or collateral purpose in seeking disclosure.¹⁰ Chivers J stated:

"In the circumstances I cannot be satisfied that [Robert] has any collateral purpose in obtaining the documents, let alone a collateral purpose which might cause harm to the TFT. Nor can I be satisfied that there is a real risk of harm to the TFT if the documents are disclosed".¹¹

He then said:

"before considering the discretionary factors ... I need to decide whether [Robert] has a sufficient purpose in seeking the documents from the Trustees for the purpose of holding the Trustee to account. In my view he has". There is no ground of appeal that challenges this important finding.¹²

[21] On the evidence before Chivers J, and in the absence of cross-examination, we are satisfied that **Chivers J's decision, that a proper case had been made out for disclosure,** was right.

[22] As mentioned earlier, the grounds of appeal were narrowly framed. They do not expressly challenge **Chivers J's conclusion on the so called "three discretions"**:

(a) Whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all;

¹⁰ Tchenguiz v Rawlinson Judgment (n 2) para 36.

¹¹ Tchenguiz v Rawlinson Judgment (n 2) para 36.

¹² ibid para 37.

- (b) What classes of documents should be disclosed, either completely or in a redacted form; and
- (c) What safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court.

[23] Chivers J held that, as some of the assets in the TFT were designated as being joint or **for Robert only, Robert was “close to the economic position of a beneficiary absolutely entitled”**.¹³ Therefore, he was entitled, by that interest to be granted relief. Chivers J summarized the arguments on whether the Claim Documentation should be redacted, and properly concluded that they should be disclosed in un-redacted form in order that Robert could decide whether to hold the Trustee to account.¹⁴ Finally, in terms of safeguards to be imposed on the use of the Claim Documentation, he accepted the undertaking of counsel¹⁵ with respect to the circumscription as to use of the documents.¹⁶

Conclusion

[24] We have not found it necessary to consider the authorities relied on by the Trustees in **support of the argument that this Court can interfere with the trial Judge’s exercise of his discretion**. The authorities and principles are largely settled, uncontroversial and well known to the Court.¹⁷ For completeness though, we refer to Sheikh Abdullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani et al¹⁸ and the dictum relied on by the Trustees:

“A decision which was not properly open to the judge below on the evidence amounts to an error of law in respect of which an appeal court should intervene

¹³ Tchenguiz v Rawlinson Judgment (n 2) para 41.

¹⁴ *ibid* paras 42 – 44.

¹⁵ See para 7.

¹⁶ *ibid* paras 45 – 46.

¹⁷ *Dufour v Helenair Corporation Ltd and Others* (1996) 52 WIR 188.

¹⁸ BVIHC VAP2013/0005 (delivered 18th September 2013, unreported).

unless it can be shown that the judge's decision was plainly and unarguably right notwithstanding his misdirection of himself"

[25] We have firmly decided that the conclusion reached by the trial Judge – that Robert had made out a case for disclosure of the Claim Documentation, was properly open to him on the evidence. In reaching that decision, Chivers J did have in mind the two versions of the **evidence (Robert's version and Nahal's version)**. Chivers J did not commit any error that led him to reach a wrong decision. We therefore have no jurisdiction, or inclination, to intervene.

Costs

[26] When we announced that we had dismissed the appeal, we invited Counsel to assist us with respect to the appropriate costs order. As I understood Mr. Mowschenson QC, he submitted that the Trustees should **be ordered to pay Robert's costs personally**. This is consistent with his written case.¹⁹ Alternatively, he submitted that the costs should be paid out of the funds of the TFT, provided that Victor approved that they be paid exclusively out of his assets. Specifically, the assets of Robert, in the TFT, should not be used to **meet the costs order**. Mr. Wilson QC said that depending on this Court's reasoning, there might be reason to oppose the primary position advanced by Mr. Mowschenson QC on costs. He therefore reserved the position of the Trustees. I should note that in his written case Mr. Wilson QC maintained that Robert had an ulterior purpose in seeking disclosure.²⁰ We indicated that we would decide the matter and provide our reasons. We do so now.

[27] It is necessary to point out that Robert is a beneficiary of the TFT, notwithstanding the division of the TFT assets. When one has regard to the history surrounding the TFT and **Robert and Victor's differences**, it was not wholly unreasonable for the Trustees to **carefully evaluate Robert's request for disclosure**. However, once Chivers J handed down

¹⁹ Skeleton Argument of the Claimant/Respondent para 17.

²⁰ Appellant's Skeleton Argument in Reply paras 10 – 11.

his Judgment it was difficult, in my view, for the Trustees to justify the continued resistance to disclosure of the documents. As I repeatedly pointed out, this appeal was narrowly framed; it is indicative of its weakness. I am decidedly of the view that Robert should have his costs of this appeal.

[28] Ultimately, I view the resistance to disclosure as resistance by Victor. Broadly speaking, the view taken by the Trustees was that the assets of TFT were essentially for Victor, and therefore Robert had no legitimate basis to see the Claim Documentation. His purpose for pursuing disclosure was improper or collateral. The Trustees likely saw themselves as duty bound **to protect the Trust from improper disclosure, thereby protecting Victor's rights. In the end I am persuaded that the Trustees should pay Robert's costs in this Court and in the Court below.** These costs are to be met exclusively out of the assets held by the Trustees in the TFT for Victor.

Order

[29] The orders I make are as follows:

- (a) The appeal is dismissed, and the Judgment of the trial Judge is affirmed.
- (b) The Respondent is to have his costs in the court below, assessed if not agreed within 21 days from the date hereof; and

(c) Costs are awarded to the Respondent in this Court on the substantive appeal at two-thirds of the costs in the Court below.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Anthony Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar