SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2010/0783

BETWEEN:

DESMOND DEVAUX

Claimant

and

[1] RICHARD JOHNSON
[2] GERARD BERGASSE

Defendants

Appearances: Mr Dexter Theodore for the Claimant
Mr Geoffrey DuBoulay, Ms Sardia Cenac, and Mr Michael DuBoulay for the Defendants

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2011 January 19th
2012 March 22nd

JUDGEMENT

[1] **Belle. J:** The Claimant in this case is a beneficiary of a trust which was pursuant to the Will of Marie Camille Therese Devaux (deceased) mother of the Claimant Desmond Devaux and the Executor of the Will Charles Devaux.

[2] The Trustees paid the Claimant $3000.00 per month and made provision for any special needs of the beneficiaries such as "house repairs car replacement and the like," to be paid to the Claimant from the trust fund.

[3] On 10th June 2003 the Trustees/Defendants invested $150,000.00 with CLICO. During the period June 2003 to February 2008 the Trustees/ Defendants invested $820,000 in four Executive Flexible Premium annuities with CLICO.

[4] However the Claimant discovered in about June 2010 that the Defendants had invested the trust funds with CLICO and according to him the trust amount was in trouble. He relied on public knowledge that CLICO had suffered massive financial reverses and was in the process of being dissolved. He therefore filed this Claim to secure his beneficial entitlement under the trust deed.

[5] In his Claim Form the claimant claimed:

(1) An account of all of the Defendants' dealings with the trust, with substantiating certificates, deeds and other source documents and supported by an affidavit;

(2) An order that the Defendants do furnish to the Claimant details of the investments of the trust, including copies of all certificates of deposit or other documents representing those investments.

(3) A declaration that the CLICO investment was unauthorised;

(4) An order that the Defendants make good any loss to the trust ascertainable upon taking of an account occasioned to the trust by the unauthorised investment.

(5) A declaration that the Claimant is entitled, upon replenishment of the trust, to have the trust amount paid to him;

(6) Interest thereon at 6% per annum from the date of the said investment (to be ascertained) or such other rate and such other period as the Court shall think fit;

(7) Further or other relief;

(8) Costs.

[6] The Claimant claimed in his statement of Claim that by letter dated 19th April 2010 the Claimant, through his solicitors requested the following from the Defendants:

> "to be allowed on behalf of the Claimant to inspect the accounts of the trust and the vouchers supporting them;
>
> Details of the investment of the trust, including the copies of all certificates of deposit or other documentation representing those investments."

[7] According to the Claimant the Defendants had failed/ or refused to comply with the said request.

[8] The Defendants admitted receiving the Claimant's request but denied that they refused to comply and explained that they submitted audited accounts prepared by an independent accountant to the Claimant every three years as mandated by paragraph 12 (viii) of the Will.

[9] The issues in the case are as follows:

1. Did the Defendants/Trustees fail to provide accounts of the trust to the beneficiary/the Claimant when required to do so?

2. Did the Defendants breach their fiduciary duty as Trustees by investing the bulk of the trust funds in CLICO?

3. Do the Trustees' duties include the duty to have regard to the standard investment criteria which are (a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind and (b) the need for diversification of investments of the trust in so far as is appropriate to the circumstances of the trust, based on the relevant law in England which applies pursuant to Article 916A of the Civil Code?

4. Was the scope and sufficiency of the advice given by the person duly qualified in financial matters part of the Claimant's case?

5. How is the phrase "the law of England for the time being in force "to be interpreted?

6. How is the duty of care of the Trustees to be exercised?

7. Were the Trustees impartial in the exercise of their duties.

8. Can the beneficiary bring the trust to an end?

9. Are the Trustees liable to make good any loss to the trust?

10. Are the Trustees liable to pay costs?

11. Can costs be paid to the Trustees from the trust fund?

[10] At the outset it was apparent that the Claimant had not filed any evidence in support of his Statement of Case. The Claimant was therefore not permitted to give evidence at trial. There was therefore no body of evidence before the court in support of the Claimant's claim. However the Claimant's counsel submitted that the Defendants could still be cross-examined and evidence based on the cross-examination may support the Claimant's case.

[11] The case proceeded on the basis of the evidence of the Defendants alone.

Was there a duty on the part of the Defendants to have regard to and **did they apply the standard investment criteria?**

[12] The Claimant's case was that the Defendants invested the trust funds with CLICO without informing the Claimant and without consulting a person who is reasonably believed by the Defendants to be qualified by his ability in and practical experience of financial matters on the question of whether the new investments are satisfactory having regard to all the circumstances of the trust. The Claimant alleged that this was contrary to clause 12 of the Will.

[13] Counsel for the Claimant argued further that the trustees were obliged to achieve the minimum standard investment criteria required for investors based on section 5 (1) of the Trustee Act (UK) which applies in Saint Lucia via Article 916A of the Civil Code.

Law For The Time Being Enforced

[14] Counsel argued cogently that subsection (3) of Article 916A provided that the law of England for the time being in force governing the rights and duties of trustees and beneficiaries under a trust shall be extended to Saint Lucia. Subsection (4) of Article 916A goes even further and states that whenever by the law of England a beneficiary of a trust is entitled to a right in equity a beneficiary shall be entitled to a like right under the Civil Code.

[15] Counsel found authoritative support for his view in the decision of the Court of Appeal in **Eversly Thompson v R** Court of Appeal No.9 of 1995 where Byron CJ (as he then was) had occasion to discuss the meaning of the expression "for the time being in force."

[16] Indeed in **Eversly Thompson v R** Byron CJ himself relied on academic writing of Dr Kenney Anthony who had opined in an article titled "The Court and the inter-relation of the Civil Code in a mixed Legal System: St. Lucia revisited" published in Caribbean Law Review that the view most widely accepted is that the law to be applied in these circumstances is the law of England as it stands whenever the court is asked to apply the relevant provision.

[17] Counsel therefore concluded that the court should apply the law of England as it stands today (at time of trial) relating to rights powers and duties of trustees. Counsel cited **Underhill & Hayton Law of Trusts and Trustees,** 16th Edition at page 597 where the authors of that text state:

"Trustees cannot lawfully invest funds upon any securities other that those authorized by the settlement or by statute (or in rarer case, by the court)".

[18] Counsel opined that the court should have regard to the standard investment criteria which are, pursuant to The Trustee Act (UK):

(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and
(b) the need for diversification of investments of the trust in so far as it is appropriate to the circumstances of the trust.

[19] Counsel also relied on section 5 (1) of the Trustee Act which states:

"Before exercising any power of investment, whether arising under this Part or otherwise, a trustee must (unless the exception applies) obtain and consider proper advice about the way in which having regard to the standard investment criteria the power should be exercised."

[20] Counsel argued that the Defendants' evidence at least from Mr Gerard Bergasse did not say that Mr. Regobert from whom they sought advice on the CLICO investment had practical experience on financial matters relating to the proposed CLICO investment or that the trustees believed that to be the case. He argued further that in the correspondence to which the Defendants refer in which the trustees requested Mr Regobert's advice they did not write that the wanted to know whether investment with CLICO was a good and acceptable form of investment "under the terms and conditions as set out by the trust" and having regard to the standard investment criteria.

[21] Counsel cited the case **Cowan v Scargill** [1985] Ch 270 in support of the submission that the trustees were in breach of their duty of care to the beneficiaries. In that case the trustees enjoyed a broad power of investment but the court insisted on the following guidelines relating to the duty of care owed by trustees.(In Summary)

"It is the duty of trustees to exercise their powers in the best interest of the present and future beneficiaries of the trust, holding the scales impartially between the different classes of beneficiaries."

[22] Counsel identified dicta in the case to the effect that the trustees should take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other

people for whom he felt morally bound to provide. This included the duty to seek advice on matters which the trustee does not understand such as the making of investments.

[23] Counsel cited the need in this context for the trustees to consider diversification of the investment portfolio and the suitability of the investment proposed.

[24] All of this is apparently based on the broad statement in section 1 of the Trustee Act that whenever the duty under this section applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances..."

[25] Counsel's argument was summarised in his pronouncement that:

> " A breach of trust arises when the trustee:
> (i) Fails to obtain proper advice having regard to the standard criteria [including portfolio diversification] : or
> (ii) Fails from time to time to review the investment with a view to vary them;
> (iii) Fails to exercise the duties of care and fairness when exercising his powers of investment;
> (iv) Fails to exercise the duties of care and fairness when exercising his duty to obtain and consider proper advice."

[26] Counsel argued that the Defendant should be ordered to make up any loss to the trust fund and pay costs for having failed to provide an account on time.

[27] Counsel for the Defendants argued in reply that because the Claimant failed to give evidence he cannot discharge the evidential burden of proving that the Defendants did not account to the beneficiary neither can he prove that the Defendants acted in breach of the trust.

[28] Counsel was of the view that the Claimant sought without amending his statement of case in accordance with Part 20 of the Civil Procedure Rules 2000, to import into and amplify his pleadings to allege breach in respect of the scope and sufficiency of the written advice in fact obtained, and the impartial administration of the trust, which took the Defendants by surprise at the close of the case.

[29] Counsel submitted further that there could be no requirement in this case that the advice achieved the standard criteria for investment since that was not pleaded was not raised in the trial and it could not be expected that the Defendants would be prepared to respond to such an argument without it being at least raised in the Statement of Case.

[30] In my view it is not fair for the Claimant to say that it is a statutory requirement and the Defendant is required to prove that they complied. Indeed the Claimant's allegation was that the Defendants failed to seek the necessary advice. The adviser was never questioned by the Claimant's counsel with regard to the application of the standard criteria under the Trustee Act 2000 (UK). I therefore do not see how it can then be presumed on a balance of probabilities that he did not apply the standard criteria. It was not alleged that he did not and therefore it cannot be proved that he did not consider the standard criteria based on the evidence before the court. I am of the view that the advice given with regard to the trust must be understood to include consideration of the general investment climate and the reasonableness of investing in CLICO at that time.

[31] Furthermore if Mr Regobert himself made an error this cannot be attributed to the fact that the trustees failed to achieve the standard criteria for investments unless the adviser is himself permitted to explain the criteria for his investment above and beyond the yield of 8% per annum interest on the sum invested.

[32] I am also of the view that had this matter been raised the Defendants would have been well placed to examine the application of the statement "(the trustee) must exercise such care and skill as is reasonable in the circumstances", pursuant to section 1 of the Trustee Act. In failing to include this aspect of the argument preferred in the written submissions in the Claimant's statement of case counsel failed in his duty to assist the court in doing justice pursuant to the overriding objective of Part 1 of the CPR 2000.

[33] I am of the view that the court can take judicial notice of the fact that the stringencies of the investment criteria would vary from place to place, and time to time, commensurate with the investment opportunities available and the general investment climate in the applicable jurisdiction. While the United Kingdom would provide a good international standard the court would require

expert evidence to establish that these criteria were or were not achieved by the Trustees in this case, in the context of Saint Lucia, when they consulted Mr. Regobert.

[34] The tactic which was utilized by the Claimant runs totally contrary to the spirit and letter of the CPR 2000 where many stages are provided for a litigant to clarify his case before trial. If amendments are to be made to the statement of case then reasons must be given for having failed to include the relevant statement or allegations in the statement of case. In this matter no application has been made to amend the statement of case to include the matter of the scope and sufficiency of the advice given by Mr. Regobert, no reasons have been given for failing to include these statements or allegations in the statement of case, and failing to seek to amend before the end of the Case Management Conference, which would have been the requirement pursuant to Part 20 of the CPR 2000 at the time of the trial.

[35] It must be noted that even if the Claimant can successfully argue that he was not obliged to plead that the Defendants did not apply the standard investment criteria he cannot be excused for failing to mention this alleged failure in a witness statement. Hence the circumstances which arose in **Eastern Caribbean Flour Mills v Ormiston Ken Boyea,** Civil Appeal No.12 of 2006 (St Vincent and The Grenadines) did not arise in this case.

[36] This means that the Defendants were taken totally by surprise by a matter being raised in the skeleton submissions for the first time. There could be no procedure which would approve of such a practice on the part of the Claimant. Indeed the Defendants counsel cited **Daniel's Chancery Practice** , 8th Edition 1914 in which the learned author states that relief will not be granted if not supported by the allegations in the pleaded case and fourthly , relief will not be accorded , save in very unusual circumstances , if the defendant reasonably claims that the claim for it takes him by surprise.

[37] In my view the issues raised in relation to the Defendants failure to meet the standard criteria are not properly part of the case before the court. They are therefore disregarded to the extent that any comment upon them cannot affect the outcome of the case.

[38] Counsel argued that the facts did not support the argument that the Defendants did not seek the advice of a person who was qualified to advice on investments since the evidence of Mr. Regobert contradicted this allegation. I agree with this submission.

[39] Mr. Richard Johnson gave evidence that he and Gerard Bergasse sought the advice of Mr. Cleophas Regobert of Regobert & Co. on whether he thought the proposed CLICO investment was a good, sound and acceptable form of investment under the terms and conditions set out by the Trust. Mr. Regobert according to Mr Johnson was well-known in the community as an experienced certified accountant and auditor and therefore he and Mr. Bergasse **believed** him to be qualified to give advice whether the new investments were satisfactory under the terms of the trust.

[40] Mr. Johnson recalled that in a letter of 4th June , 2003 Mr. Regobert advised that the CLICO investment was "one of the best available" and he and Mr. Bergasse relied on this advice and decided to make an initial investment of $150,000.00 with CLICO on or about 10th June 2003.

[41] With regard to the value of the investment Mr. Johnson stated that the trustees had received regular interest payments from CLICO which have been paid to the trust account as evidenced by the Trust Account Ledger.

[42] He went further in paragraph 15 of his Affidavit filed on 11th January 2011,

> *"From 2000 to the present, we have made regular monthly payments out of the interest/income generated for the Claimant's maintenance, including payments towards the Claimant's home repairs and medical bills. The Claimant also receives a basic allowance in the sum of $3000.00 monthly."*

[43] Mr. Bergasse and Johnson had loaned the sum of $600,000.00 to Mr. Charles Devaux with interest payable at the rate of 7.5% per annum. This loan was authorised by Clause (i) of the Will of Marie Camille Therese Devaux.

[44] On 10th February, 2003, The Defendants received the sum EC$300,000.00 from Charles Devaux as payment against the promissory note and they continued to receive regular monthly payments from Charles Devaux

[45] This evidence was unchallenged and the court therefore finds that it represents a factual account of what took place. The other Trustee Gerard Bergasse also supported Mr Johnson's evidence and his evidence also was not shaken under cross-examination.

[46] Counsel argued that the Claimant benefited from the CLICO investment and did not disclose this. Counsel stated that the lateness of the account was not of a magnitude to result in any penalty nor costs.

[47] Indeed Mr Johnson stated in his affidavit that he had kept proper accounts in the Form of a Fixed Deposit Ledger and Trust Account Ledger which were attached to their Joint Affidavit which they were required to file pursuant to the Court's Case Management Order of 14th December 2010, and which were marked "RJ7" and RJ8". Mr Bergasse in his affidavit of January 11th 2011 confirmed that Mr Johnson was the Trustee who handled the accounting aspects of the trust.

[48] Counsel was of the view that the costs due at best would be for the minimal period of the lateness of the accounts.

Furnishing Accounts of Any Dealings with The Trust

[49] Counsel submitted and I agree that the Defendants would have already provided the accounts required by the trust and ordered by the court and I see no basis for making any order that they pay further costs for providing late accounts in the context of this case. Costs awarded in the matter if the Claimant is successful would suffice in any event.

[50] Other than this the Claimant's case should be dismissed with prescribed costs payable to the Defendants.

Did the Defendants provide Accounts when requested?

[51] The evidence in support of non-receipt of accounts is based on the inability to provide proof of delivery. But the Claimant is not able to show that he enquired about the alleged failure to send him the accounts. A considerable time has passed and it is possible that the accounts were received and misplaced. But there is no evidence of any refusal or neglect to provide accounts when requested, and no evidence of breach of trust in that regard. But in spite of the alleged absence of accounts the Claimant continued to receive and accept payments from the trust fund.

Did the Claimant prove that the Trust suffered a loss?

[52] With regard to any loss incurred by the trust, I agree with the Defendants' counsel that a loss cannot be proved simply by alluding to a law suit filed against CLICO. Firstly the CLICO matter is still to be determined by way of enforcement. But more importantly I agree with counsel's submission that a claim by a beneficiary who is unable to prove that a loss was suffered as a result of a breach of trust must fail.

[53] In support of this submission counsel cited **Snell's Equity (30th Edition)** at paras 13-14- 13-16 in which the authors of that text state that the measure of the trustee's liability for breach of trust is the loss caused thereby to the trust estate. Thus if the trustee makes an unauthorised investment he is liable for the loss incurred on realising it, and is also liable for interest and costs. However if the beneficiaries are unable to prove that loss was suffered as a result of breach of trust, their claim will fail. I accept this submission

[54] Counsel went on to cite the authority of **Nestle v National Westminster Bank** (No.2) [1993] 1 WLR 1260 in which Leggatt L.J is reported to have opined:

> *" In my judgment either there was a loss in the present case or there was not. Unless there was a loss, there was no cause of action. It was for the plaintiff to prove on balance of probabilities that there was, or must have been, a loss. If proved, the court would then have had to assess the amount of it...."*

[55] Indeed with the best of due diligence and intentions a third party with whom or with which the money is invested can turn out to be unsound. How in those circumstances can the investor be blamed for the loss which has resulted?

[56] Thirdly, the accounting which has taken place has not shown any loss and the Claimant has not filed any statement which alleges a specific sum lost

Have the Trustees managed the trust impartially?

[57] The Claimant's counsel argued that the Defendants favoured Mr. Charles Devaux the executor of the deceased's Will, and therefore acted in breach of trust. There is no evidence that the Defendants failed in their duty toward the Claimant. No evidence was adduced to support an allegation that the Defendants favoured Charles Devaux. The Claimant relied on the Defendant's evidence that they consulted Charles Devaux before they made the CLICO investment. But it is clear that this was a requirement of the Will. There is no evidence of bias in exercise of the duties of trustees.

[58] In abiding with the letter and spirit of the Will the Defendants consulted and made a loan to Charles Devaux. They also invested trust money and made payments to the Claimant. It is true that Richard Johnson did say that he communicated regularly with the Claimant at first but less regularly, maybe once per year in the last three years while he continued to communicate with Charles Devaux 5 or 6 times per year. But this behaviour alone does not substantiate an allegation that the Trustees did not act in an impartial manner.

Should the trust funds be handed over to the Claimant on recovery of the trust money?

[59] Since no breach has been proved there is no basis for dissolving the trust. Furthermore the Claimant's beneficial interest is that of tenant for life and there must be concurrence between himself and the capital beneficiary Charles Devaux to terminate the trust and claim the trust amount. The Claimant's true position is also illustrated by the fact that the Trustees are to pay only the income of the trust to the Beneficiaries pursuant to Clause 12 (iii) of the Will. Furthermore the

Trustees pursuant to the Clause 12 (x) of the Will are prohibited from making loans of any kind to the Beneficiaries.

Should the Trustees be liable to pay the Claimant's costs of the accounting?

[60] In relation to costs counsel for the Defendants argued that in the absence of misconduct a trustee is entitled to have his costs of successfully defending an action for breach of trust paid out of the trust fund. Counsel cited Re: **Spurling's Will Trusts Philpot and Another v Philpot and Others** [1966] 1 WLR 920 as applied in **Armitage v Nurse** [1997] 3 WLR 1046 (CA) at 1064B-C and 1065B-C. Based on these authorities I hold that the Defendants should have their costs paid from the trust funds.

Did the Trustees Act honestly?

[61] I also hold the view that there is no evidence that the Trustees acted dishonestly in investing the trust money, making the loan to Charles Devaux and paying the income from the fund to the Claimant. Pursuant to Clause (12) (vii) of the Will;

> *"Each trustee shall he answerable only for losses arising from his own acts and defaults and not for any involuntary acts nor for any voluntary acts nor for the neglect or default of any solicitor, banker, accountant or other agent employed by virtue of this Deed or reasonably employed by THE TRUSTEES. PROVIDED that where THE TRUSTEES or any one of them has acted honestly and reasonably and has sought proper advice (as defined in clause (12) (i) (2) above) in making an investment then THE TRUSTEES or trustee as the case may be, shall not be liable if the said investment shall be unauthorised or shall cause loss to the trust."*

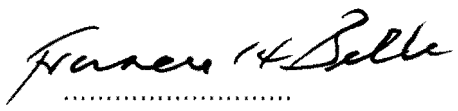
[62] It is clearly not possible for any finding to be made in the circumstances of this case that the Defendants should held personally liable to make good any loss to the Trust. See: **Perrins v Bellamy** 1898 2 Ch. 521.

[63] The Court therefore orders:

1. The relief claimed in paragraphs (i) and (ii) of the Claimant's statement of Claim have been satisfied and there is no need for any further order.
2. There is no order of costs in relation to the accounting provided by the Defendants.

3. The Claimant failed to prove that the CLICO investments were unauthorized and the Claim for a declaration that they were unauthorized investments is accordingly dismissed.
4. The Claim that the Defendant make good any consequential loss to the trust from any unauthorized investment is also dismissed.
5. The Claim that the Claimant is entitled to have the trust amount paid to him upon replenishment is also dismissed.

[64] The Defendants are awarded costs of the proceedings to be paid from the trust fund pursuant to part 65 of the CPR 2000.



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Francis H V Belle
High Court Judge