

JERSEY / JUDGMENT

Cunningham -v- Cunningham

[2010] JRC 074 (13 April 2010)

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judgment

the bailiff: 1. This is an application by the plaintiff for an order that Mr Tony Christodoulides be authorised to swear an affidavit in support of the plaintiff's case. The complication arises because Mr Christodoulides was the solicitor to the party cited ("Meridian") in its capacity as trustee and the evidence which he proposes to give consists of information which he acquired in that capacity.

Background

2. The background which is relevant to this application can be shortly stated. The plaintiff and the first defendant are brothers. A dispute has arisen between them in relation to the affairs of the trust known as the A Cunningham No.2 Settlement ("the Trust"). 3. The Trust was established on 27th September, 1991, by way of declaration of trust made by the original trustees, namely the third defendant ("CI Law"), Mr David Morgan and Mr Nicholas Morgan. It is governed by Jersey law and the beneficiaries specified in the trust deed included the plaintiff and the first defendant together with their children and remoter issue. Under the terms of the trust deed, the original trustees were given power to designate the settlor and the first protector. By deed dated 30th September, 1991, they designated the first defendant as both the settlor and the first protector of the Trust. The power of appointing new or additional trustees was vested in the protector, who also had the power to remove any trustee by instrument in writing. 4. By instrument dated 1st September, 2003, the first defendant purported to remove CI Law as trustee and appoint the second defendant ("Sovereign International"), a Gibraltar company, as trustee in its place. By instrument dated 15th September, 2003, Sovereign International purported to exercise a power under the trust deed to exclude the plaintiff as a beneficiary of the Trust. Finally by deed dated 22nd June, 2005, between the first defendant, Sovereign International and Meridian, Meridian was appointed as trustee of the Trust in place of Sovereign International. 5. In April 2006 the plaintiff began proceedings in respect of the Trust. There have been many interlocutory hearings and amendments to the Order of Justice. For today's purposes, suffice it to say that he seeks a declaration that the exercise by the first defendant as protector of his power to remove CI Law as trustee and appoint Sovereign International in its place was void; that any

purported exercise by Sovereign International of the power to exclude the plaintiff as a beneficiary of the Trust was void; and that certain loans made to the first defendant by CI Law and subsequently by Sovereign International ("the loans") are either void or alternatively were made in breach of trust for which CI Law or Sovereign International, as the case may be, is liable to account. There are associated claims against the fourth and fifth defendants. This application 6. The case is listed for a two week trial beginning on 14th June, 2010. I am due to preside at that trial. The plaintiff contends that it is relevant for the purposes of the trial for evidence to be given as to the current assets of the Trust, including in particular the position in relation to the loans and whether they are thought to be recoverable. I agree that this is relevant and admissible evidence and the Court will need to be informed as to such matters. 7. Normally such evidence would be obtained from the current trustee, namely Meridian. But here lies the complication. Meridian's licence to conduct trust business has recently been revoked by the Financial Services Commission of Gibraltar ("FSC") following the commencement of an investigation into the affairs of the managing partner and finance director of Meridian's associated law firm in Gibraltar called Marrache & Co ("M & Co"). Following the intervention of the FSC, M & Co has ceased to practice. 8. Mr Christodoulides is a member of the English Bar and admitted as a solicitor of the Supreme Court of Gibraltar. Until 2nd March, 2010, he was an associate and head of the commercial litigation department at M & Co. He is no longer employed by that firm following its cessation of practice. 9. Mr Christodoulides was the member of M & Co with responsibility for representing the interests of Meridian in relation to the current proceedings. Meridian has previously sought directions from this Court in relation to the proceedings and the Court has from time to time given directions to Meridian. I shall refer to these for convenience as the "Beddoes applications", although they may not technically have been such. Meridian was represented by Crill Canavan in Jersey but on writing to Crill Canavan recently, the plaintiff's advocates were informed that Meridian had ceased to carry on business and matters were in the hands of the duly appointed administrator of Meridian, namely a Mr White of Grant Thornton (Gibraltar) Limited. 10. The upshot is that there is apparently no one from Meridian who can provide the information which the plaintiff seeks. However, Mr Christodoulides has indicated that he would be able to provide the necessary information from the knowledge that he acquired through acting as solicitor to Meridian in relation to the Beddoes applications and these proceedings generally. He would be willing to provide an affidavit in relation to such evidence but does not feel able to do so unless the Court directs him to do so. 11. It was in these circumstances that Sinels, on behalf of the plaintiff, issued a summons seeking a direction that Mr Christodoulides should be authorised to provide the evidence in question on the grounds that the interests of justice overrode any duty of confidence which he owed to Meridian. That was the application which came before me earlier today. A detailed skeleton argument was submitted which referred to cases such as Wadman-v-Dick

[1993] JLR 052, British Steel Corporation-v-Granada Television Limited

[1981] AC 1096, *Farm Assist Limited (in liquidation)-v-Secretary of State for the Environment, Food and Rural Affairs*

[2009] EWHC 1102 and *in Re Internine Trust*

[2006] JLR 195 . All of these cases concerned the issue of confidentiality and discussed the circumstances in which the court could override such confidentiality and order disclosure of information or documentation. 12. However, with due respect to Advocate Tracey, the application did not focus on the real issue. Mr Christodoulides acted as solicitor to Meridian in its capacity as trustee of the Trust. It is not therefore simply a question of his owing a duty of confidentiality to Meridian; he is subject to legal professional privilege. However, this fact was never mentioned in the application or the skeleton. The position in relation to legal privilege is well established and is conveniently summarised by the Court of Appeal in *Hume-v-Attorney General*

[2006] JLR N 36 and *Hume-v-Attorney General*

[2006] JCA 162 . Paragraph 26 of the judgment reads as follows:- "In the judgment of Lord Millett in *B and Others* at paragraphs 44 and 45, the well established principles set out by Lord Taylor CJ in *Derby Magistrate's Court ex parte B* are confirmed:- (i) the privilege remains after the occasion for it has passed unless waived - 'once privileged, always privileged.' (ii) the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence; (iii) the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the Court; (iv) save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute. At paragraph 45 Lord Millett stated that it was well established that the privilege belongs to the client and not to his lawyer and may not be waived by the lawyer without his client's consent." 13. It seemed to me therefore on reading the papers that Mr Tracey's application was doomed to failure in that only Meridian, in its capacity as trustee of the Trust, has the ability to release Mr Christodoulides from his obligations of legal professional privilege. This Court, being the Court in charge of the adversarial dispute involving Meridian, has no jurisdiction to order a party to that litigation to waive its privilege. That was also the submission of Mr Buckley on behalf of CI Law. 14. However, it seemed to me that there is an alternative route whereby Mr Tracey may achieve his objective. I see no reason why the plaintiff should not apply under Article 51(3) of the *Trusts (Jersey) Law 1984* for leave to apply to the Court under Article 51 for directions to be given to the trustee. For my own part, I would think that, in the very unusual circumstance of this case, it would be reasonable for such leave to be given. Meridian and the other parties to this litigation should be convened. 15. I am advised that Meridian's costs in respect of the Beddoes applications and the advice from M & Co were paid for out of the trust fund, as one would expect. The privilege therefore belongs not to Meridian in its own right but to Meridian in its capacity as trustee of the Trust. It is therefore something in respect of which the Royal Court can exercise its supervisory jurisdiction over trustees and trusts. In the ordinary situation, there would be

no difficulty in this Court, being the Court in charge of the adversarial proceedings, issuing a summons for Meridian (or more strictly an officer of Meridian) to produce the evidence and information which the plaintiff seeks. No question of privilege would arise because the information would be obtained from the trustee, not from the trustee's legal adviser. On the assumption that that no one from Meridian is available to provide the necessary evidence, I see no reason why Mr Tracey should not be able to argue strongly before a differently constituted court hearing the Article 51 application that, bearing in mind that Meridian is no longer carrying on business and is not in a position to provide this information itself, the court should direct Meridian to waive privilege in respect of Mr Christodoulides so that he can provide the requested evidence or alternatively the court could accept a surrender of discretion by Meridian and reach that decision itself. That will of course be a matter for the court hearing the Article 51 application but, unlike this Court, that court would have jurisdiction to procure the waiver of privilege by the trustee of the Trust pursuant to its general supervisory jurisdiction over trustees. It would simply be giving directions to a trustee as to how to act in this particular and very unusual situation. 16. After these matters were raised with him during the hearing, Mr Tracey decided, correctly in my judgment, to withdraw the current application and to proceed as described above. This judgment is given for the assistance of any court hearing the Article 51 application so that that court is aware of the importance which this Court attaches to the provision of the evidence in question and to the thinking which has led to the Article 51 application. Authorities Wadman-v-Dick

[1993] JLR 52 . British Steel Corporation-v-Granada Television Limited [1981] AC 1096. Farm Assist Limited (in liquidation)-v-Secretary of State for the Environment, Food and Rural Affairs

[2009] EWHC 1102 . Re Internine Trust

[2006] JLR 195 . Hume-v-Attorney General

[2006] JLR N 36. Hume-v-Attorney General

[2006] JCA 162 . Trusts (Jersey) Law 1984. Page Last Updated: 02 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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