

[1] This judgment determines two applications regarding the provision of documents to beneficiaries of the Adriaan Went Family Trust (“trust”).

Applications

[2] The Applicants, Mr Van Dam and Mr Hall, are the trustees of the trust and, by originating application (“trustees’ application”),¹ they seek directions as to whether they are required to disclose financial statements of Ch’i International Limited (“Ch’i”) to the Respondents (“Mr Went” and “Mrs Smith”), who are beneficiaries of the trust.

[3] Although Mr Went has previously sought, and now seeks, provision of these documents, for some reason he opposes the application.

Mr Went’s application

[4] In the second application, Mr Went seeks orders appointing him a trustee of the trust and for disclosure of various categories of documents. I am only required to determine that part of the application which concerns disclosure of documents.

[5] The trustees oppose this application, Mrs Smith supports it.

[6] I adjourned the hearing of the applications pending service of Mr Went’s application on affected parties, including Mr Ray Nicholls and other trustees of the Echo Trust (see below). Mr Went then filed and served an amended application dated 30 October 2014, the trustees of the Echo Trust and others served advised that they did not wish to be heard, and the hearing resumed.

Background

[7] The following appears from the affidavits that have been filed.

[8] Mr Adriaan Went (“Mr Went Snr”) settled the trust on 1 March 2002.² Mr Went Snr was a trustee and discretionary beneficiary of the trust until his death on 1 February 2011.

¹ Originating Application dated 23 May 2014, pursuant to s 66 Trustee Act 1956.

² Deed of Trust dated 1 March 2002.

[9] At the heart of these applications is the trust's interests in Ch'i, which Mr Went Snr established in 1987. Ch'i produces and sells bottled mineral water, the source of which is a spring situated on land in Auckland ("land").

Trustees

[10] Mr Van Dam has been a trustee since the trust was settled. He was Ch'i's Operations Manager from 1992 until he left the business (on good terms) in 2010.

[11] Mr Hall, the other trustee, is a chartered accountant who acted for Mr Went Snr from 2004 onwards, attending to preparation of financial statements for the trust and Ch'i, and assisting Mr Went Snr with his affairs.³ Mr Hall continues to undertake accountancy work for the trust and for companies in which the trust has an interest. Mr Hall agreed to Mr Went Snr's request that he accept appointment as a trustee on Mr Went Snr's death.

Beneficiaries

[12] Mr Went and Mrs Smith are Mr Went Snr's children. They, their children and various charities and clubs are discretionary beneficiaries of the trust. Mr Went and Mrs Smith are also the final beneficiaries of the trust. Each is in their 40s and married, and their children are minors.

Ch'i

[13] As I have said, Mr Went Snr established Ch'i in 1987 and Mr Van Dam joined the business in 1992. Mr Went and Mrs Smith's husband, Mr Geoff Smith, are also former employees of Ch'i, each having worked in the business for two years prior to 2000.

[14] The components of the Ch'i business are the brand and recipe, and the land and right to draw water from the spring. At all material times, Mr Went Snr owned the water right and at least a majority interest in the shares in Ch'i. He owned the land until he transferred it to the trust in 2006.

³ Affidavit of A R Hall sworn 15 May 2014 at [7] – [9].

[15] In 2009, Mr Van Dam advised Mr Went Snr he wished to leave the business. Mr Went Snr then commenced a process by which the Ch'i business was offered for sale to third parties. No sale was achieved – on Mr Van Dam's view of it, because Mr Went Snr did not in fact wish to sell.

[16] No sale having been achieved, on Mr Van Dam's and Mr Hall's evidence, Mr Went Snr then considered bringing Mr Went and Mr Smith back into the business. He decided not to do so, so as to avoid any risk of family disharmony, a matter of which he himself had experience. Mr Hall's evidence is that Mr Went Snr returned from a meeting with his son and Mr Smith adamant that he would put the business in the hands of the trustees and let them run it.

[17] Ultimately Mr Van Dam did leave the business and on or about 1 October 2010 Mr Nicholls was appointed as General Manager of Ch'i in his place. Mr Nicholls, or rather Mr Nicholls and other trustees of the Echo Trust, now have an interest in the Ch'i undertaking, and several of the documents that Mr Went seeks concern the provision of that shareholding.

[18] Mr Nicholls is experienced in the food and beverage industry both in New Zealand and abroad. Indeed he was at Frucor when that company made overtures to Mr Went Snr to sell Ch'i in about 2000. Mr Nicholls' appointment to Ch'i followed a lengthy interview with Mr Went Snr, a six month trial period and Mr Went Snr's offer of a permanent position. Mr Nicholls' evidence is that, throughout their discussions, Mr Went Snr made several offers to give him 25 per cent of the shares in Ch'i, with Mr Nicholls preferring to buy an equity share on a "transparent" basis.

[19] Mr Went Snr became ill towards the end of 2010. Following his death, the trustees embarked on a restructuring of Ch'i and concluded arrangements with Mr Nicholls in December 2013.

Trust assets

[20] In June 2010, Mr Went Snr acquired Mr Van Dam's (by then) 25 per cent shareholding in Ch'i. This gave Mr Went Snr 100 per cent of the company.

[21] Mr Went Snr then sold 95 per cent of the shares to the trustees, for what appears to be \$4.275 million.⁴

[22] Pursuant to Mr Went Snr's will, the trustees came to hold the remaining five per cent of the shares in Ch'i, the water right, and cash and real property. Debts owed to the estate were forgiven.⁵ As I have said, the trustees already owned the land. The trustees have since distributed cash and properties to Mr Went and Mrs Smith, leaving the trustees' holding an interest in the Ch'i business and cash of about \$1.5 million.

Restructuring

[23] From 2011 on, the trustees restructured the holding of the Ch'i assets. First they incorporated three companies, namely Tradewinds Brands Limited, Ararimu Land Limited and Ararimu Supply Limited ("Tradewinds", "Ararimu Land" and Ararimu Supply"). The trustees then:

- (a) sold the land to Ararimu Land and the water right to Ararimu Supply;
- (b) sold the shares in Ch'i, Ararimu Land and Ararimu Supply to Tradewinds;
- (c) made vendor loans such that Tradewinds is liable in respect of the purchase price for the shares in Ch'i, being \$3,031,200, and the land, being \$1,007,000;
- (d) sold 26 per cent of the shares in Tradewinds to Mr Nicholls, or rather the trustees of the Echo Trust, for nominal consideration of \$26.

[24] The effect of these transactions is that Mr Nicholls will realise 26 per cent of any increase in the value of Tradewinds over and above its debts of, in round terms, \$4 million. It is unnecessary for me to address the trustees' evidence as to the transactions and the valuations on which they are said to have been based.

⁴ Email Hall & Parsons CA Ltd to J Went dated 21 March 2012, at 127.

⁵ Affidavit of D P Van Dam sworn 19 May 2014 at [18].

[25] The trustees and Mr Nicholls are the directors of Tradewinds and the trustees are the directors of Ch'i.

Meetings etc

[26] The trustees, sometimes with Mr Nicholls, have met Mr Went and Mrs Smith on several occasions since Mr Went Snr's death and there has been correspondence between the parties and their legal advisers. The trustees have also provided Mr Went and Mrs Smith with the trust's financial statements since year ended 31 March 2011, if not earlier.

[27] At a meeting on 3 December 2013, the trustees outlined to Mr Went and Mrs Smith "the broad details" of the agreement with Mr Nicholls and informed the beneficiaries that Ch'i would not declare a dividend for the 2013 financial year.⁶

[28] Shortly afterwards, on 5 January 2014, the trustees received a letter from Mr Went's legal advisers seeking the financial statements of Ch'i for the four most recent financial years and a promise by the trustees to supply them in the future. The trustees declined and then sought directions.⁷ Mr Went's application seeks the provision of documents extending well beyond the request contained in that letter.

Discussion

[29] I have considered the authorities to which the parties referred me. Venning J's decision in *Erceg v Erceg*, in which the Judge summarised the effect of earlier leading decisions, has been particularly helpful.⁸ For present purposes the relevant passages of the judgment are:⁹

[26] Millie Erceg's application for access to the Trust documents raises an aspect of the Court's inherent jurisdiction to supervise and, if necessary, to intervene in the administration of trusts.

[27] The request highlights the conflict acknowledged in the authorities between the rights of a beneficiary to seek information to ensure the accountability of trustees and the established principle that trustees exercising a discretionary power are not bound to disclose to the beneficiaries the reasons behind their decisions.

⁶ At [55].

⁷ At [61].

⁸ *Erceg v Erceg* [2014] NZHC 155.

⁹ At [26] – [27], [32] – [33] (footnotes omitted).

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[32] With respect, I consider Potter J overstated the position in suggesting the need for exceptional circumstances to exist to outweigh the beneficiaries' "right" to be informed. The point is, as the Privy Council made clear, that the beneficiary does not have a proprietary right to information; rather, the Court will require disclosure of information to ensure the trustees meet their obligations towards the beneficiaries. The beneficiaries' right is to have the Trust property properly managed. There are corresponding obligations on the trustees to properly manage the Trust and to meet the fiduciary obligations they owe to all beneficiaries. In order to ensure that the trustees are held to account, it may be necessary for the beneficiaries to have access to the relevant Trust documents. The beneficiary's ability to apply to the Court for access to Trust documents, and the Court's discretionary authority to direct access, is ancillary to the beneficiaries' primary right to have the Trust property properly managed. What information may be required to enable the beneficiaries to hold the trustees to account in a particular case will therefore depend on the obligation in issue. The matter must be considered in the context of the application, the disclosures sought, and the relevant obligations in issue. Further, as the Privy Council confirmed, where there are issues of personal confidentiality disclosure may properly be limited.

[33] For those reasons, I consider the context of the application to be particularly relevant. In my view there is a difference between a request such as in the present case, made to enable counsel for the beneficiary to give the beneficiary general advice as to her position and potential rights, and a request for disclosure in the context of an application for discovery in properly and responsibly instituted proceedings which raise, for example, a possible breach of trust. In this regard it is relevant that this is an application for summary judgment in which the Court is asked to exercise its discretion in making the orders sought.

[30] Of the documents in issue in the present case, I order the trustees to disclose the following categories, which I consider necessary to enable the beneficiaries to satisfy themselves as to the management of trust assets.

[31] First, the trustees are to disclose any valuations obtained to determine the price at which they sold the shares in Ch'i, the land and the water right. Any written request for those valuations and any information supplied to the valuer or referred to in the valuation likewise should be made available.

[32] Secondly, the trustees are to disclose any shareholders' agreement between the trustees and the trustees of the Echo Trust, the agreement for sale and purchase of the 26 per cent interest in Tradewinds and any employment agreement between Tradewinds and/or its subsidiaries with Mr Nicholls.

[33] Thirdly, the trustees are to disclose the financial statements for Ch'i for the years ended 31 March 2011 to date, and for Tradewinds, Ararimu Land and Ararimu Supply since incorporation.

[34] Fourthly, the trustees are to provide a schedule of fees paid to them in their capacity as trustees and as directors from Mr Went Snr's date of death.

[35] I decline to order disclosure of the other documents Mr Went seeks, for one or more of the following reasons.

[36] First, the trust did not have an interest in Ch'i prior to June 2010. The trustees are not required to disclose documents prior to the acquisition of that interest.

[37] Secondly, the transaction by which Mr Went Snr acquired Mr Van Dam's shareholding was a private one, and likewise preceded the trustees having an interest in Ch'i.

[38] Thirdly, no issue as to management arises which necessitates the disclosure of trustee resolutions, their minute book, a schedule of beneficiary loans/advances and distributions, or the background to or advice taken regarding the restructuring to which I have referred.

[39] Lastly, the tone of some of the correspondence from Mr Went's legal advisers, past and present, is peremptory and lacking in objectivity. Such correspondence is best avoided in the future.

Conclusion

[40] It may be the parties require further orders as to the form or method of disclosure. I reserve leave to apply, if necessary.

[41] Costs are reserved. The parties may file memoranda if they are unable to agree.

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M Peters J