

X v. A, B, C [2000] EWHC Ch 121 (29th March, 2000)

IN THE HIGH COURT JUSTICE
CHANCERY DIVISION

Before

**THE HONOURABLE MRS JUSTICE
ARDEN DBE**

SITTING IN PRIVATE

Between

X

(Claimant)

and

(1) A

(2) B

(3) C

(Defendants)

JUDGMENT

Mr Simon Taube of Counsel, instructed by Herbert Smith, appeared for the Claimant.

The Defendants appeared in person.

1. **Mrs Justice Arden** This is a trustee's application for directions by the Court under RSC Order 85. [The Court explained that the trustee was the sole trustee of the will of the testator, who died leaving his residuary estate, including land, on trust for his widow for life with remainder to his children. Following the death of the life tenant the Defendants were now absolutely entitled to the residuary estate. The application arose out of concerns over the potential effect of the *Environmental Protection Act 1990*, which when brought into force would impose a new and far-reaching liability regime on owners of land and others for cleaning up contaminated land. The trustee sought directions as to whether it had a lien over the trust fund for liabilities, including future and contingent liabilities, in respect of land held by the testator and might accordingly retain possession of the land, whether it should be at liberty to invest and vary investments in accordance with terms of the testator's will in relation to investments retained pursuant to its lien, to charge for acting as trustee in accordance with the terms of the will and in relation to the land to exercise all the powers of trustees of a trust of land, and whether it should notify the beneficiaries where practicable of the proposed exercise by it of its powers of investment and certain other powers about which it

sought directions in connection with the management of the land and give the beneficiaries an opportunity to comment.]

Contaminated Land

2. I will now give a brief (and by no means comprehensive) description of the legislation affecting contaminated land, so far as relevant to this application.
3. The *Environmental Protection Act 1990*, in Part IIA (as amended by the *Environment Act 1995*) contains a new regime for dealing with contaminated land. However, the new regime has yet to be brought into force. The Act is heavily dependent on statutory guidance, which is still in draft and has yet to be finalised. References to sections below are to sections in the 1990 Act as amended.
4. Under the new regime, contaminated land is defined (in section 78A(2)) as any land which appears to the local authority in whose area it is situated to be in such a condition by reason of substances in or under it that either:
 5. significant harm is being caused, or there is a significant possibility of such harm being caused; or
 6. significant pollution of controlled waters is being or is likely to be caused.
7. Harm is defined as harm to the health of any living organisms, any other interference with their ecological systems and includes harm to property (section 78A(4)). "Substance" is defined (section 78A(9)) as any natural or artificial substance whether in solid, liquid or gaseous form.
8. Under the Act, a local authority will be under a duty to inspect its area from time to time to identify contaminated land (section 78B). There is a consultation period in which the local authority must reasonably endeavour to consult the persons on whom a remediation notice may be served as to what is to be done by way of remediation as well as allowing for the possibility of negotiating an agreement for a voluntary clean up.
9. After the consultation period has ended the local authority must serve a "remediation notice" on each "appropriate person" specifying what is to be done by way of remediation (section 78E). "Remediation" includes clean up, the doing of works for the prevention or minimisation of harm or the restoration of land to its former state and subsequent inspections to keep the condition of the land under review (section 78A(7)). However, the local authority can only require remediation for that which it considers reasonable having regard to the cost and seriousness of the harm (section 78E(4)). Failure to comply with a remediation notice without reasonable excuse is an offence (section 78M).
10. As I have explained, if land is contaminated within the legal definition, statutory liability for clean up costs attaches to the "appropriate person" or "persons" (as defined in section 78F). There are two types of appropriate persons:
 11. the person or any of the persons who caused or knowingly permitted substances or any of the substances to be in, on or under the land; and
 12. if no such person has been found after reasonable enquiry, the owner or occupier for the time being of the contaminated land.

13. Where a person is liable because he caused or knowingly permitted substances to be on land, he can in principle be held liable for the clean up costs referable to that substance (section 78F(3)). However, provision is made for the case where a chemical reaction occurs and that substance indirectly causes pollution, and for the case where that substance escapes on to other land. However, a person may be liable as a person who has caused land to be contaminated even after he has sold the land, and, even if he did not cause the land to be contaminated, it is arguable that he could be liable as a person who knowingly permitted contaminating substances to be on land if he sold the land knowing of the contamination and not having removed it.
14. "Owner" is defined as a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is or would be entitled to receive the rack rent of the land. A rack rent means a rent reflecting the full annual value (section 78A(9)). Thus a trustee may be an "owner" even though he has no beneficial interest in the land. However, a person cannot by reason of being the owner or occupier of land be made liable to take remediation measures on land which he does not own (section 78K).
15. While land can only be classified as contaminated after the 1995 Act comes into force, it appears that it applies even if the activities which cause the land to be contaminated occur before that date.
16. As mentioned above, statutory guidance is to be issued. The draft statutory guideline provides that a person may be excluded from liability where certain tests apply. Thus a person may escape liability where that was incurred solely by reason of a specified activity, for example, as owner of land, licensing its occupation by another, except for the purpose of waste disposal, or issuing a statutory licence by reason of which another person causes or knowingly permits the presence of pollutants. Under another proposed test, a person will not be liable for pollution if he caused or knowingly permitted the presence of contaminants but sold it ensuring that the purchaser had information as to the presence of contaminants.
17. Even though Part IIA of the *Environmental Protection Act 1990* is not yet in force, an abatement notice could be served on the trustee as owner of the site under the existing statutory nuisance provisions of the Act, and in addition the owner may be liable at common law for nuisance or under the rule in *Rylands v. Fletcher* (1868) LR 3 HL 330.

Does the trustee have a lien over the trust fund for the liabilities to which it may be subject in respect of land held by the testator?

18. This is the first question I have to decide. Counsel for the trustee referred me to a number of authorities, including *Re The Exhall Coal Company Limited ex parte Bleckley* (1866) 35 Beav. 449, *Stott v. Milne* (1884) 25 Ch D 710, *Re Beddoe* [1893] 1 Ch. 547, *Re Pauling's Settlement* [1963] 1 AER 857 and *Halsbury's Laws of England*, 4th Edition, Vol. 48 paragraph 785. These authorities show that a trustee has a lien over the trust fund for his proper costs and expenses and that these extend to an indemnity against future liabilities. (In addition, there is

- authority for the proposition that the trustee will be entitled to have proper protection from liabilities that he has incurred as a trustee before he retires as a trustee: see *Re Brockbank* [1948] Ch 206, 211 and section 19(3) of the *Trusts of Land and Appointment of Trustees Act 1996*). The decision of Wilberforce J in *Re Pauling's Settlement (No.2)* is instructive. The question was whether the existing trustee should be replaced. The existing (among other things) trustee claimed that it would be deprived of the security of the trust fund for costs in respect of litigation against it as trustee. It also claimed that it would remain liable for possible future estate duty in respect of advances made to the children of the life tenant in the event of the life tenant dying within 5 years. Wilberforce J held that the trustee's right of indemnity extended to any costs awarded in its favour and to the possible liabilities for estate duty. In the circumstances, the Court declined to appoint new trustees until the situation was clarified
19. The lien extends to all the liabilities of the trustee as such. In my judgment these include liabilities under Part IIA of the *Environmental Protection Act 1990* even though they are contingent upon a number of matters, including the commencement of Part IIA.
 20. [The Court then dealt with certain matters concerning the trust.]

The trustee's power to invest funds that it holds pursuant to its lien

21. The testator's will gives the trustee power:

"To invest trust money and transpose investments with the same unrestricted freedom in their choice of investment as if they were absolute owners beneficially entitled and to purchase retain or improve a freehold or leasehold house or other dwelling on trust for sale (with power to postpone the sale) to be used as a residence by my wife or any one or more of my children or remoter issue."

22. This is a wide power of investment. Where, however, wide powers of investment are given to trustees, the beneficiaries have the protection of the duties imposed on trustees by the general law. Under the general law, the trustee must take such care as an ordinary prudent person would take if he were minded to make for the benefit of other people for whom he felt morally bound to provide (*per* Lindley LJ in *re Whiteley, Whiteley v. Learoyd* (1856) 33 Ch.D 347). There is a further principle which provides protection to beneficiaries of a trust and that is the duty imposed by the general law on trustees to act fairly. Thus, in deciding how funds should be invested, a trustee must act fairly as between the beneficiaries. Hoffmann J explained some of the implications of this duty in *Nestle v. National Westminster Bank plc*, (29 June 1988, unreported):-

"A trustee may act fairly in making investment decisions which may have different consequences for differing classes of beneficiaries ... The trustees have a wide discretion. They are, for example, entitled to take into account the income needs of the tenant for life or the fact that the tenant for life was a person known to the settlor and a primary object of the trust whereas the remainderman is a remoter relative or a stranger. Of course, these cannot be allowed to become the overriding considerations but the concepts of fairness between classes of beneficiaries does not require them to be excluded. It would be an inhuman rule which required trustees to adhere to some mechanical

rule for preserving the real value of capital when the tenant for life was the testator's widow who had fallen upon hard times and the remainderman was young and well off."

23. The same point was made by Staughton LJ in the Court of Appeal in the same case ([1993] 1 WLR 1260).
24. Counsel's submissions were as follows. The trustee has a right to be indemnified against liabilities which it incurs as trustee, and it has a lien on the trust fund for this purpose. Since the trustee's lien arises by operation of law, it is implicit in the terms of trust that the trustee's powers to manage the trust property continue to apply even where the lien has arisen. In those circumstances, on Counsel's submission, the trustee when deciding what investments to make can take into account its own interest by virtue of its lien. However, it must act impartially as between itself and the other beneficiaries. Counsel was not aware of any authority on this point.
25. In my judgment Counsel's submissions are correct. The law does not require the trustee to disregard its own position and interest by virtue of its lien when it decides how to invest the trust funds. It can take its position and interest into account. However, it must act fairly as between the beneficiaries and itself. It must act in an even-handed way, taking into account the different rights and interests of the parties in the trust assets.
26. This case is thus distinguishable from *Re Pauling's Settlement Trust (No.2)*. In that case, the trustee had been held liable to refund substantial sums to the capital of the trust fund. It claimed (in separate proceedings) the right to be recouped out of the income of the trust fund, but the life interest had by then vested in the Guardian Assurance Co as mortgagees. Wilberforce J held that it was not necessary for the trustee to be in actual possession of the trust fund in order to enforce any right of recoupment. The trustee, however, contended that it had a right to control the investment of the trust fund so that it was not invested in such a way as to prejudice its right to be recouped out of income. Wilberforce J rejected that argument. It was the duty of any trustee to exercise his powers of investment in such a way as to hold the balance properly between capital and income, and to preserve an equitable balance. In other words, the trustee in that case could not be in any better position than the life-tenant, as its right of recoupment for the advances which it was ordered to repay extended only to income. That is not the position in the present case. The trustee's rights are not limited to the income of the trust fund. Moreover, the trustee in this case does not claim that investment decisions should be made in its interest alone.
27. On Counsel's analysis, the power to invest conferred by the will continues to apply. However, if there is any doubt as to the power of the trustee in this case to invest monies which it holds pursuant to its lien, in my judgment it should have the power conferred by the will. This is consistent with the other investment powers which it has. Even though this is a wide power, the beneficiaries have the protection of the principles of the general law to which I referred above.
28. [The Court then made a direction that the trustee should have power to invest and vary investments in accordance with the power of investment conferred by the testator's will in relation to investments retained pursuant to its lien, that it should have power to charge in accordance with the terms of the will and that in relation

to the trust land it should have power to exercise all the powers of trustees of a trust of land.]

Consultation with the beneficiaries

29. [The trustee sought a direction that so far as reasonably practicable before exercising any of the powers set out in the Court's directions it should notify the beneficiaries of its intention to do so and give them an opportunity to comment]
30. The trustee has been advised by other Counsel specialising in trusts as to its duties now that the interest of the life tenant has come to an end. Counsel advised that
31. "The life interest having terminated, it is undoubtedly the trustee's duty to consult the beneficiaries as to their wishes concerning the trust property and to have the fullest regard to those wishes in deciding how to proceed in the best interests of the trust, subject to the trustee's rights under its lien."
32. Counsel further advised (among other things) that the trustee should proceed along the following lines:-

"(1) keep the beneficiaries informed and ascertain their wishes; ..."

33. The direction sought by the trustee - to notify the beneficiaries of its intention to exercise any of the powers subject to the directions and to give them the opportunity to comment - does not go as far as this.
34. However, Counsel appearing on this application submits that Counsel's advice set out above went beyond what the law requires. Trustees have no obligation to consult the beneficiaries, unless they are required to do so by the terms of the trust or there is some relevant statutory provision. In this case there is neither any relevant provision in the testator's will nor any relevant statutory provision. Neither section 26(3) of the *Law of Property Act 1925* or section 11(1) of the *Trusts of Land and Appointment of Trustees Act 1996* (which would impose an obligation to consult in certain circumstances) applies in this case.
35. I accept that the trustee has no *obligation* to consult, but I note what was said by Wilberforce J at the end of his judgment in *Re Pauling's Settlement Trust (No.2)*. Wilberforce J expressed the hope and understanding that the trustee would give an undertaking that

"they will confer with the plaintiffs as to the investments held in the trust fund, and will give consideration to every suggestion made by them with regard to the investment and will not object to any suggestion that is made which is in reasonable terms."

36. Counsel told me that, in this case, the trustee was not happy at the idea of putting itself in a position where it was obliged to do what the beneficiaries asked unless it could think of a good reason not to do so. The investment decisions might be complex, the beneficiaries might disagree and in the immediate future the trustee's lien would take priority. I accept the trustee should not be bound in any way to act on the wishes of the beneficiaries. It suffices to say that the trustee has a lien on the trust fund and income arising from it for liabilities properly incurred by it as trustee, and thus a right which has priority over the rights of the beneficiaries. On the other hand, I regard it as implicit in the direction sought that the trustee should

consider any comments which the beneficiaries make, and take them into account to the extent appropriate. In addition, the proposed direction imposes an obligation on the trustee to make prior disclosure to the beneficiaries of the matters to which it applies. Given the parties' potentially differing interests in those matters, I consider that this is an appropriate and sensible discipline for the trustee. Accordingly I propose to make the direction as asked.
