Representation of I

Jurisdiction:	Jersey
Judge:	F.C. Hamon, O.B.E., Jurats Rumfitt, Bullen
Judgment Date:	12 November 2001
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Text

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ROYAL COURT

(Samedi Division)

Before:

F.C. Hamon **Esq**., O.B.E., **Commissioner and** Jurats Rumfitt, **and** Bullen.

Representation of I

Advocate J.P. Speck **for the Representor**.

Advocate C.G.P. Lakeman **for the minor and/or unborn and/or unascertained beneficiaries of the Trust**.

Authorities

In re S (24th July 2001) Jersey Unreported: [2001/154].

Representation of I seeking Directions under Trusts (Jersey) Law 1984.

All the relevant parties, convened by Act of Court of 19 th October 2001 were present in Court.

THE COMMISSIONER:

1 The settlor established a trust by deed with the trustee, a Jersey Trust Company, incorporated and carrying on business in Jersey. The trustee is the sole trustee of the trust. The trust contains very substantial assets. The Proper Law of the trust is the Law of the island of Jersey. The trust deed is comprehensively drafted. By clause B7 of the deed the trustee has the power to pay taxes whether or not such payment shall be capable of being enforced by law.

2 Because this hearing was 'in camera' we have, determinedly, made this judgment without identifying any of the parties involved. At a hearing before us today the relevant parties were all present, having been convened by Act of the Court, dated the 19 th October 2001. All the adult children were in Court, although not represented by counsel, Mr. S., the middle child of the three children of the settlor, declared to us on behalf of his brother and sister that he was in perfect agreement with the proposals put for approval to the Court. Advocate Lakeman appeared on behalf of all the minor and/or unborn and/or unascertained beneficiaries of the trust. He too was in perfect agreement with the proposals which were made by Advocate Speck on behalf of the trustee.

3 We had before us, and had read prior to the hearing, a most comprehensive file of documents. There was an eight page affidavit of law from the managing director of the trustee, which sets out the facts with accompanying documents, an affidavit from Mr. Rik Deblauwe, a partner of the Belgian Law firm Tibeghien. He has some twenty five years of experience in tax and civil law. He gave us a detailed affidavit of the legal and tax position. There were two hundred and sixteen pages of exhibits attached to his affidavit. There was an affidavit of law from Frans M. M. Duynstee, a Dutch avocaat, admitted to the Bar since 1989 and specialising in taxation. There was also an affidavit from Mr. S, who is a university professor and, finally, there was included in the bundle all the relevant correspondence.

4 The background facts pellucidly set out in the affidavits are as follows: The settlor was born in the Netherlands and is a national of that country. He was, however, resident and domiciled in Belgium, where he established the Jersey trust and he died, both resident and domiciled in Belgium, on the 19 th May 2000. S married his wife under the Dutch regime of community of property. Her last will and testament created a *fruchtebroek* or *usufruit* of her entire estate on behalf of S, leaving the *nue propriété* to her children. We have used the

Jersey terms of *usufruit* and *nue propriété* as the concept is well understood in this jurisdiction. Because S. and his wife lived in Belgium for more than ten years prior to their respective deaths, they were considered to be Belgium residents for the purpose of both income and inheritance tax and were no longer subject to Dutch inheritance tax.

5 The consequences of the terms of the will are set out in the legal opinion of Mr. Duynstee as follows:

> *The right of usufruct entitles the person holding that right to the use and proceeds of the assets encumbered with this right.* During the usufruct the legal owner is called the bare owner, upon expiration of the usufruct the bare ownership becomes whole again and the legal owner may once again enjoy the full use and the proceeds of the assets. A usufruct maybe created for a fixed term but also for a life term. A usufruct always ends with the death of the holder of the usufruct – the law does not allow any exception to this rule. During his life and as long as the right of usufruct exists the holder of the usufruct is entitled to transfer the right of usufruct but cannot transfer the bare ownership of the assets.
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> *It is important to keep in mind that as a result of the community property rules Mrs. S's estate comprised half of the communal estate that existed during her marriage.* Under the rules of community property the estates of husband and wife merge and become one, unless prior to the marriage a marriage contract has been drawn up by a civil law notary. Such a contract had not been drawn up, as clearly stated in the will of Mrs. S – note that a civil law notary had drawn up the will. The estates merging into one means that one undivided estate is created with two owners. Each asset within the estate therefore belongs to both spouses.
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> *When the marriage terminates by divorce, or with the death of a spouse the estate will have to be divided.* Each spouse is then entitled to half of the estate. They may divide the assets of the communal estate at will, as long as each receives half of the value. It is even possible to allocate all of the assets to one of the spouses who then has the obligation to pay half of the value to the other. The same principle applies upon the death. Regardless of the will, half of the value of the communal estate belongs to the surviving spouse. The will of the deceased can only, by law, pertain to his, or her own half. The heirs and the surviving spouse may divide the assets of the communal estate, as long as the heirs receive half of its value and the surviving spouse receives the other half. One has to keep in mind that the surviving spouse is often appointed as an heir. Thus, the survivor will receive half the value of the estate because he already owns it and not under the laws of inheritance. He may, in addition, receive part of the other half that belonged to the deceased spouse in his capacity as heir to her estate.
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> *Thus, at his wife's death, S acquired his own half in full ownership and he inherited his wife's half in usufruct, while the children inherited the bare ownership of that half.* Mrs S's testament granted S the option to acquire the

corporeal assets of her estate in full ownership against payment of their value. We understand that S has not exercised this option. He never declared his intention to do so and no documentary evidence, for example description of the assets involved and proof of the payment of value indicating his desire to do so exists. Further Mrs S's estate consisted mainly of non corporeal assets which were not subject to the option. In 1997 S transferred all of his estate, including the assets to which he only held as usufruct to the trustees. He died on May 19th 2000.

6 So that when S transferred the assets to the trust he transferred all the assets including those encumbered with the usufruit. Upon the death of S on 19 th May 2000, the usufruit came to an end by operation of law.

7 There are, presumably, two solutions possible: 1: that S was not entitled to transfer possession of the assets because of the existence of a *usufruit;* or 2: that he could not transfer more than he himself owned — *nemo dat quod non habet* — so that he did not transfer full ownership but only the *usufruit*. There is no question of the children having consented to the transfer.

8 These two possible solutions are inevitably going to lead to the same conclusion: the *usufruit* has come to an end, the assets belong to the children, entirely. If an action were to be brought in this Court then there would appear to us to be no valid opposing argument to the children's legitimate claim.

9 We have been shown that, vis à vis the Belgian tax authorities, there may be inheritance taxes and other fiscal penalties because the transfer of the assets to the trustee was apparently not declared on the inheritance tax return of Mrs. S when she died in 1991. The prescriptive period still has to run its course. There may also be liability under the Belgian income tax code as S did not declare any income on the assets transferred to the trustee on his Belgian income tax returns.

10 There may also be tax risks in the Netherlands. These are not as pressing as the Belgian fiscal implications because if the trustee hands back to the children that to which they have always been entitled, that would not, apparently, be considered as a distribution by the trustee under Netherlands law.

11 This Court has no doubt that the children are now the full owners of their mother's estate. We cannot involve ourselves in Belgian or Netherlands taxation implications, particularly as the trustee has an absolute discretion in its power to pay duties, fees, interests and penalties, whether or not such payments shall be capable of being enforced by law.

12 In the matter of the S Settlement reported on 24 th July 2001, the learned Deputy Bailiff

made a judicial statement which we can happily endorse. It is important enough to set out the relevant section of the judgment in extenso:

> ***10. We turn next to consider the role of the Court in this application. The Trustee has asked the Court to authorise it to enter into the various deeds which have been produced to us and which are intended to achieve the objectives which we have described. We wish first to consider exactly what the Court is being asked to decide. Mr. Clyde-Smith has cited to us an extract from the English case of*** *The Public Trustee v Cooper*, ***an unreported decision of Hart J dated 20th December, 1999. That judgment in turn cites from a judgment of Robert Walker J in an unnamed case which took place in chambers in 1995. We think that the extract is extremely useful and is to be taken as reflecting the position under Jersey Law just as much as under English Law, and we would therefore like to take the opportunity of setting it out. Robert Walker J said this:***
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> ***"At the risk of covering a lot of familiar ground and stating the obvious it seems to me that when the court has to adjudicate on a course of action proposed or actually taken by trustees there are at least four distinct situations and there are no doubt numerous variations of those as well*** .
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> **(1)** ***The first category is where the issue is whether some proposed action is within the trustees' powers.*** That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to.
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> **(2)** ***The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.*** Obvious examples of that which are very familiar in the Chancery Division are a decision by the trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do, but they think it prudent and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.
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> **(3)** ***The third category is that of surrender of discretion properly so called.*** There the court will only accept a surrender of discretion for a good reason, the

most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest. The cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in chambers in which adversarial argument is not essential, although it ***sometimes occurs.*** It may be that ultimately all will agree on some particular course of action, or at any rate will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under Category (2)), approving the exercise of discretion by trustees or (under category (3)), exercising its own discretion .

(4) ***The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers.*** Cases of that sort are hostile litigation to be heard and decided in open court."

Hart J in the *Cooper* ***case went on to comment:-***

"Secondly, I would draw attention to the paradigm nature of the classification suggested by Walker J. There may be variations within each category and a particular application may straddle more than one category. Moreover, some caution needs to be exercised before assuming that there is always a bright-line distinction between the case where trustees surrender their discretion and the case where they do not. In a case like the present, for example, it might theoretically be possible for the trustees to have been unanimous in reaching a conclusion that special circumstances existed such that would justify them in selling, but divided as to whether in fact it was desirable for them to do so. If the court's assistance was then invoked to resolve the deadlock, the court would not necessarily have to revisit with a clean slate the question of the existence of special circumstances. Even where the trustees are surrendering their discretion, the question will arise as to what discretion is being surrendered" .

11. This is not a case where the Trustee is surrendering its discretion to the Court, nor indeed would it be a suitable case for that to occur. It is therefore a case of the second category. The Trustee has decided what it wishes to do; there is no question as to its legal power to do so, but, because it can be categorised as a momentous decision, it wishes to seek the blessing of the Court to the course of action which it proposes to take. We think that in this case, that was a perfectly reasonable stance for the Trustee to take. Drawing further on a subsequent part of Robert Walker J's judgment, we think that we need to consider three issues when fulfilling our role under the second category .

> ***1. Are we satisfied that the Trustee has in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out each of the steps we***

have described earlier in this judgment?

2. Are we satisfied that the opinion which the Trustee has formed is one at which a reasonable Trustee properly instructed could have arrived?

3. Are we satisfied that the opinion at which the Trustee has arrived has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision?

And, as I have said, because of its importance, we adopt the whole of the argument and the ratio of that case.

13 If Belgian tax were to be paid with a twenty seven per cent tax and income tax there will be a final estimated balance available for distribution of some 10,490,000 Euros. If the sixty five per cent tax and income tax were paid – that is what is deemed the worst case scenario – and it would include any penalties that might be imposed, the final estimated balance would reduce the original balance available to some 3,145,000 Euros. The decision is, therefore, momentous. Negotiation with the Dutch and Belgian tax authorities, with a revealing of the existence of the assets, may well be necessary. We are satisfied, however, that the proposals put to us by the trustees are very much in the best interests of all the beneficiaries and in those circumstances we are able top sanction the following proposals:

The trustee will transfer to, or otherwise hold to the order of, the three adult children in equal shares such sum as it considers, in its discretion, to represent the assets which, by their mother's Will, were bequeathed to them absolutely by S. Thereafter, the trustees will discharge all liabilities to tax in relation to the remaining funds of the trust, even though such liabilities would not be enforceable against the trustee. There will not now be a further payment to Mr. S, as recommended in the letter of wishes. The trustee will pay to a company called Azaria Limited, not the recommended fee in the letter of wishes, but such reasonable fees and expenses as the trustee in its discretion shall approve, not exceeding 0.5 per cent of the net value of the trust fund once the deductions mentioned above have been paid out. And the remaining assets after the payments above shall be divided in three funds of equal shares and amongst those shall be the persons represented by Advocate Lakeman.