A Trustees Ltd v W_X_Y_and_Z

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Tibbo, King
Judgment Date:	16 June 2008
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Text

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ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Tibbo, **and** King.

Between
A Trustees Limited
Representor
and
W
X
Y
Z
Respondents

Advocate J. M. P. Gleeson **for the Representor**.

Advocate J. P. Speck **for W**.

Advocate M. L. Preston **for X, Y and Z**.

Authorities

In the matter of the S Settlement [2001] JLR N 37.

S v L, E and Bedell Cristin Trustees Limited [2005] JLR N 34.

Public Trustee v Cooper (20th December 1999) Unreported Judgment of the High Court of England.

THE COMMISSIONER:

1 On Thursday 3rd April 2008 the Court gave certain directions to A Trustees Limited ("the Trustee") in its capacity as trustee of a fund created within a settlement ("the Settlement") and we now set our reasons.

Background

2 The Settlement is a discretionary trust and was created between the late B, a resident of Jersey, as settlor and himself and the Trustee (under its original name) as trustees on 10 th February 1987. On the settlor's death in December 2007 the Trustee became the sole trustee.

3 In his memorandum of wishes dated 24th July 1987, the settlor recited that the Settlement had been created by him for the benefit of V and his family which included his god-daughter. He asked the trustees to consult with V before considering exercising any of their discretions conferred upon them as to the granting of any benefit in the Settlement and on V's death to consult with his wife W. The beneficiaries of the Settlement were named as V and W and any child or children of them and their spouses, widows, widowers, children and remoter issue. V and W have substantial wealth in their own names as well as being beneficiaries of the Settlement. V is UK resident and domiciled. W was born in the US and is UK resident but non domiciled. There are three adult children.

4 After thirty one years of marriage V and W separated in 2004 and in 2005 divorce proceedings were instituted, which proceedings are not yet finalised. Perhaps unusually, however, they reached an agreement as to how their assets should be divided, namely 55% for V and 45% for W. Pursuant to this agreement they asked the Trustee to consider creating a new revocable sub-fund for the benefit of W and their children and remoter issue

to be known as the W Fund, appointing to it assets valued at just over £22 million including a one-third interest in a property in Bermuda used by the family. W was to be regarded as the principal beneficiary of this fund with the trustees looking to her for guidance in relation to distributions of capital and income.

5 On 15th May 2006, the Trustee put this request into effect firstly by excluding from the Settlement the class of spouses, ex spouses, widows and widowers of V and W (excepting V and W themselves) and secondly by revocably appointing the assets requested upon new but similar trusts as the Settlement save that the beneficiaries were W and the children ("the Fund"). V is not a beneficiary of the Fund.

6 On 7th March 2008, Mark Harper of Withers acting for W wrote to the Trustee in relation to the radical changes to be introduced to the fiscal system of the United Kingdom by the Finance Act 2008. In the light of the draft Budget presaged by the pre-Budget report, the overwhelming urgency was that it would be tax advantageous for as much as possible of the capital of the Fund to be advanced to W to mitigate avoidable CGT charges which would otherwise arise on capital distributions after 6th April 2008. Recognising that the Trustee would wish to retain assets within the Fund for the unexpected needs of W and for the benefit of the children, three proposals were put forward:-

Mr Harper expanded upon these proposals in his letter and upon the tax advice received from Saffery Champness, who had a long association as tax advisers to the Settlement.

(i) that £11 million be advanced out of the Fund outright to W before 6th April 2008. That was the minimum sum required on a Duxbury calculation to enable her to invest to produce the estimated £500,000 net of tax per annum to meet her anticipated normal annual expenditure on the basis of amortisation ("Proposal 1").

(ii) that the two-thirds equitable interest in the Bermudan property held by the Settlement be assigned to the Fund in exchange for a consideration equivalent to the net market value of that interest ("Proposal 2").

(iii) the Bermudan property and any remaining assets in the Fund be transferred to a new trust with the same beneficiaries and on broadly the same terms as the Fund ("Proposal 3").

7 In view of the very short time frame and recognising that the proposals would constitute a momentous decision as far as the Fund was concerned, the Trustee instructed Bedell Cristin to advise it on the Jersey law implications of the proposals and retained specialist tax counsel to advise in relation to the purported tax benefits of the proposals. In addition, it instructed Saffery Champness to provide an opinion confirming the tax advantages and disadvantages of Proposals 1 and 3, in each case with respect to income tax, capital gains tax and inheritance tax. The Trustee also filed a representation convening W and the children so that it could seek the blessing of the Court to any decision that it reached and a hearing date for the afternoon of 3rd April 2008, one working day before the 6th April 2008

deadline, was reserved for that purpose. Withers instructed Advocate Jonathan Speck to act for W and the children appointed Advocate Michael Preston to represent them. The Court also appointed Advocate Preston to represent remoter issue.

English proceedings

8 Withers put the Trustee on notice that W was intending to proceed with an application for ancillary relief in which she was seeking, *inter alia*, to vary the Settlement and the Fund. A first hearing had been scheduled for 8th May 2008. In an affidavit of 31st March 2008, a senior trust manager at the Trustee said that the Trustee had a concern that any steps taken in relation to the proposals made by Withers on behalf of W in relation to the assets of the Fund may have an adverse effect on the position of V in the English proceedings or otherwise pre-empt the English hearing.

9 Withers confirmed, as did Mr Speck before us, that in the English proceedings, W was not seeking any more than the 55%/45% division agreed with V. The key driver was the continued tension between her and her estranged husband by reason of the connections between them and their financial affairs and her desire that there should be a greater degree of separation of their affairs as they endeavour to establish separate lives in line with the "clean break" policy of the English Family Division. Adoption of her proposals would reduce the need for the English proceedings.

Advice

10 Saffery Champness advised on 31st March 2008, strongly recommending that the Trustee consider making a capital payment to W on account of her UK living expenses before 6th April 2008. There were no rules regarding the size of the payment but they advised that the Trustee would no doubt wish to consider the annual income requirements of W. It was their understanding that she currently had no intention to leave the UK in the foreseeable future, although she had not formed the intention to remain there permanently and the Trustee might wish therefore to consider a payment which would satisfy her income needs in the UK in the medium to long term. They noted that as she was deemed domiciled for IHT in the UK, the capital paid would form part of her chargeable estate for IHT whereas it is "excluded property" (and would not therefore be chargeable for IHT) whilst retained within the Settlement. However the Trustee had to consider the disadvantage of an immediate tax charge of up to 40% when capital payments were made (arising from UK income tax or capital gains tax), compared with a potential 40% IHT liability hopefully not for some time in the future which, if W were to move to Bermuda to live, would go away and in the interim could be insured against. They also advised that there were tax advantages to appointing the remaining assets of the Fund on to a new separate trust. In short Saffery Champness strongly supported Proposals 1 and 3.

11 Counsel advised at conference on the 1st April 2008. In his view there was some

advantage in making a small capital distribution to W by way of advance against the capital element of future distributions. He suggested pre-empting capital distributions over the next five to ten years because of the uncertainty as to W's future plans. However, he cautioned that pre 6th April 2008 distributions should not exceed the existing stockpiled of gains estimated by Saffery Champness at around £6 million. He said it was undesirable to make rushed decisions now which might be regarded as pre-empting the English Court decisions, particularly as the Trustees may be directed to participate in those proceedings. Ideally he advised that V and W, with the consent of the children, should put forward agreed proposals for the Trustee to consider before 5th April 2008. Finally, he advised that there were no overriding tax or other reasons for a new trust to be established.

12 Saffery Champness were unable to discuss counsel's advice on the UK tax implications directly with him but prepared a written response taking issue with his advice, in particular that the capital distributions should not exceed the stockpiled gains of £6 million and that there was no overriding tax reason for a new trust being established. As it transpires, the Trustee has accepted that there are good reasons for such a trust to be established and has therefore decided to proceed with Proposal 3.

13 In relation to counsel's advice concerning the stockpiled gains, Mr Speck submitted that the risk identified by counsel related to the theoretical post 6th April 2008 gains. With the capital distribution requested by W and the balance of the funds going into the new trust, there would be an automatic rebasing and therefore no real risk in adopting her proposals. Mr Gleeson accepted that this was correct and that in giving effect to Proposals 1 and 3 the risk identified by counsel fell away.

Further advice from Saffery Champness

14 On 2nd April 2008, the Trustee also received a further opinion from Saffery Champness illustrating the impact upon the family wealth of failing to make a pre 5th April capital distribution to W. Assuming gains are realised on both the Settlement and the W Fund of £500,000 in the year ended 5th April 2009, the Trustee would, for example, be required to pay out an extra £145,000 in order to pay her £500,000 net of tax, the additional sum being used to meet her UK tax liability. If the total offshore income and capital gains were higher than £500,000 then the tax cost would increase and the capital payment required would increase accordingly. They advised that the additional payments required to pay the UK tax would erode the family wealth in the trust.

Position of the children

15 We were informed that the children were financially astute, had been well provided for and were not in need of financial distributions in the near future. They were each financially self sufficient, owning their own properties in London mortgage free. They had each received substantial payments from their parents and stood to inherit substantial sums not only from

the Fund but also from the Settlement, which excluding the Fund is worth in excess of £24 million. The children did not object to a capital distribution being made to their mother but left the quantum to the Trustee. They understandably did not wish to be drawn into the arena and their preference was for their parents to reach a global settlement. They supported the transfer of the balance of the Fund into a new trust but did harbour some concerns over any further requests for capital advances that may be made in the future. A distribution of £11 million to W constitutes just over half the value of the Fund and therefore there will remain substantial benefits retained within it. Saffery Champness also advised that there were tax benefits to both V and the children by washing out the stockpiled gains in the Settlement by means of the proposed capital distribution to W.

Position of W

16 W had assets of some £19.7 million in her own name of which some £9.5 million was illiquid. She had potentially significant tax liabilities and with her other commitments Withers estimated her free capital at some £3 million. Appended to Mr Harper's affidavit was a detailed breakdown of the income needs of W which the Trustee had no reason to question or doubt. Also enclosed were the Duxbury calculations showing how the sum of £10.5 million is required in order to produce an annual income of £500,000 net per annum on the basis that the capital reduces over W's lifetime on the basis of a life expectancy of 30 years.

The decisions

17 Having received this advice, the Trustee made its decisions on 2nd April. It decided, with the agreement of the parties, to defer Proposal 2 in relation to the Bermudan property and to proceed with Proposal 3 in relation to the new trust. We approved both these decisions. The Trustee decided, however, not to advance £11 million out of the Fund to W, but to advance a sum in the region of £1.5 million to £2.5 million, for the reasons explained by counsel (as per paragraph 11 above). This was not acceptable to W and accordingly in the short time available to it, the Court had to consider not only whether to bless and authorise the decision actually made by the Trustee in relation to Proposal 1 but, as requested by Mr Speck, to consider whether it should direct the Trustee to distribute the £11 million requested.

18 None of the parties adduced any authority and we were not addressed on the legal principles to be applied. An adjournment to Friday 4th April for that purpose was not practicable. The Court had no alternative but to proceed on its understanding of the basic principles, namely that:-

> (i) In giving its approval to a decision where, as here, the trustee's discretion had not been surrendered, the Court must be satisfied that (1) the trustee's opinion had been formed in good faith, (2) the opinion is one of a reasonable trustee and (3) it had not

been vitiated by any actual or potential conflict of interest (*In the matter of the S Settlement* [2001] JLR N 37).

(ii) Where the trustee had not surrendered its discretion, the Court could only vary the decision if it was one which no reasonable trustee could have made. It may not be overturned merely because the Court itself would have reached a different decision (*S v L, E and Bedell Cristin Trustees Limited* [2005] JLR N 34).

Our findings

19 We were thus faced with a situation in which W, a mature lady of 58 and beneficiary of a trust established principally for her benefit, had approached the Trustee with proposals, primarily tax driven and made on the advice of her own lawyers, Withers, and on the advice of the long-established tax advisers to the Trustee, Saffery Champness. There was no objection in principle from the remaining beneficiaries, namely the three children, and in any event, just under one half of the assets would remain in the Fund. The risk of distributing more than the £6 million of stockpiled gains identified by counsel was accepted not in fact to be a risk at all. In any event, counsel was recommending a much smaller distribution because of perceived uncertainties about her plans and concerns as to the English proceedings.

20 In relation to the uncertainty as to her plans, Mr Gleeson placed reliance upon the statement contained in the report of Saffery Champness that W had no intention to leave the UK in the foreseeable future, although she has not formed the intention to remain in the UK permanently. As Mr Speck pointed out, such wording is to be expected in the context of a formal report reciting the position on domicile but otherwise the Trustee was merely speculating as to whether she might move to Bermuda.

21 W is clearly financially capable and well advised so there were no concerns expressed as to her ability to handle sums of this kind or that she intended to give them away inappropriately or invest them in some speculative venture or that it was not her intention to benefit her children ultimately on her death.

22 In all the circumstances, we could not understand why the Trustee was reluctant to give substantial effect to these properly thought out and reasonable requests based on professional legal and tax advice. After all, trustees exist for the sole purpose of benefiting their beneficiaries and as Mr Speck put it, would ordinarily be expected to facilitate their wishes, unless there was good reason not to do so. We say "give substantial effect" because whilst we could understand some debate on the term over which her income needs should be capitalised (Saffery Champness advised a payment to cover the medium to long term), the Trustee had decided upon the very shortest period mentioned by counsel namely 5 years, which when capitalised amounts to approximately one fifth of the amount requested by W and her advisors.

23 W expressed the hope, through Mr Harper's affidavit, that the Court would be astute to ensure that the fact that her request as primary beneficiary of the Fund is made while ancillary proceedings are pending between her and V, who is not a beneficiary of the Fund, should not overshadow the fiscal benefits of a significant capital payment.

24 In our view, it is the Trustee's concern in relation to the English proceedings and their potential impact upon V that lie at the heart of their reluctance to give effect to the wishes of W and which underlie counsel's cautious approach.

25 The Trustee does not appear to have considered the potential for conflict between its roles as trustee of the Settlement (with power to revoke the Fund) and the Fund, in circumstances in which V and W are estranged and whose divorce proceedings are yet to be finalised. If the Trustee had only been trustee of the Fund and therefore only concerned with the interest of W (and the children), we could think of no good reason why it would not wish to give substantial effect to her request. The English proceedings are not a real concern to the interests of the Fund in that in family law terms her request constitutes a re-arrangement, for perfectly proper tax reasons, of what would be regarded as her assets or assets held principally for her benefit. We cannot see how implementing her request could be regarded as pre empting a decision of the English court in any way or otherwise disrespectful of it.

26 On the other hand, her application in the English proceedings would be of understandable concern to V and to the interests of the Settlement. The fact that the Trustee's thinking was influenced by these concerns is evidenced by the affidavit sworn on behalf of the Trustee (see paragraph 8 above). It is also evidenced by counsel's suggestion that ideally V should agree the proposals. This conflict, in our view, explains the Trustee's reluctance to give substantial effect to W's request, a reluctance which was hard otherwise to understand.

27 In our view therefore, the decision to cut down W's request for £11 million to a figure between £1.5 million and £2.5 million was not the decision of a reasonable trustee and was influenced by the Trustee's conflict of interest.

28 Beneficiaries are entitled to require that the decisions of their trustees are made independently of any competing duty. In *Public Trustee v Cooper* (20th December 1999) (cited in the *S Settlement*), Hart J said there were three possible ways in which a conflict could be successfully managed. The first is for the trustee to resign, which would not always be practicable. Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they as a body have no alternative but to surrender their discretion to the court. Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision. In this third case it would usually be prudent, if time allows, for the trustees to allow the proposed exercise of their discretion to be scrutinised in advance by the Court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their

discretion in subsequent hostile litigation and then satisfy the court that their decision was not only one which any reasonable body of trustees might have taken, but was also one that had not in fact been influenced by the conflict.

29 Although the Trustee had not acknowledged any conflict, it has acted prudently in bringing its decision to this Court in advance of proceeding. We found that its decision was not one which any reasonable body of trustees would have taken and that it had been influenced by conflict. We therefore decided not to approve the decision in relation to Proposal 1.

30 It was not a question, however, of our simply deciding not to approve that decision and sending the Trustee away, thus losing forever the window of opportunity identified by Saffery Champness. W was entitled to have a decision made in respect of her request that day, independently of any competing duty. The Trustee was not independent of its competing duty as trustee of the Settlement and it was necessary therefore for the Court to interfere in the exercise of the Trustee's powers as trustee of the Fund, and we did so by directing it to make the requested distribution of £11 million to W, a request which, for the reasons set out above, we regarded as reasonable.

Costs

31 The issue of costs was left over pending the handing down of this judgment. The great benefit of trustees applying to Court for directions prior to implementing a decision is that it avoids the potential for costly and time consuming hostile litigation brought by disaffected beneficiaries. Such applications are to be encouraged and the Court should be slow to penalise trustees whose decisions are not in fact approved. The Trustee has acted in good faith in difficult circumstances and was prudent in bringing this matter before the Court prior to implementation. Even if it had decided to advance the full £11 million, the application was justified as a momentous decision and the costs of the application would therefore have been incurred in any event. Accordingly, it would be my intention to grant the Trustee and the other parties to the application their costs out of the trust fund of the Fund in the ordinary way unless any of the parties wish to submit otherwise.

Future advances out of the new trust

32 The assets remaining within the Fund will by now have been appointed out to the new trust established under Proposal 3. Whilst the future exercise of discretions vested in the trustees of that new trust cannot be fettered, we express the view that the trustees from time to time of the new trust, in considering applications for further advances of capital, should take into account the very substantial advance to W directed by this Court, representing over half of the trust fund of the Fund.