A (Settlement)

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Morgan, Milner
Judgment Date:	05 January 2012
Neutral Citation:	[2012] JRC 5
Reported In:	[2012] JRC 05
Court:	Royal Court
Date:	05 January 2012

Text

[2012] JRC 5

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith., **Commissioner, and** Jurats Morgan **and** Milner.

IN THE MATTER OF THE B SETTLEMENT

AND IN THE MATTER OF THE D SETTLEMENT

AND IN THE MATTER OF THE C SETTLEMENT

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

Between
RBC Trust Company (Jersey) Limited

Representor
and
E
F
G
H
I
K
First Respondents
Advocate Claire Davies appointed to represent the grandchildren and remoter issue of D
Second Respondent
L
J
M
N
O (both on their own behalves and representing their own children and remoter issue)
Third Respondents

and

P
Q (both on their own behalves and representing their own children and remoter issue)
Fourth Respondents

Advocate D. M. Cadin **for the Representor.**

Advocate L. M. Langlois **for the First Respondents.**

Advocate C. R. G. Davies **for the Second Respondents.**

Advocate S. J. Young **for the Third and Fourth Respondents.**

Authorities

Trusts (Jersey) Law 1984.

Lewin on Trusts 18th Edition.

Royal Court Rules 2004.

A Settlement [2010] JCA 231.

A Settlement [2010] JRC 085.

A Settlement [2009] JRC 223.

Settlement-application to surrender trustee's discretion.

THE COMMISSIONER:

1 On 16 th November, 2011, the Court gave directions to the Representor ("RBC") to enable it to give effect to an agreement reached between all of the adult beneficiaries to settle this long outstanding matter.

2 The background is set out in a number of previous judgments, notably the decision of the Court of Appeal given on 22 nd December, 2010, (*A Settlement* [2010] JCA 231) and we adopt the same definitions.

3 In broad terms there are three settlements established by three brothers (now deceased), namely the D, B and C Settlements which through a wholly and equally owned Jersey holding company, EE, ultimately own either the whole of or half of or a minority interest in a number of Irish companies (save for Y or BB in which the interest is held directly by the B and C Settlements respectively) which are managed by certain beneficiaries of the D Settlement ("the D directors"). There have been a number of applications for directions but the central issues identified by the Court were:-

(i) The actions of the D directors and the tax affairs of the Irish companies, and

(ii) The separation of the interests of the settlements or some other resolution or programme for resolution.

4 In its judgment of 4 th May, 2010, (*A Settlement* [2010] JRC 085) the Court had ordered the D Directors to provide information in relation to the affairs of the Irish companies set out in the schedule to the act of that date, exercising its purported jurisdiction under Article 51 of the Trusts (Jersey) Law 1984. No issue had been taken by the parties at the hearing as to the scope of the Court's jurisdiction under Article 51 or on appeal by the D Directors, but it was raised by the Court of Appeal which held that the orders made by the Court fell outside the scope of Article 51.

5 On 24 th January, 2011, the Court of Appeal remitted the matter back to the Court for consideration as to how RBC should act and, in particular, in the event of the D directors failing voluntarily to disclose all of the documents set out in the schedule to the act of court of 4 th May, 2010, within 21 days (save for those not in their custody, power or possession which do not exist or which have already been disclosed) for consideration as to whether RBC should be directed:-

The Court of Appeal also ordered that the reasonable costs of the respondents both in the Court of Appeal and in the Court below should be borne equally by the three settlements, this being the first costs order that had been made in favour of the respondents since the inception of the matter.

(i) to pursue by way of shareholder action all or part of the further information identified in the schedule;

(ii) to bring proceedings in Ireland to recover sums overpaid to the directors of the underlying companies; or

(iii) to draw inferences against the directors of the underlying companies and order distributions in the light thereof.

6 RBC fixed 17 th May, 2011, for such directions to be given. On 12 th April, 2011, V for RBC, swore his 9 th affidavit, setting out the detailed proposals of RBC. It is not necessary for the purposes of this judgment to set out those proposals but in general terms, it was proposed that adverse inferences should be drawn against the D directors and their immediate families, which should be taken into account in the exercise of the trustee's discretion, and that certain compensating payments should be made from the D Settlement to the B and C Settlements or their principal beneficiaries.

7 On the application of the first respondents the 17 th May, 2011, was vacated and in recognition of the complex issues to be aired before the Court the 4 days commencing 19 th September, 2011, were fixed for the giving of directions.

8 On 15 th June, 2011, Bedell Cristin for RBC wrote to the parties, pointing out *inter alia* that the fees submitted by them pursuant to the Court of Appeal order and including the costs of Bedell Cristin totalled £270,293.38, a figure that would have an impact on the proposals put forward by RBC. It pointed out that there were uncertainties for all of the beneficiaries in terms of the directions that might be given by the Court and a real risk that the Court might reach a decision which satisfied no one. Given the delay in the proceedings, RBC once again (there had been a three month adjournment for mediation in November 2009) invited all the beneficiaries to use their utmost endeavours to settle the issues, as the alternative could lead to all of the value in the structure being eroded or dissipated.

9 On 8 th July, 2011, when all the skeleton arguments and evidence had been filed by the parties, Bedell Cristin wrote again pointing out that allowing for the costs of a 4 day hearing in addition to the costs ordered by the Court of Appeal, the settlements collectively may have a liability for costs in the sum of £600,000, a significant sum in the context of the structure as a whole. Such costs would also have a clear impact on cash and cash flow. They once again urged the parties to reach an agreement before even more costs were incurred and to that end had contacted the mediator who had previously been involved, namely Mr Mark Lomas QC, to ascertain his availability. That invitation was accepted by the respondents and 31 st August, 2011, fixed for mediation.

10 That mediation was successful and led to an agreement being signed by all of the adult

beneficiaries. By a series of steps involving the payment of dividends, the writing-off of loans, the transfer of shares, the provision of funding and appointments from the D Settlement to the B and C Settlements, the financial interests of the three families will effectively be separated in a manner which substantially meets the principles set out in V's 9th affidavit at paragraph 65, namely:-

> *"(1) that the interests of the respective families need to be separated;*
>
> *(2) any separation needs to occur as soon as reasonably practicable and by reference to a fixed timescale;*
>
> *(3) the separation should be achievable by the Trustee without, unless unavoidable, further proceedings;*
>
> *(4) that separation should also remove insofar as possible, and otherwise minimise, the potential for intra-family conflict in future;*
>
> *(5) financial issues (whether by way of costs, charges, compensation or otherwise) should not be the primary goal but they are relevant and must be taken into account."*

11 In a joint written submission on behalf of all of the adult beneficiaries, Mr Young and Miss Langlois pointed out that the agreement will bring a halt to expensive trustee activity and proceedings which had been in train since 2004 at a cost of almost £3M. It was therefore appropriate for RBC to give effect to the implementation of the agreement.

Surrender

12 RBC sought to surrender its discretion as it had in the earlier applications. The reasons for the earlier acceptance by the Court of that surrender are set out in paragraphs 14–17 of the Court's judgment of 25th November, 2009, (*A Settlement* [2009] JRC 223). In its judgment of 22nd December, 2010, (*A Settlement* [2010] JCA 231) at paragraph 27, the Court of Appeal, whilst not going so far as to say that it was wrong for the Court to have accepted that surrender, said that it should be extremely reluctant to accept a surrender of discretion in such circumstances.

13 The grounds previously put forward by RBC for surrendering its discretion remain but in addition there is a further ground. Its own recommendation to the Court was that adverse inferences should be drawn against the D directors with certain compensatory appointments being made from the D Settlement to the B and C Settlements. The adult beneficiaries of all three settlements had now reached an agreement that in effect divides the assets equally without such compensation. Implementation of that agreement involves RBC making appointments and procuring transfers between the settlements on the basis of that agreement. These transactions place RBC in a position of conflict between its duties as trustee of the three settlements. It is well settled that a conflict between duties in different fiduciary capacities is within the conflict rule -see Lewin on Trusts 18th Edition at paragraph

20–81 which goes on to say at paragraph 29–300 that no principles have been laid down to determine when the Court will and when it will not accept a surrender, but there must be a ***"good reason"*** for that surrender, which include cases in which the trustees are disabled from acting by a conflict of interest.

14 Whilst a future court in similar circumstances might decline to accept a surrender, we were conscious of the history of this particular case in which surrender had consistently been accepted and in the light of the further clear conflict of RBC as between its duties in respect of the three settlements, we agreed, albeit reluctantly, to accept the surrender of the trustee's discretion.

Decision

15 Mrs Davies had been appointed to represent the grandchildren and remoter issue of the late settlor of the D settlement. As she had been appointed by the Court, she did not think it appropriate to execute the agreement reached between the adult beneficiaries, but was generally supportive of that agreement. She was conscious of the deteriorating economic situation in Ireland and considered it to be in the best interests of those she represented for the matter to be settled, their interests in that settlement outweighing the possible benefit of any ongoing investigation into wrongdoing by the D directors. The effect of the agreement was to equalise the funds within the settlements but she noted that no valuable assets were dropping out of the D Settlement which it was intended should continue to provide benefits for the D family.

16 The agreement provided to the Court had been signed by the adult beneficiaries of the three settlements, but not by RBC as trustee or by Mrs Davies, in her representative capacity. It was in that sense incomplete but both Mr Young and Miss Langlois, who between them represented all of the adult beneficiaries, confirmed that their clients agreed to and were bound by the terms of the agreement. In that respect we noted that adult beneficiaries of the C and B settlements had been appointed by the Court to represent the interests of their children and remoter issue. There were within the three settlements the same "longstop" beneficiaries who were represented by Mr Young and Miss Langlois respectively, pursuant to Rule 4/4(1) of the Royal Court Rules 2004.

17 The Court accepted and agreed with the recommendation of RBC that the agreement be implemented. Given all that had occurred in this case and the depth of animosity between the beneficiaries, the fact that all of the adults had reached an agreement after hard fought negotiations was to be commended. They had been independently advised and their common desire must be given significant weight. To direct otherwise would be to condemn these settlements to on-going proceedings which would erode the structures and potentially negate the very reason for their existence namely the provision of benefits for their beneficiaries. In our view, implementation of the agreement was clearly in the interests of the trust estates of all three settlements and we therefore gave directions for its implementation.

18 A number of practical matters arose in relation to the actual directions given, which it is not necessary to go into for the purposes of this judgment save in one respect and that related to the transfer of the company AA from EE to the D Settlement.

19 Tax advice had been commissioned by Mr Young for RBC from Kennelly Tax Advisers Limited which stated that on such a transfer the transferor, EE, would be liable to Irish Capital Gains Tax (currently 25% but due to increase on 6 th December, 2011,) if AA derives greater than 50% of its value from land in Ireland. Cash owned by AA was not considered “land” even if it derived from a sale of Irish land. AA holds an Irish property shown in its accounts to have a value of €650,000 with cash of €500,000 and so if this valuation was correct, then if no action was taken, Irish Capital Gains Tax of 25% would be payable by EE on the transfer of the shares in AA.

20 Kennelly Tax Advisers Limited advised that in the past the Irish Revenue had accepted that when ascertaining whether a company derives its value from Irish land and buildings you look at the gross assets of the company only. Therefore if, for example, an additional €200,000 in cash was lent to AA before the transfer, AA would now have cash of €700,000 and Irish property worth €650,000 and would no longer derive 50% of its value from Irish land and EE would not be liable to Capital Gains Tax.

21 The adult beneficiaries therefore proposed that in order to avoid Irish Capital Gains Tax, sufficient cash be lent by EE to AA so that the cash in AA exceeded the valuation of the Irish property (which was to be re-valued in any event), such loan to be interest free and repayable on demand. RBC was concerned as to the making of such a loan which served no commercial purpose beyond avoiding Irish Capital Gains Tax for EE, not AA.

22 RBC commissioned its own “good sense” tax advice from its advisers, A L Goodbody. They advised that “flooding land holding companies” used to be fairly common where a non resident shareholder was planning to dispose of shares, but generally was done by subscription for additional shares. Company law had made extraction of the additional subscription after the event more difficult. Whether a simple loan could succeed in altering the derivation of value of the issued shares was an open question but they were inclined to suggest that a commercial analysis of the value of shares might allocate the debt to the liquid assets, and thus conclude that the value of the AA shares was referable to the remaining assets, which in this case would be its Irish property and the pre-existing cash. If, on the other hand, RBC had received advice that the loan arrangement was sufficient given the analysis is on a gross asset basis, they suspected that RBC should proceed on that basis. In updated advice, Kennelly Tax Advisers Limited said that there are a number of tax saving schemes disclosable in Ireland, but that this was “at present not one of them and is therefore perfectly legitimate”.

23 The adult beneficiaries sought a direction that RBC procures the making of this loan by EE to AA. Even though such a loan was not referred to in the agreement they had entered into,

under clause 11 of schedule 3 to that agreement, the parties had agreed to cooperate fully in carrying out such transactions “as may reasonably be required having regard to effecting, amongst other considerations, reasonable tax planning opportunities for the parties”.

24 RBC advised against the making of such a direction. Even though both tax advisers had said “flooding” AA with cash in this way was legitimate, Mr Cadin pointed out that the advice from A L Goodbody was circumspect. RBC would be entering into a tax scheme through a loan that had no commercial purpose other than the avoidance of tax. Furthermore bearing in mind the history of animosity between the families in this case, it questioned the prudence of making a loan interest free and unsecured to an entity that it had never been able historically to control, despite its 100% ownership.

25 It may well be that a Court, where no discretion is surrendered and undertaking its much more limited role, would have no difficulty in blessing a decision of a trustee to enter into a tax saving scheme that the trustee had been advised was legitimate but in this case RBC's discretion had been surrendered to the Court. RBC clearly had serious reservations about being directed to enter into such a scheme and would not have done so if acting on its own discretion. Even with a surrender of discretion the advice of the trustee is an important consideration for the Court and we were not prepared in the circumstances of this case to direct RBC to enter into such a scheme against its advice.