

# The Representation of a Trust Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	25 January 2018
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## Text

[2018] JRC 21

Royal Court

(Samedi)

Before:

T. J. Le Cocq, Esq., Deputy Bailiff, and Jurats Olsen and Thomas.

In the Matter of the Representation of a Trust Limited  
In the Matter of the Number 1 C Trust  
And in the Matter of Article 51 of the Trust Jersey Law 1984

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

**Advocate D. Evans for the Minor Beneficiaries.**

**Advocate D. P. Le Maistre for the Unborn Beneficiaries.**

## Authorities

Trusts Law (Jersey) 1984.

*Landau v Anburn Trustees Limited and others* [\[2007\] JLR 250](#) .

*Z Trust* [\[2016\] \(1\) JLR 132](#) .

*In the matter of the Greville Bathe Fund* [\[2013\] \(2\) JLR 402](#) .

*Representation of N and N* [\[1999\] JLR 86](#)

Trust — reasons for the orders and declarations made by the Court on 31st October 2017

Bailiff

## THE DEPUTY

- 1 On 31<sup>st</sup> October, 2017, the Court made certain orders and declarations pursuant to a representation brought by A Trust Limited (“the Representor”):
  - (i) Ratifying and / or confirming the Representor's actions taken during its period of purported administration of the Number 2 C Trust from the initial receipt of assets on or about the 18<sup>th</sup> October, 2005, to date (or to the date of the valid appointment of the Representor as trustee of the Number 2 C Trust if earlier);
  - (ii) Confirmation that the Representor is entitled to remuneration on the Representor's standard terms during the aforesaid period;
  - (iii) To the extent necessary, on the grounds that, notwithstanding its invalid appointment, the Representors have acted honestly and reasonably throughout, that they ought fairly to be excused wholly for any breach of trust which may have occurred as a result of the defective appointments;
  - (iv) That Article VII of the Number 2 C Trust be varied to enable the Number 2 C Trust to be terminated by the Representor at any time;
  - (v) That certain distributions be approved.

These are our reasons.

## Background

- 2 There are three trusts known as the C Trust and the Representor's application is made in its capacity as trustee of the Number 2 C Trust. That Trust was created by Irrevocable Trust

Agreement dated 21<sup>st</sup> October, 1997, by the Settlor who is now deceased. It is a Jersey law trust.

- 3 As indicated above, the applications before the Court relate to the Representor's status as trustee and the validity of certain acts carried out by it purportedly as trustee. The second aspect to the Representor's application is of a variation of the Number 2 C Trust (pursuant to Article 47 of the Trusts Law (Jersey) 1984 ("the Law")) and specifically for the Court's approval on behalf of the minor and unborn beneficiaries to an arrangement which would facilitate the early termination of that Trust and distribution to certain adult beneficiaries of the trust fund. If such a variation is not agreed the Trust would need to remain in existence until 2039.
- 4 The beneficiaries of the Number 2 C Trust are:
- (i) D (the settlor's widow) ("D");
  - (ii) E (the settlor's son) ("E");
  - (iii) F (the settlor's son) ("F");
  - (iv) G (the settlor's son) ("G");
  - (v) H (the settlor's stepson) ("H");
  - (vi) I (the settlor's stepson) ("I").

These are referred to jointly as "the adult beneficiaries".

- 5 It is worth at this point noting that all of the adult beneficiaries of the Number 2 C Trust have been informed of this application and are supportive of it.
- 6 The Settlor created the Number 1 C Trust with a Jersey trustee company, J Trustees Limited ("J Limited"). It was a discretionary trust, governed by Jersey law, and written in the usual terms. It had a nominal trust fund and the Settlor intended that that Trust would receive the proceeds of a certain policy on his death. He provided a detailed letter of wishes regarding the intended distributions. J Limited informed the Settlor that they could not accept the letter of wishes as legally binding as the Trust was discretionary in nature. Accordingly the Settlor elected to establish the Number 2 C Trust.
- 7 The Number 2 C Trust was established in October 1997 with K Corporation ("K Corp") as the original trustee. K Corp was a USA company incorporated for the specific purpose of acting as trustee of the Number 2 C Trust and the Settlor's mother and investment adviser were its directors. This Trust was intended to be the recipient of the proceeds of the policy referred to above given that J Limited was not prepared to treat the letter of wishes as binding.

- 8 Article 1 of the Number 2 C Trust provides that the anticipated proceeds of the policy would be transferred to K Corp as trustee and that K Corp would resign as trustee in favour of J Limited. That did not in fact happen.
- 9 Article III(A) of the Number 2 C Trust contains the only provision which permits distribution or transfers of the trust property. There is no power to distribute to other trusts and no element of discretion afforded to the trustee. Its terms are detailed and prescriptive as to quarterly distributions to each of a number of the adult beneficiaries. Article VII provides that the Number 2 C Trust will terminate no later than 11<sup>th</sup> March, 2039, and there is no provision for earlier termination save in limited circumstances which do not apply in this case.
- 10 Following the death of the Settlor in 2005, K Corp as trustee of the Number 2 C Trust received US\$9m approximately pursuant to the policy.
- 11 J Limited, for the reasons mentioned, being unwilling to act, arrangements were put in place for its replacement by the Representor as Trustee of the Number 1 C Trust with the intention that K Corp would transfer to it, the replacement, the proceeds of the policy. It was the intention, so it appears, that the Representor would replace K Corp as trustee of the Number 2 C Trust but this did not happen and the funds were simply transferred by K Corp as trustee of the Number 2 C Trust to the Representor at a time when the Representor's only relevant capacity was as trustee of the Number 1 C Trust.
- 12 The Representor's position as express trustee of the Number 2 C Trust was confirmed in an instrument dated 12<sup>th</sup> January, 2017, by the adult beneficiaries pursuant to their powers under Article XV and XVI of the original trust instrument.
- 13 Understandably, doubts arose in 2009 as to the manner in which the proceeds of the policy were in fact being held. From the Representor's perspective it held the proceeds pursuant to the terms of the Number 1 C Trust but it was clear that it was the Settlor's intention that the funds should be held and administered pursuant to the terms of the Number 2 C Trust. The Representor took advice from its then Guernsey advocates who advised that, in order to clarify the position the Representor should declare that it henceforth held the Trust on a Guernsey trust, the Number 3 C Trust, whose terms would be the same as those of the Number 2 C Trust.
- 14 The terms of the Number 2 C Trust however contain no provision permitting the transfer of the funds other than in compliance with the prescriptive distribution policy as stated above. In the circumstances it appears that the transfer of funds by K Corp to the Representor was invalid until its appointment as express trustee of the Number 2 C Trust in January 2017. Up until that time the Representor could be said to have held the funds as trustee *de son tort*.

- 15 In the intervening period the Representor had purported to deal with the funds by effecting payment in accordance with the provision of the Number 2 C Trust and during the course of which it paid its own and other professional fees and arranged for the investment of the trust fund.
- 16 We have reviewed the affidavits in support of this application which confirm the background that we have set out above and which was also set out in the Representor's skeleton argument. It is clear that there is a justifiable concern that any of the actions taken by the Representor from the time that it received the proceeds of the policy until the time it was validly appointed as trustee of the Number 2 C Trust were without authority and it was, as has been stated above, trustee *de son tort*. It is in these circumstances that the Representor is seeking ratification for its actions during the period from its receipt of the funds in 2005 to its formal appointment in 2017.
- 17 A further complication lies in the fact that the Representor's fees had exceeded the maximum permitted under the terms of both the Number 2 C Trust and the Number 3 C Trust. This unauthorised charging, if it may be termed that, was ratified and approved by the adult beneficiaries who also approved future charges on the basis of the Representor's published terms and conditions. Accordingly the Representor seeks the Court's approval of its charges both historic and until the termination of the Number 2 C Trust. As this effectively will take the charging mechanism outside the terms of the Number 2 C Trust a variation is sought in order to accommodate the agreement with the adult beneficiaries.
- 18 As mentioned above, the Number 2 C Trust remains in existence until 2039. There has been discussion with the adult beneficiaries and it is also proposed to vary the way that the trust fund will be distributed at termination to provide that:-
- (i) E would receive 27.5%;
  - (ii) F, G and D would each receive 21.5%; and
  - (iii) H and I would each receive 4%.
- 19 The terms of the Number 2 C Trust do not in fact provide for any distribution on termination to D. The adult beneficiaries have agreed, however, that D should receive a distribution on the early termination, if the Court so agrees, to compensate for the fact that her fixed distributions under the existing provisions would come to an end.
- 20 The position relating to the minor and unborn beneficiaries is affected by the variations proposed. The Number 2 C Trust provides only, at Article VIII, for distribution to the Settlor's five sons and step-sons on termination or, in the event of their death, their issue. Accordingly any early distribution will deprive minor and unborn beneficiaries from a potential benefit in the event of the death of their father or fathers before 2039.

- 21 The Representor proposes, therefore, and it has been agreed with the adult beneficiaries, that there will be a separate fund set aside of US\$150,000 for the benefit of the minor and unborn beneficiaries. The adult beneficiaries will act as trustees of this fund which will be subject to a US trust but there is no mechanism within the Number 2 C Trust to facilitate such a transfer and therefore there is a proposed variation.
- 22 When the matter was first presented before the Court orders were made for service on relevant interested parties and Advocate Evans was initially appointed to represent the minor and unborn beneficiaries of the Number 2 C Trust. Subsequently, in the light of the fact that a conflict of interest might arise, Advocate Evans was retained to represent the minor beneficiaries and Advocate Le Maistre to represent the unborn beneficiaries.

## The Law

- 23 In *Landau v Anburn Trustees Limited and others* [2007] JLR 250 the Court dealt with circumstances in which a trustee had ceased to be licensed to carry on trust company business. Thereafter, one of its directors agreed that the trust would be transferred to another licensed trust company to which he was moving. The director administered the trust whilst the new licensed trustee company submitted fee notes. However by an oversight the new trustee company had never been appointed as trustee. The settlor of the trust had wished the new licensed trustee to be confirmed as such but then decided subsequently to revoke the trust. That was challenged by the original trustee as a result of which the settlor issued a representation seeking the Court's confirmation of the revocation and to declare that the original trustee was not entitled to any remuneration because it was unlicensed. The trust instrument contained an express provision to the effect that only authorised trust businesses were entitled to any remuneration. In that case the Court noted, at paragraph 16, that the provisions of Article 26 of the Trust Law “**extends not only to authorising remuneration but also increasing or varying the amount of remuneration provided for in a trust deed**”.
- 24 In the matter of the ( *Z Trust* [2016] (1) JLR 132) the court had to consider the actions of one party who had remained in law the trustee of the settlement in question whilst in good faith believing it had resigned, and the other party who had, erroneously, assumed, in good faith, the duties of the trustee of that settlement. The court set out the provisions of Article 45 of the Law:-

“.....

### **45. Power to relieve trustee from personal liability**

**(1). The court may relieve a trustee either wholly or partly from personal liability for a breach of trust where it appears to the court that :-**

**(a). the trustee is or may be personally liable for the breach of**

***trust;***

***(b). the trustee has acted honestly and reasonably;***

***(c). the trustee ought fairly to be excused:***

***(i) for the breach of trust, or***

***(ii) for omitting to obtain directions of the court in the matter in which such a breach arose .***

.....”

25 At paragraph 50, the Court confirmed that the definition of “trustee” in the Trust Law was wide enough to encompass a trustee *de son tort*, and could see no reason why the provisions of Article 45 could be extended to a trustee *de son tort*.

26 The court then went on to consider its ability to ratify past acts of a trustee *de son tort* and after reviewing what little authority was available the court said:-

***“43. The definition of a trustee in Art 2 of the Trust Law is wide enough to encompass a trustee de son tort and therefore the court would have jurisdiction to make orders in relation to the representors under Article 51 of the Trust Law. That Article makes no express reference to ratification of past Acts of trustees but if there is any doubt as to the court's power to ratify the pass actions of the representors under Article 51 then, in our view, the court has an inherent jurisdiction to do so .***

***44. The general principle guiding the court in the exercise of its jurisdiction under Article 51 and of its inherent jurisdiction as the welfare of the beneficiaries and the competent administration of the trust in their favour. Where, as here, a trustee de son tort has acted in good faith, unaware that he has not been duly appointed to office then, applying the general principle, it seemed to us that we should save the trust from the havoc that may ensue from any attempt to unscramble what was purportedly done by the trustee de son tort by confirming and approving those actions (i.e. to ratify them), whilst at the same time preserving any claims the beneficiaries may have against the trustee de son tort for breach of trust assuming he had been validly appointed.”***

27 And further that Article 26:-

***“Was not to be read as confining the power of the court to make an order concerning remuneration in those cases where there is no provision for remuneration in the trust deed.”***



- 28 It was recognised that the power should be exercised sparingly in that case.
- 29 There was a further example of the Court permitting a claim for remuneration in the case of *In the matter of the Greville Bathe Fund* [\[2013\] \(2\) JLR 402](#) on the basis that remuneration was required “**for the good administration of the fund**”.
- 30 Article 47(1) of the Law provides the court may approve on behalf of certain persons “any arrangement.... varying... or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property”. The persons for whom the court may approve include minor and unborn beneficiaries and the test that the court applies is whether or not the carrying out of such approval appears to be “**for the benefit**” of the relevant person. The test of what constitutes a benefit was considered in the matter of the *Representation of N and N* [\[1999\] JLR 86](#) which the court found that the question it had to answer was in the following terms:-
- “... is the benefit to be attained on behalf of those for whom the court as such that a prudent adult motivated by intelligent self-interest after sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?”**
- As is noted in this Court the term ‘benefit’ is to be widely construed.
- 31 We have reviewed the affidavit of M, a senior manager of the Representor, dated 13<sup>th</sup> July, 2017, filed in support of the application which has set out the background.
- 32 Advocate Speck characterised his client Representor's application as a wish to draw a line under a “bit of a mess”. We can only agree with this assessment. In this case complexity seems to have been added to error in an attempt to deal with the matter that could have been dealt with in a straightforward way by an application to the Court at an earlier stage.
- 33 It is clear that the adult beneficiaries wish to achieve an early termination of the Trust and in order to do that the Trust's terms must be varied. Given that all of the adult beneficiaries agree, as, of course, does the Representor, the question for the Court is whether the arrangements set out are for the benefit of the minor and unborn beneficiaries.
- 34 Advocate Evans in his letter of 27<sup>th</sup> October supports the trustee's proposals. It is clear, as he points out, that the benefit that may come to his clients is contingent upon the death of their father and they will not receive anything until they achieve a specific age. Some would therefore not benefit for decades. The current proposals give a pot for the minors who have, therefore, the prospect of a share in something, albeit a small percentage of the current assets of the trust, against the possibility of nothing.
- 35 Similarly the application is supported by Advocate Le Maistre on behalf of the unborn



beneficiaries. He views their contingent interest as highly remote and therefore they will have at least have some form of benefit.

- 36 The practical effect of the arrangements that are proposed is that the Number 2 C Trust will come to an end. The adult beneficiaries will receive a distribution which will put them in a financially better position and, taking a not too broad view of the concept of benefit, one might well take the view that they will be in a better position to provide for their families including the minor and unborn beneficiaries. Their ages are not such that it is unreasonable to assume that they will still be alive at the time of the termination of the trust and therefore no money will be received by the minor and unborn beneficiaries if there is not a variation. The Trust will, however, have suffered a significant number of years of fees and costs making income distributions and this is not, in the view of the adult beneficiaries for their benefit and nor, so it is argued, for those of the minor and unborn beneficiaries.
- 37 As we have said the term 'benefit' is to be widely construed. In this case the settlor's widow, D, would receive an accelerated receipt of her annual distributions and this we think can be said to be for the benefit of the family as a whole and therefore also for the minor and unborn beneficiaries.
- 38 Accordingly we are prepared to agree to the variation of the Trust in the form that the trustee requests to provide for the ending of the Number 2 C Trust, the distribution to the adult beneficiaries and the setting up of the fund for the minor and unborn beneficiaries and the provision of a sum to D.
- 39 We turn to the question of the Representor's costs. There was no suggestion, and the agreement of the adult beneficiaries supports this assessment, that the Representor has acted other than in good faith during the period that it thought it was the fully constituted trustee of the Number 2 C Trust and the holder of the trust fund on that basis. There was no suggestion that it had done other than manage the trust fund in accordance with the Settlor's distribution policy and appointed the investment manager who was designed for that purpose by the Settlor. It was put to us that we should approve the historic charges of the Representor on this basis and we agree. Furthermore, we do not think it will be in the interests of the family, were we to say that the trustees action should not be treated as valid acts, to create uncertainty with regard to prior distributions. Accordingly it seems up to us to ratify the actions of the trustee and absolve it from liability during the time they have acted as trustee de son tort provided, of course, that it would remain liable for any breaches of trust should any have occurred.
- 40 With regard to future costs it seems to us to be right to provide that the Representor may henceforth, until the final distribution, continue to charge its fees on its standard terms and conditions. This was agreed by the adult beneficiaries and it will provide, in our view, for the proper administration of the Number 2 C Trust going forward.

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41 We did not exercise these powers and discretions lightly but we are satisfied that the trustee has sought to deal with its duties as it saw them honestly and competently, to the benefit of the beneficiaries of the Number 2 C Trust. We accordingly granted the variations of the trust deed and made the necessary declarations and orders sought by the Representor.