The Representation of C, D, E and F and The A and B Trusts v Articles 51 and 53 of The Trusts (Jersey) Law 1984 (as Amended)

Jurisdiction:	Jersey
Judge:	H. W. B. Page, Jurats Morgan, Liston
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Text

[2012] JRC 169A

ROYAL COURT

(Samedi)

Before:

H. W. B. Page, **Q.C., Commissioner, and** Jurats Morgan **and** Liston.

In The Matter Of The Representation Of C, D, E And F And In The Matter Of The A And B Trusts
and
In The Matter Of Articles 51 And 53 Of The Trusts (Jersey) Law 1984 (As Amended)

Advocate F. B. Robertson **for C, D, E and F**.

Advocate E. C. P. Mackereth **for the Trustee**.

Advocate J. D. Kelleher **for the Protector**.

Advocate S. A. Franckel **for the minor and unascertained beneficiaries**.

Authorities

Re the Freiburg Trust [2004] JRC 056.

Re VR Family Trust -v- Van Rooyen [2009] JRC 109.

Parujan -v- Atlantic Western Trustees Limited [2003] JLR N 11.

Eiro -v- Equinox Trustees Limited [2006] JRC 119.

E.L.O. and R. Trusts [2008] JRC 150.

Lewin on Trusts (18th edition).

Letterstedt -v- Broers (1884) 9 App. Cas. 371.

Kershaw -v- Micklethwaite [2010] TLC/475/09.

Trust — reasons for removal of protector.

THE COMMISSIONER:

The matter concerned the application by certain beneficiaries of two Jersey trusts, the Representor Beneficiaries, for orders removing the protector of each trust, S, from office. The hearing took place In Private, but in view of the scarcity of reported judgments concerning the role of trust protectors the Court authorised the publication of the following edited extracts from its full judgment.

[Having described the parties and the background, the Commissioner continued as follows.]

Concerns about S's role as protector

1 To a large extent the most compelling material underlying our conclusion that it was undesirable for S to continue in office only came to light during the trial itself. But, as appears below, there were already legitimate causes for the Representor Beneficiaries to be concerned at an earlier stage.

2 As the trial progressed it became abundantly clear that relations between S and the Representor Beneficiaries had irretrievably broken down and that the overwhelming majority of the other adult beneficiaries also wanted him to go. S insisted that there was no hostility on his part towards the Representor Beneficiaries but his vigorous attack on them was at odds with that assertion and it was difficult to see how relations could ever have been restored to an acceptable level. He may not have been exclusively responsible for this state of affairs but, as discussed below, he was plainly a major contributor to it. Late in the day it also became clear that there had at times been significant tensions between him and at least some of the relevant personnel in T.

3 It also became clear that the root of the problem lay in S's misconceived view of himself as the living guardian and enforcer of the settlors' wishes. This view of things was made all too clear in a passage of one of his affidavits reading:-

> *"46. My understanding of my role and duties as protector is as follows: a.) I understand that I have a duty to act in what I consider to be the best interests of the beneficiaries of the Trusts, both those that currently exist and those who are within the beneficial class but are yet to be born. b.) I also consider it my duty to ensure that the wishes of [the settlors] are adhered to in principle in the management and distribution of the trust fund of the Trusts and to ensure that the Trustees exercise their discretion broadly in accordance with these wishes, but with an overriding concern to exercise their discretion wisely having regard to changing circumstances which might arise over the period of the Trusts."*

And again, a little later,

> *"64. In considering the allegations set out in paragraphs 62 and 63 above, it is relevant to take an overview of the overall management and operation of the Trusts and the way in which I felt that I was able to help in this respect as protector. One of my principal concerns was to ensure that the wishes of [the settlors] were carried out."*

(Our emphasis in each case).

4 It can be no part of the function of a protector with limited powers of the kind conferred on S by the trust instruments to ensure that a settlor's wishes are carried out any more than it is open to a settlor himself to insist on them being carried out. A trustee's duty as regards a letter of wishes is no more than to have due regard to such matters without any obligation to follow them. And a protector's duty can, correspondingly, be no higher than to do his best to see that trustees have due regard to the settlor's wishes (in whatever form they may have been imparted): from the moment of his acceptance of the office of protector his paramount duty is to the beneficiaries of the trust.

5 Advocate Kelleher suggested that the wording of these passages from S's affidavit was no more than infelicitous draftsmanship. But that was difficult to accept given S's professional qualification and experience. Striking corroboration that this was no accident and a glimpse

of related tensions between trustee and protector were also provided in the terms of three documents disclosed by T, via Mr. Mackereth, for the first time on the final day of the trial.

[The Commissioner proceeded to review the evidence and the matters that had most influenced its decision that S should stand down; observing that the Court had also been influenced by the fact that the majority of the other adult beneficiaries were of this view and that the Court had been confirmed in its assessment of the position and the appropriate course to take by the carefully measured submissions made by Advocate Franckel on behalf of the minor and unborn beneficiaries. He then continued as follows.]

The Law

6 The jurisdiction of the Court to remove a protector from office, as opposed to a trustee, is not one on which there is much specific authority. But it was substantially common ground between counsel (i) that such a jurisdiction had been exercised by the Royal Court on at least two occasions, in *Re the Freiburg Trust* [2004] JRC 056 and in *Re VR Family Trust -v- Van Rooyen* [2009] JRC 109; (ii) that that jurisdiction flows from the fiduciary nature of a protector's office; and (iii) that the guiding principles for the exercise of that jurisdiction are akin to those applicable to the removal of a trustee as discussed, for example, in *Parujan -v- Atlantic Western Trustees Limited* [2003] JLR N [11] and *Eiro -v- Equinox Trustees Limited* [2006] JRC 119 and *E.L.O. and R. Trusts* [2008] JRC 150 and in Lewin on Trusts (18th edition) at paragraphs13–49 & 50 and 29–41, all of which take as their lead the words of Lord Blackburn in *Letterstedt -v- Broers* (1884) 9 App. Cas. 371 at 386, 387:-

> ***"In exercising so delicate a jurisdiction as that of removing trustees, their lordships do not venture to lay down any general rule beyond the very broad principle that their main guide must be the welfare of the beneficiaries.*** Probably it is not possible to lay down anymore definite rule in a matter so essentially dependent on details often of great nicety. It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of trustees. Where the hostility is grounded on the mode in which the trust has been administered it is certainly not to be disregarded. If it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with a trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so" (Emphasis added) .

7 In *Eiro*, having cited this passage from Letterstedt, Sir Philip Bailhache, then-Bailiff, added:-

> ***"If without any reasonable ground he refused to do so it seems that the Court might think it proper to remove him"*** .

Earlier he had said:-

> ***"The legal test for the removal of a trustee is set out conveniently in Lewin on Trusts to which the Court's attention has been drawn by both Counsel.*** It is in these terms, "the general principle guiding the Court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the Trust in their favour. In cases of positive misconduct the Court will without hesitation remove the trustee who has abused his trust, but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of the trustee that will induce the Court to adopt such a course. Subject to the general guiding principle the act or omission must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

Though not reproduced in Eiro, Lewin continues:-

> ***"Friction or hostility between trustee and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for removal of a trustee.*** But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by over-charge against the trust estate, **or where it is likely to obstruct or hinder the due performance of the trustees' duties**, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed" (Emphasis added) .

8 While there is, perhaps, not much difference between the words italicised in the passage from *Lewin* and those italicised in the passage from Letterstedt set out above, it seems to us that Lord Blackburn's words express the test in the simplest and most appropriate terms: namely, whether the continuance of the trustee [or protector] *"would be detrimental to the execution of the trusts*."

9 Mr. Kelleher also submitted that the jurisdiction is one that should only be exercised in exceptional cases. We would prefer to say, and we accept, that it is not a jurisdiction to be exercised lightly.

10 Where counsel differed was in the application of the foregoing principles to the circumstances of the present case. Mr. Kelleher submitted that *Re the Freiburg Trust* and *Re VR Family Trust* were illustrative of the sort of exceptional circumstances required to justify the court exercising its jurisdiction with which the present case bore no comparison. They were indeed extreme cases, but we do not accept that they define the limits within which the jurisdiction can properly be exercised. Nor did we find the decision of the High Court in *Kershaw -v- Micklethwaite* [2010] TLC/475/09, another case to which Mr. Kelleher drew attention, a useful guide: apart from the fact that it concerned an attempt by a beneficiary to remove an executor of a will rather than the protector of a trust, Newey J. found that the (admitted) poor relations between the parties need not and should not have prevented or substantially impeded the administration of the estate. In the present case, mutual hostility and distrust between the Representor Beneficiaries and the protector had

led to a breakdown of relations that was quite plainly having a seriously detrimental effect on the execution of the trusts and was likely to continue to do so. This alone would have been a sufficient basis for the exercise of the Court's jurisdiction had that been the only way in which the situation could have been redressed. But add to this the fact, as we found, that S bore much of the responsibility for this state of affairs and we were left in no doubt whatever that this was a case in which it was right for a protector who was reluctant to retire to be removed from office.

Summary

11 In Summary:-

(i) We accept, on the evidence, that S's motivation for the way he exercised his role as protector was *bona fide*, his behaviour being driven by conviction that it was his duty to ensure that the trusts were administered according to his perception of what the settlors would have wanted and that it was all the more important for him to remain steadfast to that role at a time when the original trustee had resigned.

(ii) Unfortunately the role in which he cast himself went well beyond what was proper for someone in his position and led him, not just to insist on playing an overactive part in the management of the trusts, but also to take up indefensible positions as regards his successor, his reluctance to recognise the potential jeopardy to the trusts created by his over-zealous involvement, and his readiness to allow the entirety of proceeds of liquidation of a substantial portfolio of investments to remain on deposit with a bank that was part of the same group as T.

(iii) The Representor Beneficiaries already had good reason to have serious concerns about T's management of the trusts and about S's role as protector even if they did not know about matters that subsequently came to light. And by the time the matter came on for hearing before us, if not before, it was incontestable that relations between S and the Representor Beneficiaries, as well as the great majority of the other adult beneficiaries, had irretrievably failed and that this state of affairs was seriously inimical to the proper administration of the trusts.

(iv) Responsibility for this may not have lain entirely with S, but we were in no doubt at all that to a large extent it was of his making and that the only viable solution was for him to cease to hold the office of protector of these two trusts.