

# Dunham & La Ville Trustee v Toland Trust and O

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	The Bailiff
<b>Judgment Date:</b>	13 October 2005
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## Text

[2005] JRC 142

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Bailiff **and** Jurats de Veulle **and** Clapham.

In the matter of the representation of Peter Stanley Dunham and La Ville Trustees Limited  
And in the matter of the Toland Trust, the Pennywise Trust and the Sequential Trust

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

**Advocate S.J. Young for the minor, unborn and unascertained beneficiaries of the Trusts.**

## Authorities

Trusts (Jersey) Law 1984.

*In the matter of the Green GLG Trust* [2002 JLR 571](#).

*In Re Hastings-Bass v Inland Revenue Commissioners* Court of Appeal Civil Division [\[1975\] Ch 25](#); [\[1974\] 2 All ER 193](#); [\[1974\] 2 WLR 2001](#); [\[1974\] STC 211](#) J3 ATC 87; [\[1974\] TR 87](#).

## The Bailiff

- 1 This is an application by Peter Stanley Dunham and La Ville Trustees Limited, as Trustees of three trusts, known as the Toland Trust, Pennywise Trust and Sequential Trust, to whom we shall refer as “the Trustees”. The application discloses a catalogue of errors by the Trustees and persistent misunderstanding of the Jersey law of trusts by Mr Dunham.
- 2 The brief history is that Barbara Jean Toland to whom we refer as “Mrs Toland”, died intestate in England on 8<sup>th</sup> October, 1992. Under the relevant law half her estate was inherited by her brother, John Geoffrey McLean, to whom we refer as “the Settlor”.
- 3 The Settlor executed a deed of variation on 29<sup>th</sup> November, 1993, by which his interest in Mrs Toland's estate was varied, so as to take effect as if Mrs Toland had left a will, by which *inter alia* she bequeathed her brother's interest in her estate to the Trustees of the Toland Trust.
- 4 The Toland Trust was constituted by a schedule to the deed of variation. The Toland Trust is a discretionary settlement expressed to be governed by Jersey Law. There are a number of beneficiaries, but the intention of the Settlor as expressed in a letter of wishes was that in broad terms his immediate family should benefit from the trust.
- 5 Clause 8 of the deed establishing the Toland Trust conferred upon the Trustees a general power of appointment which was limited by paragraph (d) in the following terms:

*“In any appointment made pursuant to this clause, the Trustees shall, during the Trust Period, have power in their discretion to pay or transfer any income or capital of the Trust Fund to the Trustees of any other trust wherever established and subject to the laws of whatever jurisdiction under which any one or more of the beneficiaries is or are interested PROVIDED THAT no interest thereunder is capable of vesting in interest later than the expiration of the Trust Period”.*
- 6 Considerable capital gains having accrued within the Toland Trust advice was taken by the Trustees as to how the tax liability of the beneficiaries might be mitigated. Advice was taken

*inter alia* from Mr Prosser Q.C. The advice was succinct and clear. It is unnecessary to describe the scheme put forward by Mr Prosser in any detail, but the crucial part of his advice was in the following terms:

*"The next step is for Mr Peter Dunham to establish with say £1 a new settlement which would be a discretionary trust, like the trusts of the Part B fund with different, if possible, Jersey trustees and with a trust period ending automatically with that of the Toland Trust. I enclose a draft sub-clause. This is vital to ensure that the Trustees of the Toland Trust have power to pay to the trustees of the new trust without breaching the perpetuity rules."*

- 7 Unfortunately, that advice was not followed. The new trust known as "The Pennywise Trust" (which incidentally had the same trustees as the Toland Trust) provided for a trust period which exceeded that of the Toland Trust. The result was that any appointment to the Pennywise Trust would infringe clause 8 (d) of the Toland Trust because the Trustees were empowered to appoint out funds to another trust only where "no interest thereunder is capable of vesting in interest later than the expiration of the Trust period".
- 8 In the event that is exactly what happened. By a deed of appointment dated 31<sup>st</sup> March 1994 ("the First Deed of Appointment") the Trustees appointed out the part B fund of the Toland Trust to themselves as trustees of the Pennywise Trust. In addition, pursuant to the overall scheme and in exercise of powers contained in clause 4, they excluded from benefit under the Toland Trust the Settlor and his immediate family.
- 9 In March 2000 the assets held by the Trustees subject to the terms of the Pennywise Trust included a piece of land in Shropshire for which planning permission had been obtained. Again there was a substantial capital gain in prospect in respect of which the trustees sought to mitigate the tax liability. A similar if not identical scheme was devised and assets were appointed out by the Trustees to themselves as trustees of the Sequential Trust. This appointment was made on 17<sup>th</sup> March 2000, ("the Second Deed of Appointment"), and also excluded a number of persons and classes of persons from benefit under the Pennywise Trust.
- 10 The Second Deed of Appointment contained the same inherent flaw as the first, in that the trust period of the Sequential Trust exceeded that of the Pennywise Trust. The same provision was contained in the Pennywise Trust prohibiting the appointment of funds out of Pennywise to another trust where an interest was capable of investing an interest later than the expiration of the Pennywise Trust period.
- 11 Eventually the Trustees realised, having taken legal advice which was broadly consistent from several quarters, that the appointments to the Pennywise Trust and to the Sequential Trust were in excess of their powers or *ultra vires*.

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- 12 They accordingly seek a declaration from the Court to that effect. There is an additional complication, however, in that under the misapprehension that the first and second appointments were valid the Trustees have made several distributions from the Pennywise and Sequential Trusts between 1996 and 2004 to persons who have been excluded from benefit under the Toland and Pennywise Trusts respectively.
- 13 The Court is asked to ratify these distributions. The Court appointed Advocate Simon Young to represent the interests of the minor, the unborn and unascertained beneficiaries. Mr Young, having examined all the papers placed before the Court with his customary care, has told us that he supports the application of the Trustees.
- 14 None of the adult beneficiaries convened to the application has appeared, but we are informed by Mr Speck that ten of them have signified their agreement to the relief sought by the Trustees. Two of the adult beneficiaries have expressed disagreement. One of those, Mr Paul McLean has placed a letter before the Court. We have taken that letter carefully into account. Mr McLean has suggested that the Court might declare the trust periods of all three trusts to be identical but we are unable to follow that suggested course of action.
- 15 The Court initially had some reservations about the submission of counsel for the Trustees that the Court should set aside the provisions of the First and Second Deeds of Appointment excluding certain persons from the classes of beneficiaries of the Toland and Pennywise Trusts respectively. These actions of the Trustees were not in excess of their powers. On balance, however, we were satisfied that these exclusionary provisions were part and parcel of the overall scheme. The Trustees would not have taken action to exclude these persons had they been aware that the appointments were invalid as being in excess of their powers.
- 16 We therefore make the order in the form of the revised draft placed before us by counsel for the Trustees. It only remains to record that this sorry tale has been mitigated by the Trustees' proper, even if inevitable, acceptance of responsibility for the costs incurred as a result of their failures. I think it right that an order should, nevertheless, be made. I accordingly order the Trustees to pay the costs of and incidental to this application including the costs of Mr Young personally on an indemnity basis.