

# First Island Trustees Ltd v F

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith O.B.E., Jurats Ramsden, Christensen
<b>Judgment Date:</b>	24 July 2020
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<b>Court:</b>	Royal Court

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## Text

[2020] JRC 142

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., **Commissioner, and** Jurats Ramsden **and** Christensen

In the Matter of the Representation of First Island Trustees Limited

And in the Matter of the D Trust

And in the Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

Between  
First Island Trustees Limited  
Representor  
and  
F

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Respondent

**Advocate R. S. Christie for the Representor.**

**Authorities**

Money Laundering (Jersey) Order 2008.

*Re S Settlement* [2001] JLR N 37.

*HSBC v Kwong* [\[2017\] JRC 214A](#).

*Re M Trust* [\[2018\] JRC 205](#)

Trust — application for the blessing of a momentous decision

**THE COMMISSIONER:**

- 1 First Island Trustees Limited (“the Trustee”) applies to the Court for a number of decisions it has made as trustee of the D Trust (“the Trust”) to be blessed.
- 2 The Trust was settled on 24<sup>th</sup> March 2003 by E (“the Settlor”) and is governed by Jersey law. It is a discretionary settlement in standard form and lists as its beneficiaries his wife, F and any trust association body or other organisation in any part of the world the objects of which are charitable. The Settlor was at that time the chairman of the Company A, a state owned company, and was also a member of Country A's government. .
- 3 In his letter of wishes of 7<sup>th</sup> September 2006, the Settlor stated that the Trust had been established to provide financial security for himself and his son, G who would then have been aged 37. He wished to have no further involvement with the Trustee on a day to day basis, which he said should seek his son's guidance regarding the disposition of its underlying assets to the beneficiaries and the investment of those underlying assets.
- 4 Over the ensuing years, monies were settled upon the Trust and it held a number of companies within a group structure trading in the medical field in the United Kingdom and of which G was the directing mind. However, G ran into financial difficulties and in 2013 was made bankrupt in the United Kingdom. The trading companies within the Trust also failed with the result that the Trust has been left with one asset, namely a property (“the Property”), which was acquired on 1<sup>st</sup> October 2010 through a wholly owned company (“the Company”) for £565,000 and held as an investment. It was let out until 2016, after which it has been vacant and through lack of funds, fallen into disrepair.

5 The Trustee has had no contact with G since 2013 and the family have effectively disavowed the Trust. In summary:

(i) Following his bankruptcy in 2013, the Trustee attempted to contact G by means of registered delivery post, e-mail and telephone calls to his mobile telephone number, but he was entirely unresponsive. It would appear that he was similarly uncooperative with his trustees in bankruptcy.

(ii) The Trustee wrote to the Settlor on 25<sup>th</sup> June 2013 and received a call on 27<sup>th</sup> June 2013 from the Settlor and his daughter, H. The Trustee explained the circumstances surrounding G's bankruptcy. The Settlor apologised for the situation and explained that he and his family had no idea what had happened to G, and would be in contact with the Trustee again once he had heard from G. However, since that call, the Trustee had been unable to contact either G or the Settlor, despite sending numerous e-mails and letters to both.

(iii) In December 2016, the Trustee instructed Title Research to try and locate either G or the Settlor. Neither could be located but they did locate H, who was working in Country A.

(iv) The Trustee spoke to H on 11<sup>th</sup> May 2017, but she seemed unwilling to assist the Trustee in contacting either the Settlor or his wife or G. She indicated that G was unwell and possibly suffering from depression. She also indicated that the Settlor, was not in good health and would be unlikely to want to give attention to these matters. She did not think it likely that a positive line of communication could be established with any members of the family. Four follow-up e-mails to her were sent, but she never responded.

(v) On 21<sup>st</sup> November 2018, the Trustee wrote directly to the Settlor's wife (she being the only named beneficiary) by DHL and the letter was signed for by her on 25<sup>th</sup> November 2018. No response to that letter has been received.

(vi) This representation, the associated Act of Court and supporting affidavit of Billi-Jean Brown, an associate director of the group of which the Trustee forms part, were served on the Settlor's wife by courier (the package being signed for by her) and by e-mail, but she has not responded and neither has she nor any member of the family attended the hearing.

6 The position has been exacerbated by regulatory failings on the part of Moore Stephens, to which the Trustee is affiliated, which came to light in 2014, when the Jersey Financial Services Commission ("the JFSC") identified a lack of effective governance and appropriate compliance oversight in relation to the trust company business conducted through the Trustee and a number of affiliated companies. These issues were resolved to the satisfaction of the JFSC in due course – see the public statement of March, 2016.

7 These failings impacted upon the Trust, in that at no stage was any source of wealth due

diligence carried out in respect of the money settled into the Trust by the Settlor, a politically exposed person or “PEP”. An internal e-mail of 24<sup>th</sup> February 2003 noted the Settlor's position in Country A and that Country A was on the list of non-cooperative countries. Whilst saying there was a need to exercise caution, it was felt that the relationship could proceed on the basis of certified copies of the passports of the Settlor and his wife and bank references, and whilst the initial sum settled (US\$300,000) was considered modest and reasonable for a family of their status, the email noted that there was a need to monitor the nature of transactions passing through the Trust and to have annual reviews.

- 8 No such reviews appear to have been carried out and over the next ten years, some £5.3 million was added by annual increments to the Trust by the Settlor and then invested in the various companies in the UK effectively controlled by G. The whole of that investment appears to have been lost as a result of the bankruptcy of G and the failure of these companies.
- 9 As we understand the position, it would have been good practice prior to the Money Laundering (Jersey) Order 2008 to carry out source of wealth due diligence, but it became obligatory thereafter. In 2012, a due diligence report on the Settlor (but not the source of the wealth settled) was commissioned by the Trustee from Salamanca Risk Management and its report of 11<sup>th</sup> April 2012 found that there were no orange or red risk warnings in relation to him. Following his dismissal from government as part of a cabinet reshuffle, there were a number of negative media reports alleging that he was involved in corruption, but no corroborative evidence could be found to support these allegations. There was no evidence that he had been the subject of any investigations, and he was not listed on any of the sanctions or watch lists to which they subscribed.
- 10 A further difficulty is that as a result of losing contact with the family, the Trustee has been unable to update its client due diligence documentation (“CDD”) in relation to the Settlor, his wife and G. In these circumstances, the Trustee took the view that the only way forward was to procure the sale of the property through the Company, discharge the debts due and distribute the balance in accordance with the terms of the trust deed, thus terminating it.
- 11 With that in mind, in June 2019, the Trustee instructed Hamptons International to assist in the marketing of the Property for sale, and in August 2019 Hamptons found a purchaser for the Property in the sum of £575,000. However, by January 2020 the sale had collapsed as the Company did not have a bank account into which the proceeds of sale could be paid. The Company's previous bank account with RBS International had been closed in 2012. Due to regulatory restrictions, the Trustee was unable to accept the sale proceeds of the Property into its own client account. The Trustee approached three different banks to try and open a new account in the name of the Company without success, but Standard Bank confirmed that it would be prepared to open an account for the Company if the Court made an order permitting the Trustee to do so, despite the out-of-date CDD.

- 12 By its representation, the Trustee sought the Court's blessing of its decision to:

- (i) open a bank account with Standard Bank, notwithstanding the out-of-date CDD;
- (ii) to direct the Company by its directors to enter into a contract of sale of the Property;
- (iii) to use the proceeds of sale of the Property as follows:
  - (a) to pay for the cost and taxes of the sale of the Property;
  - (b) to repay the Trustee for and in respect of all the costs incurred and paid by the Trustee personally in the maintenance and upkeep of the Property, the maintenance and administration of the Company and the administration of the Trust;
  - (c) to pay the Trustee's unpaid professional fees and costs to date;
  - (d) to pay and reimburse the Trustee for and in respect of legal costs relating to these issues and the representation;
  - (e) to pay any surplus to any trust association body or other organisation in any part of the world the objects of which are charitable as may be determined by the Trustee, and
  - (f) terminate the Trust.

13 The application was supported by two affidavits from Billi-Jean Brown.

### The law

14 The test to be applied in an application for the blessing of a momentous decision is well established. As it was held in *Re S Settlement* [2001] JLR N 37, the Court must satisfy itself that:

- (i) the trustee's decision has been formed in good faith;
- (ii) the decision is one which a reasonable trustee properly instructed would have reached and
- (iii) the decision has not been vitiated by any actual or potential conflict of interest.

15 As the Court said in *HSBC v Kwong* [2017] JRC 214A at paragraph 48, it follows that the test is one of rationality. When a court is deciding whether or not to bless a momentous decision, it is not exercising its own discretion and the issue is whether the decision falls within the range of decisions that a trustee, properly exercising its powers, was reasonably

entitled to make, even if the court would balance the factors differently, and might have reached a different decision.

- 16 The Court heard the application on 1<sup>st</sup> June, 2020, and blessed the decision of the Trustee to open a bank account in the name of the Company with Standard Bank, to sell the Property and to pay for the costs and taxes on the sale of the Property, but reserved its decision in relation to the remaining matters.
- 17 In the view of the Court, the only rational way forward was for the Property to be sold and it was important that the sale proceed as soon as possible. The proposed purchaser was still interested in purchasing.
- 18 The Trustee rightly raised before the Court its conflict of interest in deciding to sell the property in the light of the substantial sums owed to it, and whilst the Court had concerns about the amount being claimed by the Trustee, to which we refer below, it was satisfied that the decision to sell had not been vitiated by that conflict.
- 19 Having reserved that part of its decision, the Court received a further affidavit from Billi-Jean Brown, which addressed more fully some of the matters that had been raised in discussion.

### **Location of G**

- 20 In its report of 10th February 2017, Title Research stated that whilst its research in Country A indicated that G was not currently residing in that jurisdiction, they believed he may be living at an address in England, but it had not been possible to make contact with him at that address within the agreed budget of £1,500 exclusive of disbursements. The Court had queried why no one had taken the simple expedient of simply knocking on the door of that flat to ascertain whether G was residing there.
- 21 In the light of this, the Trustee commissioned another report from Global Investigations dated 15<sup>th</sup> June, 2020, from which we are satisfied that G had not been residing at this flat for at least 12 months and other extensive searches gave no indication that he was residing in the United Kingdom. The presumption is that he has returned to Country A.

### **Fees, costs and expenses**

- 22 The total sums outstanding as at 31st March 2020 were £180,803.65 in relation to the Company and £88,721.51 in relation to the Trust; a total of £269,525.26. The sale of the Property was expected to generate some £570,000 gross, so that a net surplus following the sale of the property of some £300,000 might be expected to be distributed to charities.

The concerns raised by the Court in discussion related to the issue of proportionality and the extent to which fees, costs and expenses had been incurred as a consequence of the regulatory issues raised by the JFSC. There were large disbursements for legal fees and costs incurred, for example, in reinstating the Company after, through an oversight, it had been struck off for failing to file its 2016 annual return. The Court was minded to request the Trustee to carry out a review of these fees, costs and expenses to ensure that they were properly and reasonably due. The Trustee has pre-empted this by conducting what seems to the Court as a review, summarised by Billi-Jean Brown in her further affidavit.

- 23 In that affidavit, she explains that the Trustee has decided to surrender its discretion in relation to these fees, costs and expenses, but having conducted a careful exercise, it recommended a reduction in the fees, costs and expenses in respect of the Company from £180,803.75 to £143,641.75 and a reduction in the fees costs and expenses in respect of the Trust from £88,721.75 to £47,238.05. A total reduction, therefore, from £269,525.26 to £190,879.80.
- 24 Notwithstanding the regulatory failings, the family had disavowed the Trust, leaving the Trustee with an illiquid asset, and it had expended considerable amounts of its own monies in the process. Without going into the detail of the review, we are satisfied that it has been conducted very thoroughly and fairly and that the reduced fees, costs and expenses had been properly incurred and were reasonable. We therefore authorise payment of these reduced fees, costs and expenses from the net proceeds of sale of the Property.

### **Value of the property**

- 25 The Property has been purchased in September 2010 for £565,000 and in discussion, the Court questioned how it appeared not to have increased in value in the intervening period. In her further affidavit Billi-Jean Brown exhibited an e-mail from Hamptons International in which they advised that the Property had deteriorated in condition with a leak to the roof, although now repaired, causing extensive damage to the interior. The Property now requires replacement of kitchen, bathroom suites, redecoration throughout, some re-plastering, an overhaul of the central heating system and complete replacement of the carpets. Over the last two years, the Property market had been adversely affected by the uncertainty of Brexit and when marketed last year, over fifty viewings had been carried out before a sale was agreed. Feedback at the time was mainly too much work required or the negative impact of the road noise from the adjoining dual carriageway. The Court accepts that explanation.

### **Distribution to the charities**

- 26 Under Clause C2.02 of the trust deed, the beneficial class includes “ *any trust, association or body or other organisation in any part of the world the objects of which are charitable*”. It follows that the Trustee has the power to distribute the net proceeds of the sale of the



Property to charities and in the circumstances, it was rational, in the Court's view, for the Trustee to do so, bringing the Trust to an end. The Jersey Financial Crimes Unit had confirmed that the Trustee could exit the relationship.

- 27 The Trustee had approached the task of selecting the individual charities to benefit by canvassing the views of its employees and following that exercise, it proposed to pay the surplus funds realised from the sale of the property in equal sums to Shelter Trust, Mind Jersey, Jersey Women's Refuge, Clic Sargent Jersey and Caring Cooks Jersey. The Trustee explained that it had chosen charities based in Jersey which would benefit the Jersey public “ *on the basis that wealthy clients had been served well by the Jersey Finance Industry, and the circumstances of this Trust provide an opportunity to give something back to the Island.*”
- 28 The Court was asked initially to approve the distribution of the proceeds of sale to charities generally and was not asked to approve the individual choice of charity made by the Trustee. In terms of the individual choice of charity, we were not entirely persuaded by the suggestion that wealthy clients had been served well by the Jersey Finance Industry and that this was an opportunity to give something back to the Island. This money had emanated from a family from Count A, and the Court might have given consideration to the possibility of distributing at least some of this money to a charity that would benefit the people of Country A. However, the discretion lies with the Trustee and not with the Court. The decision of the Trustee as to the choice of charities satisfies the tests laid down in *Re S Settlement* in that it falls within the range of decisions a reasonable trustee, properly exercising its powers, was reasonably entitled to make, even if the Court might have reached a different choice of charity. We therefore give it our approval.

## Bank account

- 29 The Court has already authorised the opening of a bank account with Standard Bank, but it now seeks further assistance from the Court before agreeing to open an account. A similar issue arose in the case of the *Re M Trust* [\[2018\] JRC 205](#) where Sir William Bailhache, then Bailiff, said this in the context of a regulated trustee seeking to cash a cheque issued from the Madoff Victim Fund for a trust, the settlor of which had been convicted of a financial misdemeanour:

**“9 Applications of this kind bring into sharp focus competing legal principles.** On the one hand, the provision of banking facilities to particular customers is a matter of choice for the bank in question, subject to any regulatory direction which may lawfully be given pursuant to the banking licence which has been issued. Understandably for both reputational and practical reasons, banks and other financial service institutions are reluctant to **receive tainted funds, and sometimes indeed are reluctant to grant facilities to those who have been convicted of criminal offences.** This, of course, can cause real difficulty because the banking system is central for the international community's business, and to the ordinary lives of citizens everywhere .



**10 The competing principle here is that the trustee is obliged under Article 21 of the Trusts Law to carry out and administer the Trust in accordance with its terms, and, subject to the terms of the Trust, so far as is reasonable to preserve and enhance the value of the Trust property.** Of course it follows from this that there is an obligation, subject to the terms of the Trust, on the part of the trustee to gather in the Trust property. Here the trustee will be in possession of the Madoff cheque (the original cheque is to be reissued), and it follows that it is its obligation to collect in those monies.”

30 The Trustee is acting properly and in accordance with its powers in bringing this trust to an end, but it cannot do so without an account to receive and process the net proceeds of sale of the Property. It may be helpful to Standard Bank, therefore, if the Court were to make the following comments:

(i) In this case, there is no doubt as to the integrity of the proposed account holder, namely the Company which is wholly owned and controlled by a regulated trustee.

(ii) The Court has approved the decision of the Trustee to sell the Property and distribute the proceeds of sale to charities in accordance with the terms of the trust deed. That can only be achieved through a bank account being opened in the name of the Company.

(iii) There is no conviction recorded against the Settlor (or indeed any member of the family) in this case, and he has been the subject of a due diligence report, in which there are no orange or red risk warnings. The report unearthed no evidence to suggest that the Settlor had been involved in corruption. There is, in fact, no evidence that the trust funds are tainted.

(iv) The further evidence of Billi-Jean Brown has provided a helpful overview of the historic activities of the Trust and its underlying companies. The records show that G would identify an opportunity and would request the Trustee to invest. If it agreed, G would ask the Settlor to settle the necessary funds which he did from his personal bank account. A number of companies were formed and investments made, principally, it would seem, in a UK incorporated research technology development company managed by G. None of these investments were successful and indeed, G was ultimately made bankrupt personally. Whilst unsuccessful, there is no evidence to indicate that any of these activities, all carried out in the UK, were illegal.

31 Standard Bank should be able to take comfort from the fact that both the opening of the bank account and the use to which it will be put have been approved by the Court.

## Conclusion

32 In conclusion:-

- (i) The Court has already approved the opening of a bank account in the name of the Company and the sale of the Property and the payment of the costs and taxes on the sale of the Property.
- (ii) The Court authorises the Trustee to pay the fees, costs and expenses due in respect of the Trust and the Company as at the 31<sup>st</sup> March 2020 in the reduced sum of £190,809.80.
- (iii) The Trustee shall be entitled to have its costs of and incidental to this representation on the trustee indemnity basis out of the trust fund.
- (iv) The Court approves the payment of the proceeds of sale of the Property net of the above and any other administrative costs incurred after 31st March 2020 to the charities selected by the Trustee, thus terminating the Trust.
- (v) There will be liberty to apply.