

# The C Trust

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith, Jurats Kerley, Nicolle
<b>Judgment Date:</b>	14 May 2012
<b>Neutral Citation:</b>	[2012] JRC 98
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<b>Court:</b>	Royal Court
<b>Date:</b>	14 May 2012

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## Text

[2012] JRC 98

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Kerley **and** Nicolle.

IN THE MATTER OF THE REPRESENTATION OF A (A MINOR) AND B (A MINOR) BY  
MARK HOWARD TEMPLE (GUARDIAN AD LITEM)

AND IN THE MATTER OF THE C TRUST

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

Between

A and B (represented by their guardian ad litem Mark Howard Temple

Representors  
and  
Verite Trust Company Limited  
First Respondent  
George Machan  
Second Respondent  
D  
Third Respondent  
  
and  
  
E  
Fourth Respondent

**Advocate** M. H. Temple **for himself.**

**Advocate** R. J. MacRae **for the First and Second Respondents.**

**Advocate** P. D. James **for the Fourth Respondent.**

### **Authorities**

Trust (Jersey) Law 1984.

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

Children (Jersey) Law 2002.

*JEP -v- Al Thani* [\[2002\] JLR 542](#) .

*In the matter of the representation of the Sanne Trust Company Limited* [2009] JRC 025B .

*In the matter of DD* [\[2010\] JRC 193](#) .

*In re H Trust* [\[2006\] JLR 280](#) .

Trust — submissions by the trustee and the widow regarding publication of judgment handed down on 25 April, 2012.

### **THE COMMISSIONER:**

- 1 The Court's judgment on this matter ("the judgment") was handed down on 25<sup>th</sup> April, 2012, when it heard applications from Mr MacRae for the first and second respondents and Mr James for the fourth respondent as to the anonymisation and redaction of the judgment. Having heard the submissions, the decision of the Court was reserved. We will adopt the same definitions as in the judgment.

- 2 In the judgment, the Court set aside the instrument of appointment by which the grandchildren (aged 5 and 7) had been excluded from the Trust during the lifetime of the widow, and this on the ground that the decision was one at which no reasonable trustee could have arrived. The judgment is critical of the widow, the father, the trustee and the protector.
- 3 It was common ground that although the application was brought under Article 51 of the Trust (Jersey) Law 1984 as amended, these were hostile proceedings which came within the fourth of the categories described in *Re S Settlement* [2001] JLR N 37, namely hostile litigation to be heard and decided in open court. Indeed, there was no application for the matter to be heard in private and it was heard and the judgment handed down in public. It was also common ground that the judgment will need to be anonymised in order to prevent the grandchildren being identified.
- 4 Originally the proceedings had been brought by the mother (who is not a beneficiary of the Trust) as guardian *ad litem* of the grandchildren. The trustee raised concerns about documents being disclosed to her which might be used by her in the English proceedings. In order to get round this, it was proposed between the parties that Mr Temple should become the guardian *ad litem*, and he gave an undertaking, which was noted by the Court on 11<sup>th</sup> January, 2012:-

*"1. Noted the undertaking given by Advocate Mark Howard Temple that any documents served by the Trustee and/or Protector and/or [the widow] and/or [the father] will not be sent out of the jurisdiction and in particular, will not be sent or shown to or any of the contents revealed to either the mother or her advisers by quoting the contents of the same and/or that such disclosure will not be able to be used in any proceedings in Jersey, England & Wales or any other jurisdiction other than the Representation (such undertaking being subject to any further order of the Court which provides otherwise) save that such undertaking is not intended to prohibit such communication that may be required to be had between Mourant Ozannes and [the mother] or her advisers in order to respond to the evidence of the Trustee and/or Protector and the disclosure provided by [the widow] and [the father] save that, as undertaken, the disclosure shall not be sent or shown to [the mother] or the contents revealed to her by quoting from the same;"*

- 5 That undertaking remains in force and Mr Temple has confirmed that it has been complied with but of course it does not extend to the judgment which contained extensive references to confidential information in relation to the Trust, such as letters of wishes, legal advice given to the trustee and the protector and communications between the widow and the trustee and protector.
- 6 Mr MacRae submitted that in addition to the anonymisation required in order to prevent the

grandchildren from being identified, the judgment should either not be published at all or should be heavily redacted, and this upon grounds which we would summarise as follows:-

(i) Although the High Court has issued its final order, the mother is entitled to nominal maintenance and could apply at any time to have that maintenance varied. If she were to do so, it would be wrong that she could use confidential information in relation to the Trust gained through these proceedings which would not ordinarily have been available to her.

(ii) Jersey courts have attached considerable importance to the confidentiality of private trusts and the privacy of the parties (including the trustee) in this case and the confidentiality of the relationship between the beneficiaries and the trustee should be protected by the Court. It was essentially a family dispute in which there was no real public interest and there was a fear that in a few years time, the mother will show the judgment to the grandchildren in order to further damage their relationship with the widow. He stressed that this was not about sparing the blushes of the director of the trustee involved and the protector, but about maintaining the privacy and confidentiality of this family.

(iii) It would be wrong for the judgment to be used against the father, who he informed us did not have the means to appear before us and in respect of whom adverse findings have been made in his absence by the Court, which could potentially put him in contempt of the High Court.

- 7 If the Court was not prepared to withhold publication of the judgment altogether, then he recommended a middle course by which the judgment would be heavily redacted to remove information confidential to the Trust. This, he said, could be done by the agreement of counsel, and would not be a difficult process.
- 8 Mr James, for the widow, supported the trustee's application. He questioned what public interest there was in publishing the judgment. We needed, he said, to look to the interests of the family and ask whether it was in the interests of the grandchildren to be shown this judgment. It would potentially destroy any opportunity that there might be to repair the already damaged relationships. In essence, he submitted that any public interest in seeing the judgment was outweighed by the interests of the grandchildren.
- 9 It was accepted by both Mr MacRae and Mr James that whatever order the Court made today, the grandchildren would be entitled to require sight of the full form of the judgment once they had come of age, as they are parties to the proceedings. It transpired in discussion that Mr Temple's firm had already e-mailed a copy of the draft judgment to the mother and it was therefore in her possession in Peru and that the e-mail had been copied to her English legal advisor.

- 10 The draft judgment was issued under Practice Direction RC10/01, which provides that the

draft is confidential and may only be shown in confidence to the parties or associated legal advisors for the purpose of obtaining instructions on the strict understanding that the judgment or its effect is not to be disclosed to any other person.

- 11 Since her retirement as guardian *ad litem*, the mother is no longer a party to the proceedings and she and her English legal advisors should not, therefore, have received a copy of the draft judgment. This is of particular importance in this case because, having heard submissions from Mr James on the draft judgment, the Court felt able to make certain amendments to the draft in the interests of the family as a whole and that would be entirely undermined by the improper use of the draft.
- 12 Mr Temple has apologised for this error and has received confirmation from both the mother and her English legal advisor that they have destroyed any copies of the draft (electronic or paper). The Court has accepted his apology.
- 13 The leading authority in this sphere is *JEP -v- Al Thani* [2002] JLR 542 but the principles to be applied in cases involving trusts are, in our view, helpfully summarised in the judgment of Bailhache, Bailiff in the case of *In the matter of the representation of the Sanne Trust Company Limited* [2009] JRC 025B at paragraphs 2 – 7 as follows:-

**“2. Before turning to the merits of the application Mr MacRae for the Trustee asked us to deal with a preliminary matter dealing with the identification of the beneficiaries and de facto settlor of the settlement. Counsel drew attention to an unreported decision of this court in *Re the Representation of Saffery Champness Trust Corporation* [2005] JRC 052 . In that case the court had declined to sit in private but had agreed that the identities of the beneficiaries of the trust in question could be withheld by a redaction of the judgment to that end.** The principles in question are important, and the court's policy in this area bears re-statement.

**3. The first principle is that justice must be done in public. The principle is conveniently encapsulated in the second paragraph of the headnote to the report of *Jersey Evening Post Limited -v- Al Thani* [2002] JLR 542 at 544 in the following terms:-**

**‘the principle of open justice had not yet found statutory expression in Jersey but formed part of the law and an order for proceedings to be heard in camera was only to be granted when it was necessary to do justice in the exceptional circumstances of the case e.g. to protect specific individuals or prevent the destruction of the subject matter in issue.** Public proceedings ordinarily deterred inappropriate behaviour on the part of the court, maintained public confidence in the impartial administration of justice, made uninformed and inaccurate comment on the proceedings less likely, and could result in additional evidence becoming available. The burden lay with the party seeking an order for hearing in camera to prove that it was the only way in which justice could be done; convenience, potential

embarrassment and the parties' preference were in themselves insufficient justifications."

**4. The second principle, which might be thought to conflict with the first, is that in this jurisdiction, considerable importance is attached to the confidentiality of private trusts. It is for that reason that administrative applications under Article 51 of the Trusts (Jersey) Law 1984 are customarily heard in private .**

**5. An application for the rectification of a settlement or other trust document is not however an administrative matter of that kind. Applications for rectification involve the commission of a mistake by someone, and the exercise of a judicial discretion as to whether that mistake can be put right. There is no public interest in sparing the blushes of professional advisers who have made mistakes in or about the drafting of trust deeds or related documents. On the contrary, there might be said to be a public interest in ensuring that such errors are put into the public domain so that clients can be made aware of them. Furthermore, the exercise of the court's discretion may affect others, particularly tax authorities; as a matter of generality there is no justification for sitting in private to hear an application for the rectification of a trust document, and the application to sit in private at an earlier stage of these proceedings should not have been made .**

**6. The reconciliation of the requirement for public justice and the need to respect the confidentiality of private trusts is achieved by sitting in public but by redacting the Court's judgment so as to excise any reference to the name of a beneficiary and/or a settlor or protector. But for the error of a professional adviser, there would be no application to the court. The nature of confidential family arrangements embodied in a private trust would not ordinarily see the light of day. There seems to us no compelling reason why the mistakes of professional advisers should involve the public exposure of family arrangements which would otherwise have remained entirely private .**

**7. We have therefore sat in public, but this judgment will be redacted to protect the privacy of the family members involved."**

14 Mr MacRae drew our attention to the case of *In the matter of DD* [\[2010\] JRC 193](#), which was concerned with rectification, and was therefore heard in public. In that case, anonymisation extended to the identity of the trustee and the professional advisers. The issue of anonymisation was not raised before the Court, and it is not possible, therefore, to discern why subsequent to the judgment being handed down, the process of anonymisation was taken that far.

15 The application was resisted by Mr Temple on behalf of the grandchildren, who, on the authority of *Al Thani* and *Re Sanne* submitted that the importance of confidentiality in trust matters was served by anonymising the names of the family (which would have to be done in any event to protect the grandchildren from being identified). There was no justification in



further anonymising or redacting the judgment which would serve only to protect the trustee and protector from embarrassment. In his view it was in the interests of the grandchildren to know what had happened, presumably at an appropriate age. As for the High Court, the father as a party to these proceedings already had a copy of the draft judgment and would receive the final judgment in its full form, which he would be duty bound to disclose to the High Court in the English proceedings. In any event, as a matter of comity the High Court should be informed of the judgment if the father's current application for a reduction in the maintenance payable by him in respect of the grandchildren was continued.

## Decision

- 16 The practice of anonymising judgments in order to protect the privacy of the family involved with the trust in accordance with the principles laid down in *Re Sanne* is now well established but in our view, the Court should be resistant to any extension of the process. Mr MacRae submitted that this case was fact dependent and no points of law arose which would be of any interest to the public, none of whom (apart from the mother) attended the hearing. We agree that the case was fact dependent but we do not agree that the judgment would be of no interest to the public. Just as errors made by professional advisers in rectification cases were said in *Re Sanne* to be of public interest, so it seems to us that the conduct of trustees and protectors carrying on trust company business in the Island is just as much of public interest.
- 17 Having given our decision in public, should the Court now become involved in attempting to protect the grandchildren from becoming aware of the conduct of their grandmother and father by withholding the judgement altogether from both them and the public? If and when the grandchildren should be informed of these matters, seems to us to be a question for those who have parental responsibility for them. It is not for the Court to assume that role. We would hope that the mother, who shares parental responsibility with the father, will act in the best interests of the grandchildren. For our part we find it difficult to envisage circumstances in which it would be in their interests to be told. Their best interests must surely lie in rebuilding their relationship with their father and grandmother and learning about these events is hardly conducive to that.
- 18 Clearly it would be wrong for the mother to seek to use the judgment vindictively against the widow, but we have no evidence to suggest that the mother would seek to do this. However, she would not need the judgment to do so. She initiated the proceedings as guardian ad litem and attended the hearing. She has more than enough information to impart to the grandchildren if she is so minded without recourse to the judgment. Withholding the judgment cannot prevent that happening.
- 19 As for further redaction, it is true that information that would otherwise be confidential to the Trust is now in the public domain to the extent referred to in the judgment, but that is an inevitable consequence of proceedings conducted in public. That information is not contained within the judgment gratuitously but because it constitutes in major part the evidence upon which the Court has based its findings. To redact from the judgment that

confidential information would leave the decision of the Court bereft of any meaning.

- 20 Turning to the issue of the High Court, this Court has in the past stressed the importance of the Family Division in England basing any decision it makes upon the true financial position of the parties and the duty is upon the trustee to make sure that the fullest information is available to the parties and, through them, to the Family Division (see *In re H Trust* [2006] JLR 280 at paragraph 17). Similar sentiments were expressed by Moylan J in the English proceedings (see paragraph 55 of the judgment). We are surprised, therefore, at the suggestion that having given the judgment publicly, the Court should now be invited to take steps to avoid the High Court being aware of its terms and we reject the invitation.
- 21 We were told that the father did not have the means to appear before us and it was therefore unfair for the judgment to be used by the mother against him. We find it difficult to accept that he was unable to assist the Court, bearing in mind that he appears to have continued to benefit indirectly from the Trust through the widow (see paragraph 141 of the judgment). In our view, a deliberate decision was taken by the widow and the father not to take part in the proceedings to which they were both convened and they cannot now complain to this Court as to the outcome.
- 22 In conclusion, we reject the submission of the trustee and the widow. The judgment will be published in full, save to the extent necessary to protect the grandchildren from being identified and to protect the privacy of the family members as per *Re Sanne*.