

Representation of WW and XX

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	06 December 2011
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Text

[2011] JRC 231

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and** Jurats Fisher **and** Olsen

IN THE MATTER OF THE C FOUNDATION

Between
WW and XX
Representors
and

A
First Respondent

B
Second Respondent

Advocate A. J. Clarke for the Representors.

Advocate M. J. Thompson for the First Respondent.

Advocate M. C. Goulborn for the Second Respondent.

Authorities

Trust (Jersey) Law 1984.

Halsbury's Laws Volume 102.

Tables des Décisions.

Trust — application relating to validity of trust documentation.

The Deputy Bailiff

Introduction

- 1 The Representors bring this representation as Joint Trustees of the first part of the trust fund of the C Foundation ("the Settlement"). In their representation, they assert in effect that the previous trustee of the first part of the trust fund of the Settlement had purported to wind up the first part of the trust fund of the Settlement in 1985 notwithstanding that there was a chose in action which formed part of the trust fund namely the right to assert that a deed of appointment of a new protector of the first part of the trust fund of the settlement dated 15th August, 1984, a declaration of additional beneficiary dated 15th August, 1984, and a revocable appointment of the whole of the first part of the trust fund, also dated 16th August, 1984, were invalid; and, as a result, a sale contract dated 30th September, 1984, and a release of the power of revocation in relation to the purported revocable appointment were also invalid.
- 2 The first and second respondents have appeared in the proceedings. The Court originally ordered four other respondents to be convened, but none of them has entered an appearance.
- 3 The first respondent, with the support of the second respondent, has taken a preliminary point in relation to these proceedings, asserting that the Representors have no *locus standi* to represent the first part of the trust fund of the settlement. This argument does not turn on any disputed issues of fact, insofar as we can tell, and is based on issues of law.
- 4 The Representors were appointed trustee by Act of the Royal Court of 25th February, 2011.

The Act was obtained on the application of C who was the settlor of the settlement. C's representation was ordered to be served on a number of respondents, which did not include the first respondent in these proceedings. Advocate Thompson submitted that incomplete information was put before the Court in February 2011, and that the order appointing the Representors as trustees ought not to have been made. It was pointed out that the first, second, fourth, fifth and sixth respondents ordered to be convened by the Court to those proceedings did not appear, and the third respondent, who is the second respondent in the current proceedings, was not served, because notice of the proceedings was sent to an old address.

- 5 The application to the Court in February was based on the absence of any trustees of the first part of the trust fund of the settlement, notwithstanding the chose in action to which reference is made above. Advocate Thompson contended that there were provisions in the settlement which could and should have been utilised to appoint new trustees.
- 6 The settlement was made between C and D on 10th July, 1981. It is governed by Jersey Law. The settlement contains discretionary powers given to the trustees in relation to income and capital. These however, with other material trustee powers, can only be exercised with the consent of the protector. The protector powers contemplate that the first protector may appoint separate protectors of each of the four parts of the trust fund, with each separate protector so appointed to exercise the powers of the protector under the settlement in relation to that part of the trust fund of which he is duly appointed the separate protector.
- 7 Two other provisions in the settlement are of relevance:-
 - (i) By clause 18(b), the protector for the time being "may by instrument in writing appoint one or more other persons or companies (whether resident within or without the Island of Jersey) but subject to any exclusions or provisions (if any) specified in the fourth schedule to be a trustee or trustees [hereof] in place of the trustee or trustees so deceased dissolving desiring to withdraw and be discharged refusing or becoming unfit to act".
 - (ii) The power of appointment of a new protector was set out in the sixth schedule to the settlement as follows:-
 - (a) The protector (of and in respect of each part of the trust fund) (or the survivor of joint protectors) for the time being or if the protector shall die without appointing a successor;
 - (b) The surviving spouse of such deceased last Protector or in default;
 - (c) The personal representative of such deceased last protector.

- 8 Clause 23(e) of the Settlement provides:-

“Whenever an occasion arises for appointing a new protector such new protector shall be appointed by declaration in writing or by will or codicil signed by the person or persons making such appointment and the same shall be effective when the document or certified copy thereof affecting the same is received by the trustees who shall retain it in safe custody and shall cause a memorandum to be endorsed on this settlement....”

- 9 The background to Advocate Thompson's submissions was that the trustees who had been appointed by the Court in February, and are the Representors, are persons who would be likely to favour C, because they are the trustees of the third part of the trust fund of the settlement, and have occupied that position for some five or six years, the third part of the trust fund of the settlement being acknowledged to be held primarily for C's benefit. It would be inappropriate for the same trustees to be appointed to the first part of the trust fund of the settlement because all the indications were that a larger part of that fund should be made available to the second respondent.
- 10 In particular, Advocate Thompson submitted that the power of the Court to appoint a new trustee under Article 51 of the Trust (Jersey) Law 1984 (“the Law”) is a power of last resort. The terms of the trust should, he submitted, be adhered to, and only if the protectors refused to act should the Court consider appointment of trustees itself. In the circumstances of this trust, it was common ground that E, the father of C, was appointed as protector of the first part. He died without appointing a successor, and the power to appoint a successor therefore vested in his surviving spouse. She did not exercise that power during her lifetime and she too has died. Advocate Thompson contended that the surviving power therefore vested in the personal representative of the deceased last protector. The executors of E have, however, both died. Accordingly, on the assumption that they had executors, then their executors would exercise the power of appointment of a new protector through a chain of representation. Reliance was placed on Halsbury's Laws Volume 102 at paragraph 637. Advocate Thompson contended that if the chain of representation was broken then ultimately the person who would be entitled to probate would have been F, the widow of E, who was entitled to receive his residuary estate. If her executors were not alive, then the second respondent, as her residuary legatee would be entitled through her to become personal representative of E's estate. As a matter of English law, reliance was placed on Halsbury's Laws Volume 102 paragraph 793.
- 11 It is perfectly apparent from this recital of common ground that the process for arriving at the appointment of a protector who would appoint a new trustee would have been convoluted, to say the least. Nonetheless, the thrust of Advocate Thompson's submissions was that the power in the Court under Article 51 of the Law was a power of last resort.

- 12 Article 51(2) of the Law provides as follows:-

“The Court may, if it thinks fit –

(a) make an order concerning-

(i) the execution or the administration of any trust ,

(ii) the trustee of a trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise

...”

- 13 Article 51 confers a general discretion on the Court to make orders in relation to a trust if it thinks fit. This gives statutory recognition of the Court's equitable jurisdiction in relation to trusts. It is a wide and vibrant jurisdiction. The power to appoint new trustees existed prior to the enactment of the Law, as is apparent from the most cursory search of the Tables des Décisions. There is nothing in Article 51 which provides any straitjacket to the powers which are there set out. This is by contrast with other language which appears elsewhere in the Law – such as, for example, Article 16 (1) which provides “subject to the terms of the trust, a trust must have at least one trustee”.
- 14 We have no doubt at all that the Court's power to appoint a trustee is a wide equitable power which is not constrained by the shackles for which Advocate Thompson contended.
- 15 That then leads to the question as to whether or not the discretion of the Court to appoint new trustees was rightly exercised in February. We have no doubt that it was. If no new trustees had been appointed, then it would be unlikely that the substance of the complaints which are the subject of the present representation would ever have been brought before the Court for determination. The decision to appoint new trustees in February was made to facilitate the disposal of the real issues at the heart of the argument.
- 16 By its order of 28th January, the Court directed that a copy of C's representation be served on the second respondent in the present proceedings. It appears that the document was sent to an address in the United Kingdom, and was returned to those attempting service. There is a dispute as to whether any significant efforts were made to bring the service of the document to the attention of the second respondent in these proceedings. Had she been present, no doubt she would have been able to advance the same kind of submissions which Advocate Thompson put forward, namely that the first part of the trust fund of the settlement was primarily intended for her benefit rather than for the benefit of C.
- 17 In our view it is clear that some protection for the second respondent needs to be included in the current arrangements on an interim basis. Article 51(4) of the Law enables the Court to impose such conditions as it thinks fit on the appointment of a trustee. We are advised by Advocate Clarke that C has been appointed as the protector of the first part of the trust fund.

Whether that is an effective appointment is too early to say. If it is effective, then that emphasises the need for some further protection in relation to the first part of the trust fund of the settlement. Accordingly, we have made the order that none of the powers conferred on the trustees under the settlement which required the consent of the protector may be exercised by the trustees without reference back to the Court. By this means the Court will be able to ensure that the interests of the second respondent are not overridden.

- 18 For these reasons, we find that the Representors have *locus standi* to bring these proceedings, having been validly appointed as trustee by Act of Court dated 25th February, 2011.
- 19 In the course of the hearing of argument as to whether the Representors have *locus standi* to bring these proceedings, it became apparent to the Court that this matter cries out for some efforts at mediation. We have accordingly adjourned the application for a date to be fixed at some future time which will enable mediation to take place in the interval. It is in our view very much in the interests of the parties that this is attempted.
- 20 In the interim we have made further directions which will appear in the Act of Court. We confirm there is liberty to apply generally.