

The Wigwam Trust

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	30 October 2020
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Text

[2020] JRC 228

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, Esq., Deputy Bailiff, and Jurats Ronge and Christensen

In the Matter of the Wigwam Trust
And in the Matter of the Representation of HSBC Trustee (CI) Limited
And in the Matter of Article 51 of the Trusts (Jersey) Law (As Amended) ("The Law")

Advocate D. Evans for the Representor.

Advocate J. P. Speck on behalf of Advocate B. J. Lincoln for the minor and unborn beneficiaries.

Advocate N. M. Sanders for Mrs X

Authorities

Kan v HSBC International Trustee Limited [\[2015\] JCA 109](#).

In Re Clore's Settlement Trust [\[1966\] 1 WLR 955](#).

Re Holt's Settlement [\[1969\] 1 Ch 100](#).

Brian Munro Limited Settlement 1995/154.

In the matter of the Esteem Settlement and the No. 52 Trust [\[2001\] JLR 7](#).

Trust — reasons for the orders made

Bailiff

THE DEPUTY

- 1 On 20th August, 2020, we made various orders in this case. We now give the reasons for our decision.
- 2 HSBC Trustee (CI) Limited (“the Trustee”) is the present Trustee of the Wigwam Trust (“the Trust”). The Trust was established by declaration of trust dated 14th June, 1995, by its original trustee, Coutts & Co. (Jersey) Limited. The Trustee was appointed in place of Coutts & Co. (Jersey) Limited by deed of retirement and appointment dated 21st January 2002.
- 3 By its representation the Trustee sought the Court's approval of its in principle decision to make a distribution of an amount equal to 50% of the value of the trust fund of the Trust, amounting to several hundred million US dollars, to A Limited, one of the beneficiaries of the Trust. A Limited is a company incorporated in the Cayman Islands but administered in Jersey. It is a grant making entity established in order to promote and support such charitable, benevolent or philanthropic objects in any part of the world as it shall consider to be the benefit of the public in the part of the world concerned.
- 4 The Trust is part of a wider group of trusts related to the same family, with the same protector for each trust.
- 5 Those trusts, like the Trust, have substantial assets. It is not necessary to set out the terms of those trusts, their assets or the identity of their beneficiaries. It is sufficient to note that the family beneficiaries identified at paragraph 7 herein stand to benefit under other trusts which hold significant assets in their own right.

- 6 The assets in the Trust are principally derived from successful business activities carried out by Mr Z and others during a 30 year period and thereafter a successful investment strategy following sale of the business.
- 7 The principal beneficiaries of the Trust are the Z family consisting of Mr and Mrs Z and their children and grandchildren, two of whom are minors. Advocate Lincoln was appointed at the convening hearing on 13th July, 2020, to act for the unborn beneficiaries of the Trust and was also appointed as guardian ad litem of two minor children who were beneficiaries under the Trust. At the hearing, Advocate Speck appeared on behalf of Advocate Lincoln.
- 8 The other beneficiaries of the Trust are principally corporate entities including A Limited.

The terms of the Trust

- 9 By Clause 2, the proper law of the Trust is the law of Jersey. The relevant terms of the Trust are as follows:
 - (i) By Clause 4(d)(i), the trustee may at any time or times during the Trust Period (with the consent of the Protector) if in its discretion it believes it to be for the benefit of the beneficiaries (or any one or more of them exclusive of the other or others), raise the whole or part of the capital of the Trust Fund and pay or apply it to for the benefit of any or all of the beneficiaries generally in such manner as the trustee shall think fit;
 - (ii) By Clause 6(a)(i), the trustee shall at its discretion have power from time to time to pay or apply the whole or any part of the income of the Trust Fund to or for the benefit of the beneficiaries (or any one or more of them exclusive of the other or others) in any shares and proportions and generally in any manner as the trustee shall in its absolute discretion determine;
 - (iii) By Clause 7, in the exercise of the trusts and powers contained in the Trust Deed, the trustee may (if in its absolute discretion it shall think fit) at the request of any beneficiary pay or apply any part of the capital or income of the Trust Fund to or for the benefit of any person, trust or purpose approved by such beneficiary and any such payment or application shall be deemed to be for the benefit of the beneficiary at whose request it was made and the trustee shall not be restricted by any rule of law which can lawfully be excluded as to the amount or manner of such payment or application;
 - (iv) By Clause 11, the trustee in exercising any of the powers conferred by the Trust Deed in favour of any particular person is expressly authorised to ignore entirely the interests of any other person interested or who may become interested under the Trust.

- 10 The Protector is a corporate entity, B Limited, a Jersey company. Its consent is required to the Trustee exercising its powers of appointment and advancement under Clause 4. It has confirmed that it would in principle be minded to consent to the proposed distribution.

A Limited

- 11 The entire issued share capital of A Limited is ultimately owned by C Limited, as the trustee of a settlement known as "D Trust", a fully discretionary purpose trust governed by the laws of Jersey. The purposes of D Trust are philanthropic and charitable. D Trust is administered by RBC Trust Company (Jersey) Limited. Members of the Z family provide most of the guarantor members and directors of C Limited. The assets of the D Trust are shares in an underlying company which holds various assets, predominately shares.
- 12 A Limited is part of a wider group of philanthropic organisations based in various countries known together as the "E Foundation".
- 13 Activities of the E Foundation include a broad range of charitable and philanthropic activities in a number of areas, covering international human rights issues, protection of children, promotion of women's rights, health, conservation and climate change, housing/homelessness and education.
- 14 A Limited undertakes no trading or other business activity other than making grants for philanthropic purposes. Its grant making history shows that it has made substantial grant commitments totalling hundreds of millions of US dollars over the last few years. It currently has unpaid grant commitments totalling over one hundred and fifty million US dollars and plans to continue making grants in the future.
- 15 The remaining corporate beneficiaries of the Trust, except those which are part of the E Foundation, are dormant and hold no assets.

The request and the stance of the Trustee and adult beneficiaries

- 16 On 21st April, 2020, Macfarlanes, a firm of English solicitors, wrote to the Trustee on behalf of A Limited requesting the Trustee consider making a distribution to A Limited to permit it to continue its philanthropic activities. The request was for an amount representing 50% of the value of the Trust represented by one half of the shares in the holding company wholly owned by the Trust which in turn holds the investments of the Trust.
- 17 The Trustee has stated in the affidavit sworn on its behalf that it has considered the choice of A Limited as a proposed recipient of funds from the Trust and while noting that its objects are capable of change, A Limited's Memorandum and Articles of Association have not

changed since its incorporation in 1984 and its objects effectively mirror the purposes of D Trust. Further, C Limited as trustee of D Trust has no intention of altering the objects of A Limited to allow these funds to be used for any other purposes other than charity and philanthropy. The Trustee recognises that a lump sum payment will allow A Limited to plan better for its own future and the charitable and philanthropic objects referred to in this judgment. It will also avoid the expense of approaching the Trustee for additional funding which might result in further applications to Court.

- 18 The views of the adult beneficiaries of the Trust were canvassed in May 2020 and the Court was shown the correspondence to and from all of the adult beneficiaries. In summary, the adult beneficiaries confirmed that it was very unlikely that they would ever need to request a distribution from the Trust to meet any personal funding requirements; that Mr and Mrs Z have substantial assets in their personal estate which were intended to provide funding for the family's future needs; that in any event the proposed distribution would leave 50% of the assets of the Trust available for the future funding needs of the family; that all of the adult beneficiaries are also beneficiaries of other trusts containing significant value which would be more than sufficient to meet their future needs and, importantly, that it has been a long standing objective of the family that two thirds of its overall wealth shall be held for the benefit of charity/philanthropy and one third for the benefit of the family. The proposed distribution will go some way to achieving the desired two thirds/one third.
- 19 Further, the adult beneficiaries fully support the activities of the E Foundation. They wished that one of their number, Mrs X, represent their interests before this Court on any application brought by the Trustee in relation to the proposed distribution. Advocate Sanders addressed us on behalf of Mrs X and we read the affidavit that she swore on 4th August, 2020, for the purpose of the hearing.
- 20 We found Mrs X's affidavit to be a helpful document as it shed light upon the way in which the members of the Z family are brought up, and the extent to which their lives are entwined with the charitable purposes of the various structures which have been set up by the family.
- 21 Mrs X has various accomplishments in her own right, including professional experience, inter alia, as a fund manager. However, in 2001 in her early 30s she began working for E Foundation and with an entity which provides investment advice to the Trust, splitting her time between the two. She attends protector meetings once a year in Jersey. It was always clear to her that the purpose of the E Foundation was to provide funds for the charitable and philanthropic aims of her family. She confirms that her family is not reliant upon the assets of the Trust and that she had never received a distribution from the Trust and neither has any of her family members.
- 22 She said that the E Foundation is an umbrella name for a group of philanthropic organisations of which A Limited is one. The E Foundation is not an operating foundation but a grant making organisation giving money to other non-profit/non-governmental organisations whose aims and values align with the areas of philanthropy in which E

Foundation is active. She identifies the aims and objectives of the philanthropic activities of the E Foundation as referred to above. She said that it is for the generation of the family running the E Foundation from time to time to decide what programs to award grants to. These days her father has largely stepped back from the activities of the E Foundation and whilst her mother still has some involvement it is “*predominately my siblings and me driving the decision making process*”.

- 23 The next generation are also becoming involved in the charitable works of the family. Mrs X says that her sister's children have all spent summers working in the E Foundation. She said “*It has always been a philosophy of my parents that family members should very much make their own way in life and choose career paths that they wish to follow*. It is hoped that the younger generation will all work elsewhere and then come back and work for E Foundation if they are interested, but there is certainly no requirement to do so.”
- 24 Mrs X also confirms that the proposed distribution helps to realise a “*long-standing wish of the family, particularly to put into effect the intention that two thirds of the family wealth would be dedicated to philanthropic causes*.” This has been discussed over many years by members of the family, most recently, at a meeting in November 2019. Furthermore, she adds that the timing is important as “*the family as a whole has a sense that it would be preferable for a pro-active step to be taken in achieving the two thirds/one third between philanthropy/family during the lifetime of my parents*.”
- 25 Finally, we were addressed by Advocate Speck on behalf of the minor and unborn beneficiaries. Advocate Speck freely volunteered that the proposed distribution was not in the financial interests of those he represented but that he could not object on their behalves as this was, in his words, a united family with a clear common ethic and, in any event, the monies available to this family within and without the Trust were ample.
- 26 If the investment strategy that had been pursued to date by the family continued, then the sum remaining in this Trust alone would continue to accrue for the beneficiaries that he represented. Advocate Speck also subsequently developed arguments, to which we will return, to the effect that in many respects this distribution could be regarded as being to the positive benefit of those that he represented. It was not necessary for the Court to make such a finding but nonetheless this is a matter to which we consider at the end of this judgment.

The relevant principles

- 27 As for the test for approving a momentous decision, the Court was assisted by the following passages from the decision in the Court of Appeal in *Kan v HSBC International Trustee Limited* [\[2015\] JCA 109](#), where Bompas JA, giving the judgment in Court said the following:

“14. Where a trustee has made a momentous decision, that is a decision of

real importance for the trust, and seeks the court's approval for the decision, the legal test to be applied by the court is well established in this jurisdiction. As explained in *Re S Settlement* [2001] JLR N 37, the court must satisfy itself (i) first, that the trustee's decision has been formed in good faith, (ii) second, that the decision is one which a reasonable trustee properly instructed could have reached, and (iii) third, that the decision has not been vitiated by any actual or potential conflict of interest. A similar approach is taken in England:- see *Public Trustee v Cooper* [2001] WTLR 901.

...

18. When the court is to give approval for a momentous decision the court needs to be satisfied as to the rationality of the decision; the lengths to which the court must go in examining the process by which the trustee arrived at the decision must depend upon the particular decision. In some cases the decision may be a difficult and doubtful one, requiring fine judgment in the face of competing considerations; in others the decision may be obvious. In the former cases the quality of the decision-making process will be more important than the latter. For that reason, we do not consider that the additional requirement for which Madam Kan contends should be introduced to the law of this jurisdiction, even if it were to be adopted in England .

19. That is not to suggest that the court should take a lax approach, or that it should approve any trustee's applications without due consideration. There is a threshold that must be crossed: the court is required properly to scrutinise the proposed exercise of the trustees' power on the evidence. As was pointed out in *Re Y Trust* (citing with approval *Lewin on Trusts* (18th ed.), at paragraph 29–299) (a similar approach is taken in Guernsey: see *Re The Trusts* (Guernsey) Law 2007 and [AAA] *Children's Trust*, Royal Court, 8th January 2014 [2011] JLR 464 [2015] WTLR 683) **the result of the court giving its approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust, or to set it aside as flawed. Furthermore, when trustees are seeking approval for a decision they have already reached, the beneficiaries are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in proceedings to challenge the exercise of the power once made. For that reason, the trustees should put before the court all relevant considerations (supported by evidence) and they should explain their reasons for reaching the decision, even though they are not otherwise obliged to make such disclosure to the beneficiaries. But the process by which the trustees satisfy the court that the legal test has been met should not be confused with the substance of the test itself. Furthermore, each case will need to be decided on its own facts, and the degree of detail that is required from a trustee cannot be uniform in all circumstances. In some cases, a trustee's decision may come out of the**

blue, and if so it may require both the beneficiaries and the court to be given the background and the context in considerable detail: in other cases, such as this, a trustee's decision may emerge from a situation that is well known to the interested parties, and that is likely to have an impact on the degree of detail required from the trustee by the court."

28 When applying this test to the facts of this case, the only matter that the Court wished to receive additional oral submissions upon was whether or not this could be regarded as a "momentous" decision in the context of the assets available to this particular family. In response to this question, counsel for the Trustee said that this was a large sum of money in the context of this Trust and the Court was only concerned with this Trust and not the other trusts under which various family members might stand to benefit. The Trustee could only focus on the assets that it held and, without approval of this distribution, there must be a risk – however small – that a beneficiary could complain about this substantial distribution of assets.

Decision

29 Accordingly we agreed that the decision in this case was a momentous one and that our jurisdiction to approve it, or not as the case may be, was engaged. In the circumstances of this case, it was not difficult for the Court to conclude that the Trustee's decision to make this distribution was formed in good faith, that it was a decision that a reasonable trustee properly directed could have reached and that the decision the Trustee had made had not been vitiated by any actual potential of conflict of interest. Accordingly, we approved the distribution and made the orders sought by the Trustee.

The question of benefit

30 Finally, we return to the submissions that Advocate Speck made in relation to "benefit".

31 This was not an application to, for example, vary the terms of a Jersey trust under Article 47 of the Law and accordingly it was not necessary for this Court to consider whether or not this application was to the "*benefit*" of a minor or unborn beneficiary, which would be central to the Court's role on an application under Article 47.

32 However, Advocate Speck made extensive submissions on this issue and, in the circumstances, we thought it appropriate to make some observations of our own.

33 Although in the opinion of the Court it was unnecessary for counsel for the minors and unborn beneficiaries to assume such a burden, Advocate Speck and Advocate Lincoln took the view that for the purpose of this application they should consider not only the financial interests of those to whom they were appointed to represent but also their interests more

broadly. In this regard, they considered the principles established by the relevant case law as to what might constitute “*benefit*” for the purposes of Article 47. The starting point for their submissions was the decision in the case of [In Re Clore's Settlement Trust \[1966\] 1 WLR 955](#), where Pennycuik J said:

“The third proposition is the crux of the present application: it is that the court has always recognised that a wealthy person has a moral obligation to make appropriate charitable donations. The court has certainly recognised this in several cases, although, generally, it has been concerned with relatively small sums of income: see, in particular, *In Re Walker* [\[1901\] 1 Ch 879](#). **It seems to me that a beneficiary under a settlement may indeed in many cases be reasonably entitled to regard [sic] himself as under a moral obligation to make donations towards charity.** The nature and amount of those donations must depend upon all the circumstances, including the position in life of the beneficiary, the amount of the fund and the amount of his other resources. Once that proposition is accepted, it seems to me that it must lie within the scope of a power such as that contained in clause 8 of this settlement for the trustees to raise capital for the purpose of relieving the beneficiary of his moral obligation towards whatever charity he may have in mind. If the obligation is not to be met out of the capital of the trust fund, he would have to meet it out of his own pocket, if at all. Accordingly, the discharge of the obligation out of the capital of the trust fund does improve his material situation.”

- 34 Reference was also made to the decision of McGarry J in *Re Holt's Settlement* [\[1969\] 1 Ch 100](#) where the judge observed at page 121:

“I should, however, state that I fully concur in the view taken by Mrs Wilson that, speaking in general terms, it is most important that young children “should be reasonably advanced in a career and settled in life before they are in receipt of an income sufficient to make them independent of the need to work.” The word “benefit” in the proviso to section 1 (1) is, I think, plainly not confined to financial benefit, but may extend to moral or social benefit, as is shown in *In re T's Settlement Trusts* [\[1964\] Ch 158](#).”

- 35 In the *Brian Munro Limited Settlement 1995/154* [Royal Court 28th July 1995] Bailhache B, when considering the meaning of “benefit” under Article 43 (as it then was) of the Law said:

“The Court should, in our judgment, look at the question of benefit to the children and remoter issue in the round and not be confined to the financial aspect of any benefit.”

- 36 Finally, in *In the matter of the Esteem Settlement and the No. 52 Trust* [\[2001\] JLR 7](#) Birt, DB, giving the judgment of the Royal Court said at paragraph 44:

“The wide meaning to be given to the word “benefit” has been adopted in Jersey in the case of *In re N* (12). That case concerned an application to

vary the terms of a settlement pursuant to art. 43 of the Trusts (Jersey) Law 1984, which gives the court power to approve a variation if it appears to the court to be for the benefit of those beneficiaries whose interests the court is considering. The court held that the word was to be widely construed. It was not restricted to financial benefit but also included educational and social benefit. On the facts of that case, the court held that the avoidance of litigation between the beneficiaries and their parents would be of benefit to the beneficiaries.”

37 Further, having reviewed the authorities including in *Clore* he concluded at paragraph 48:

“Taking account of the authorities referred to above and other useful extracts cited by counsel ((In re Cameron Dcd. (3) [1999] Ch. at 415) and (Inglewood (Lord) v. Inland Rev. Commrs. (10) [1983] 1 W.L.R. at 372)), we agree that the word “benefit” is to be construed widely and goes beyond mere financial benefit. It encompasses all sorts of ways in which a beneficiary's position can be made better. Nevertheless, it is not open-ended. There is an objective test, namely, that the way in which the trustee proposes to deal with the capital can fairly be regarded as being for the benefit of the beneficiary. There is also a subjective test, in that the trustee must genuinely believe that the appointment of capital will in fact be for the benefit of the beneficiary. A court is of course bound by exactly the same principles when, as here, the trustee has surrendered its discretion to the court. Most importantly, the question of benefit is to be considered in a realistic and commonsense manner rather than in a theoretical or academic way.”

38 We endorse and adopt those principles.

39 In this case, Advocate Speck submitted that the proposed distribution is not to the direct financial benefit of those who he represented but was nonetheless to their benefit. He said he was assisted in his submission by three matters. First, the affidavit of Mrs X to which we have already alluded at some length. He said that that affidavit showed that future generations are likely to be able to become involved in the programs operated by the charities which could only benefit such individuals.

40 Secondly, he referred to the co-operation agreement dated January 2017 which had been agreed by many of the adult beneficiaries of the family and to which many corporate entities including A Limited were party. This deals with the governance of the E Foundation and shows the broad and deep family engagement with the purposes of the E Foundation. It was submitted that the proposed distribution would not be leaving the Z family for all purposes but would be part of the patrimony of the family. The family will be engaged in the use to which the assets would be put and this would be “beneficial” to the family in the broadest sense of the word.

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- 41 Thirdly, Advocate Speck drew to our attention the E Foundation annual report for 2019 which was contained in our papers. This document describes the mission of the family and the letter from the Trustees in the introduction was authored by a majority of the adult beneficiaries. The photographs and text setting out the nature and extent of the work carried out by the E Foundation in 2019 was remarkable and Advocate Speck submitted with some force that anybody would be proud to be involved in such work.
- 42 We agreed that there was a solid legal basis for us to find, if necessary, that this distribution was to the benefit of the minor and unborn beneficiaries and had we been required to make such a finding then we would have done so.