

The Representation of RBC Trustees (Guernsey) Ltd v the Trusts (Jersey) Law 1984

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Grime, Sparrow, Birt
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Text

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Commissioner, and Jurats Grime and Sparrow

In the Matter of the Representation of RBC Trustees (Guernsey) Limited

—v—

In the Matter of the Trusts (Jersey) Law 1984

Advocate A Kistler for the Representer.

Authorities

Trusts (Jersey) Law 1984.

Lewin on Trusts (19th ed. 2014).

Jasmine Trustees Limited v Wells & Hind [2008] Ch 194.

In re BB 2011 JLR 672.

Trusts — application to appoint the representor as trustee of an employee benefit trust

THE COMMISSIONER:

- 1 This is an application by the Representor for the Court to exercise its power under Article 51(2) of the Trusts (Jersey) Law 1984 (“the Law”) to appoint the representor as trustee of an employee benefit trust (“the Trust”) of which it was the original trustee but from which position it has resigned. The circumstances are somewhat unusual.
- 2 At the conclusion of the hearing, the Court granted the application. We now give our reasons.

Background

- 3 On 11th May 2001, the Trust was established by means of a deed entered into between a company incorporated in the Isle of Man (“the Company”) and the representor as original trustee. The beneficiaries were defined as the employees and former employees of the Company (or any holding company or subsidiary of the Company) and any member of the family of such employees and former employees. The Trust was in conventional discretionary form.
- 4 Although the law of England and Wales is the proper law of the Trust and the representor is a Guernsey company, the Trust has been administered in Jersey since May 2008. Accordingly this Court has jurisdiction to make the order requested pursuant to Article 5(d) of the Law.
- 5 Clause 12 of the trust deed provides as follows:-

“12 (a) The power to appoint new and additional trustees of this Trust shall be vested in the Company.

(b) The Company may at any time remove any Trustee and any Trustee may at any time by giving not less than 30 days' notice in writing to the Company retire from the trusts of this Trust (and so that if after such removal or retirement there shall be no continuing Trustee the Company shall subject to obtaining such consent as aforesaid at the same time as such removal is effected or forthwith

appoint a new Trustee or Trustees in place of such removed or retired Trustee) PROVIDED that no Trustee shall be personally liable for acting as a Trustee after the date upon which he has been removed but prior to actual receipt of notice by him of such removal and he shall continue to be entitled to remuneration and the indemnity contained in this Declaration of Trust conferred on the Trustees until all trust assets have been transferred to the new or continuing Trustees.”

- 6 In February 2014 the representor became concerned about the accuracy of certain information with which it had been provided and decided that it wished to retire as trustee. In May 2014 the Company suggested a Gibraltarian trustee as replacement trustee but it transpired that that company was not regulated to perform trustee business in relation to an employee benefit trust as a matter of Gibraltarian financial services regulations.
- 7 There were subsequent discussions between the Company and the representor but no substantive progress was made by the Company towards nominating a replacement trustee.
- 8 In the light of this impasse, the representor took advice as to whether it could retire unilaterally by giving notice pursuant to clause 12(b) of the trust deed. In January 2015 it was advised by White & Case LLP that it could do so but that, at the end of the notice period, if no new trustee had been appointed, the representor would continue to hold the assets on the same trusts as existed immediately prior to the termination but the representor could not take any action as an active trustee.
- 9 Following this advice, the representor sent a letter to the Company dated 26th January, 2015, (“the Resignation Letter”). The Resignation Letter gave notice in accordance with clause 12(b) of its retirement to take effect on 27th February, 2015, and reminded the Company that it must appoint a new trustee with effect from, or as soon as possible after, the date of the representor's retirement.
- 10 On 20th April, 2015, the representor wrote to all the beneficiaries explaining that it had retired as trustee and that it understood that the Company was in the process of appointing a new trustee. The letter further explained that the representor's roles and responsibilities as trustee had ceased and that, although it remained as legal owner of the trust fund until transfer to a new trustee, the representor could not take any decisions or take any action other than to transfer assets to the new trustee in due course.
- 11 Despite the terms of the Resignation Letter, the Company did not appoint a new trustee and on 4th September, 2016, it was struck off the Isle of Man Companies Registry and dissolved. Accordingly, there is now no entity with the power to appoint a new trustee pursuant to the trust deed.

- 12 The representor has been in discussion with other potential trustees but it has not proved possible to bring these to a successful conclusion. In the meantime, despite what was said in the Resignation Letter, the representor has continued to receive communications and correspondence from many beneficiaries requesting action by way of update, distribution or closure of their sub-fund in order to carry out their own financial planning and other matters. The representor has not been able to respond positively to any of these because, having retired as trustee, its role is limited to safeguarding the assets.

Discussion

- 13 In the light of the difficult position in which it has found itself, the representor has taken advice from English Chancery counsel, Mr J Lewison. Counsel has confirmed that the representor effectively resigned by means of the Resignation Letter with the result that it now holds the assets of the Trust subject to the custodial obligations of a trustee but without the powers and discretions conferred by the trust deed. In order to exercise those powers and discretions, the representor would need to be re-appointed as trustee and this would have to be done by the Royal Court.

- 14 Counsel referred to Lewin on Trusts (19th ed. 2014) at 13–019 which is in the following terms:-

“We doubt whether an express power of retirement would, in the absence of clear language, be construed so as [to] authorise a sole trustee to retire, or a number of trustees all to retire at the same time, without a new trustee being appointed. But even if such a retirement were authorised, we do not consider that it would have the effect that the retiring trustee or trustees would be divested of fiduciary responsibility pending the appointment of, and vesting the trust property in, a new trustee or trustee(s). The retiring trustee or trustees would continue to hold the trust property in the intervening period, and hold it in a fiduciary capacity as a trustee, and though the retiring trustee or trustees may be unable in the intervening period to exercise powers and discretions and the like conferred on the trustees by the trust instrument, they would remain accountable for the trust property and its income, and any notices required to be served on trustees as the holders of trust property would in our view be validly served if served on them.”

- 15 Counsel advised that this passage from Lewin was consistent with certain observations of Mann J in the case of *Jasmine Trustees Limited v Wells & Hind* [2008] Ch 194 at paras 42 – 43:-

“42. ... It can be accepted that a trustee de son tort is a kind of constructive trustee ... but in so far as the trustee de son tort has property which he holds in his own name he will be a trustee of that property for the ultimate beneficiaries. To that extent it can be accepted that a trustee de

son tort of that kind ‘really is a trustee’. However, the question in this case is not whether the de facto trustees are trustees; it is whether they should be treated as being trustees of the settlement. The status of a trustee de son tort is limited. He will be liable for breach of trust much as a properly appointed trustee would be but the doctrine is more about liabilities than anything else. The trustee de son tort will be obliged to hold the property for and to account to, the beneficiaries, but on the other side of the coin will not have the powers of the trustee conferred by the settlement ... it would be contrary to principle to allow such a person to arrogate powers to himself by virtue of his “intermeddling”, even if that intermeddling is innocent .

43. All this demonstrates that while a trustee de son tort may be described as a trustee of trust property vested in him, it is not necessarily or naturally correct to describe him as a trustee of the settlement. One would expect those words more naturally to describe the actual trustees. ... Mr Rowley asked the rhetorical question – if the de facto trustees are not the trustees of the settlement then what are they trustees of? If the question is a relevant one, then the answer is that they are trustees of the trust property which they happen to have vested in them; they are not trustees of the settlement. That dichotomy is the significant one. The settlement is the abstract concept; the trust property is the physical or quasi-physical subject of the settlement. The concept ‘trustees of the settlement’ means the trustees in relation to the whole abstract concept; the concept of being trustees of property is a narrower one describing the relationship of the person to the property.”

- 16 Counsel advised that the distinction drawn by Mann J – between trustees in the true sense with all the powers and duties of the settlement and trustees of the trust property, with only the liability to account – can be carried across to the circumstances canvassed by the editors of Lewin in that a trustee who has retired under an express power has abjured the powers and discretions of the trust, but retains the trust property and so must take proper care of it and account to the beneficiaries when required to do so.
- 17 Having considered the terms of clause 12(b), counsel advised that it does indeed provide for a power to retire without the appointment of any replacement trustee. We agree. The clause itself clearly contemplates a situation in which there will be no trustee after the retirement because it provides “... if after such removal or retirement there shall be no continuing Trustee ...”. The clause then goes on to refer to the appointment by the Company of a new trustee “at the same time as such removal is effective or forthwith ...”. The reference to “*forthwith*” can only be a reference to a time after the removal or retirement has taken effect. The clause must therefore be contemplating the possibility of a period between the retirement of the outgoing trustee and the appointment of the new trustee.

- 18 The Trust is of course governed by English law and we therefore pay particularly close

attention to English counsel. We find his opinion entirely convincing both in relation to the effect of the Resignation Letter and to the position in which the representor now find itself, i.e. that it has a duty to look after and take proper care of the trust property but it no longer has any of the other powers and discretions conferred on it under the trust deed.

- 19 We were told that there are some 180 beneficiaries and it is clearly of the first importance that a trustee be appointed so that all the powers and discretions conferred on the trustee under the trust deed may be exercised for the benefit of the beneficiaries. The present situation is not satisfactory.
- 20 In the light of its lack of success in finding a replacement trustee, the representor has very responsibly concluded that it should seek reappointment so that the Trust can be properly administered in the interests of the beneficiaries.
- 21 Given the number of beneficiaries and the nature of the issue before the Court, we have not thought it necessary to convene the beneficiaries.
- 22 Advocate Kistler very properly drew the Court's attention to Article 51(3) of the Law which provides:-

“An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee, the enforcer or a beneficiary or, with the leave of the court by any other person.”

He referred to the decision of Clyde-Smith, Commissioner *In re BB* [2011 JLR 672](#) at para 43 where the Commissioner said this:-

“43. The definition of a trustee in Art.2 of the Trusts Law is wide enough to encompass a trustee de son tort and therefore the court would have jurisdiction to make orders in relation to the representors under Art.51 of the Trusts Law. ...”

He submitted that the representor as a former trustee still holding all the assets, also fell within the definition of ‘trustee’ in Article 2 of the Law and that accordingly leave to apply under Article 51(3) was not required. We are content to assume that this is so. If we are wrong, this is clearly a case where leave ought to be given to the representor to bring this application and we would grant leave.

- 23 In all the circumstances, the Court had no hesitation in concluding that it should exercise the power conferred under Article 51(2) of the Law to appoint the representor as trustee of the Trust. We also ordered that the representor should receive its costs of and incidental to this application on the usual trustee basis.