

## A Trust

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith, Jurats Tibbo, Liddiard
<b>Judgment Date:</b>	27 April 2009
<b>Neutral Citation:</b>	[2009] JRC 89
<b>Reported In:</b>	[2009] JRC 89
<b>Court:</b>	Royal Court
<b>Date:</b>	27 April 2009

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### Text

[2009] JRC 89

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Commissioner and** Jurats Tibbo **and** Liddiard.

In the Matter of the 'A' Employee Shares Trust

And in the Matter of The HWT Sub-Trust

And in the Matter of The MM Sub-Trust

And in the Matter of The AD Sub-Trust

And in the Matter of The GS Sub-Trust

And in the Matter of The GT Sub-Trust

And in the Matter of Articles 51 And 52 of The Trusts (Jersey) Law 1984 (As Amended)

Equity Trust (Jersey) Limited  
Representor  
and

GS, GT, KO and AD, in their capacities as former employees of a former subsidiary of III  
appointed to represent the interests of the beneficiaries of the head trust, as a whole

First Respondents

GTh, appointed to represent the interests of the HT sub-trust, CMM, appointed to represent  
the interests of the MM sub-trust, GT, appointed to represent the interests of the GT sub-  
trust, JES, appointed to represent the interests of the GS sub-trust, AD and KO, appointed  
to represent the interests of the AD sub-trust

Second Respondent

Mr HT

Third Respondent

Mr MM

Fourth Respondent

and

Herald Trustees Limited  
Fifth Respondent

**Advocate J. Harvey-Hills for the Representor.**

**Advocate S. A. Franckel for the Third Respondent.**

**Advocate D. R. Wilson for the Fifth Respondent.**

**Advocate N. F. Journeaux for the other Convened Parties.**

## **Authorities**

Trusts (Jersey) Law 1984.

## **COMMISSIONER**

- 1 On 7th April 2009, the Court refused an application for the transfer of funds from the head trust to one of the sub-trusts and we now set out our reasons.
- 2 The 'A' Employee Shares Trust ("the head trust") was established on 21st March 2000 for the benefit of the employees of the founder a Bahamian company, and its subsidiaries. In fact it was only a subsidiary of the founder that had employees. Equity Trust (Jersey) Limited ("the trustee") was appointed trustee on 21<sup>st</sup> November, 2003.

- 3 Shortly after the sale of the head trust's principal asset in 2003, five sub-trusts were created, each with a protector. We are concerned with the HT sub-trust ("the HT sub-trust") of which Mr HT was appointed the protector.
- 4 Since 2003, and in accordance with the wishes of the protectors, the trustee has presumptively allocated the assets, costs and expenses within the head trust between the sub-trusts. The presumptive share of the HT sub-trust is 39%.
- 5 Following the sale of the head trust's principal asset in 2003, the presumptive share of the net proceeds of the HT sub-trust was just over US\$24,000,000, the bulk of which had been appointed down to it. Of that, substantial sums were ultimately lent to Mr HT and the balance invested within companies owned by the HT sub-trust.
- 6 The head trust and each of the sub-trusts, which are all discretionary in nature, are governed by English law but the Court has jurisdiction pursuant to Article 5 of the Trusts (Jersey) Law 1984 because the trustee is incorporated in the Island of Jersey from where the head trust and the sub-trusts are administered.
- 7 As a result of divorce proceedings involving Mr HT, the trustee took advice on the trust structure in 2008. As part of the investigation carried out for that purpose, it became clear that as a result of a reverse merger in mid 2000, the founder ceased to own a subsidiary with employees. The founder is now dormant and may have been struck off the register in the Bahamas. On 14th October, 2008, Alan Boyle QC and Dakis Hagen of Serle Court Chambers, advised that as a consequence the head trust and each of the sub-trusts were settlements which had probably failed and whose assets were held on resulting trusts for the donors to them in shares referable to their contributions. The donors were Mr MM and Mr HT (the latter through his father's estate).
- 8 Accordingly, the trustee has applied to the Court by way of representation dated 15<sup>th</sup> October, 2008, for the Court to declare on what trust the assets purportedly subject to the head trust and sub-trusts are in truth held and to make consequential orders. That application has yet to be heard but it was the view of counsel that the trusts will be held to have failed, although there may be an issue as to whether Mr HT and Mr MM hold part of the assets that will result back to them on certain constructive trusts for others.
- 9 On 13<sup>th</sup> November, 2008, the Court gave the following interim directions *inter alia*:-  
  
***" 11. granted until further order and subject to order 13 below, the Representor shall be sanctioned by the Court to safeguard, administer and invest the assets purportedly subject to the above-captioned trusts on the footing that the Trust and its Sub-Trusts are valid and effective and the Representor is trustee;***

***13. granted that until further order, the Representor shall make no further loans or distributions out of the assets purportedly subject to the trust or its Sub-Trusts to or at the behest of any beneficiary or purported beneficiary or Mr MM or Mr HT without the approval of the Court. For the avoidance of doubt it is open to any beneficiary or purported beneficiary or Mr MM or Mr HT to make an application to the Court on affidavit and on notice to the other parties seeking authority for such a loan or distribution. Any such affidavit shall be served at least 13 days before the hearing date of such application and any affidavit in reply shall be served at least 5 days before such hearing date.”***

- 10 On 17<sup>th</sup> February, 2009, pursuant to an application made under the above directions, the Court approved an appointment of £200,000 from the head trust to the AD sub-trust and from that sub-trust a loan in the same sum to Mr AD, and this out of the presumptive share of the AD sub-trust. None of the parties convened opposed that application. At that time the head trust had cash in the sum of £865,631.65 and the notional account of the AD sub-trust was £394,092.33.
- 11 By application dated 5<sup>th</sup> March, 2009, Mr HT, as protector, applied for an appointment of £121,000 from the head trust to the HT sub-trust and it was that application that we heard on 7<sup>th</sup> April, 2009. On that occasion, the application was opposed.
- 12 The application was prompted by the apparently urgent need for funds within the HT sub-trust, specifically by “A” Corporation SA (a company wholly owned by the HWT sub-trust) to pay outstanding legal fees due to Freshfields in relation to the ongoing sale of its German property, by “L” LLC (in which the HT trust had apparently made a substantial investment) to pay US property taxes and to meet the educational expenses of Mr HT's two children, which had historically been met out of the HT sub-trust. Neither company was administered by the trustee which had itself alleged that it had been unable to obtain sufficient information from the directors (a matter which is the subject of a separate application by the trustee).
- 13 At the time of the application the head trust held £627,000 in cash and the notional account of the HT sub-trust stood at £65,741.58. The notional accounts of the other sub-trusts were £317,554.96 for the MM sub-trust (notional share 46%), £183,385.69 for the AD sub-trust (notional share 8%), £18,545.95 for the GT sub-trust (notional share 6%) and £5,121.94 for the GS sub-trust (notional share 1%). Thus it can be seen that the sub-trusts had drawn down so to speak on their notional accounts in different amounts.
- 14 Because of the doubts as to the validity of the trust, the trustee surrendered its discretion to the Court. It expressed the view that it was reasonable to retain some £300,000 within the head trust by way of reserve to meet its ongoing fees and expenses, in particular in the light of the forthcoming hearing as to the validity of the trusts. It was concerned about the cash

flow problems within the HT sub-trust but pointed out the distinct lack of information provided by Mr HT in his application.

- 15 Mr HT did not give the Court an overview of the financial circumstances of the HT sub-trust or any information as to his ability to assist. Mr Franckel accepted that his client's application was not "overflowing with documentary evidence". The Court has on many occasions emphasised the need for full and frank disclosure in applications of this kind. Mr Franckel for example was unable to assist as to the ownership of "L" LLC to which the HWT sub-trust had apparently already loaned substantial sums. A single page balance sheet contained within the trustee's bundle contained a note to the effect that it was owned by one SMP. Mr Franckel was unable to help us as to who SMP was and her relationship with Mr HT.
- 16 Mr Franckel invited us to ignore the internal system of maintaining notional accounts within the head trust adopted by the trustee consistently since 2003 and to which his client had hitherto made no objection. He said such a system constituted a fetter on the trustee's powers. The fact of the matter was that there was cash in the head trust sufficient to meet his client's application for £120,000 leaving a reserve in the head trust of over £300,000. Because of the demonstrated need of the HT sub-trust, the full amount requested should be appointed to it.
- 17 Mr Journeaux, acting for Mr MM and the other convened parties (other than Herald Trustees Limited), objected to any appointment in favour of the HT sub-trust. He put the position very succinctly. An appointment now to the HT sub-trust of £121,000 would more than wipe out its notional account leaving the other sub-trusts shouldering the ongoing costs and expenses of the head trust and the amount of any reserve. There were already insufficient funds in the HT sub-trust's notional account to meet its share of a reserve of £300,000. It would only just cover a reserve in half that amount. Furthermore, if, as the parties considered it likely, the trusts were found by the Court to have failed, then the Court would be giving funds to Mr HT that actually belong to the other parties. As he put it, we would be giving away their money. Such an order would not be preserving the *status quo*. Mr HT must, in effect, sort out his own problems.
- 18 We agreed with the views expressed by Mr Journeaux and for those reasons and because of the lack of full and frank disclosure refused the application.