

Vg Trustee Ltd

Jurisdiction:	Jersey
Judge:	Sir William Bailhache
Judgment Date:	07 November 2018
Neutral Citation:	[2018] JRC 205
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Text

[2018] JRC 205

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, **Bailiff, sitting alone**

Between
VG Trustee Limited
Representor

Advocate N. G. A. Pearmain for the Representor.

Authorities

Trusts (Jersey) Law 1984.

Re S Settlement [2001] JLR Note 37

Re S Settlement 2001/154

Trust—application by the Representor seeking directions from the Court to open a bank account in Jersey.

AND IN THE MATTER OF ARTICLES 51 AND 53 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED) (“THE LAW”)

THE BAILIFF:

- 1 The representation of the Representor (“the trustee”) shows that it is the trustee of the M Trust (“the Trust”), a Jersey law discretionary trust created by deed dated 31st December, 2002. The Settlor of the Trust is A (“the Settlor”). The Trust is essentially for the benefit of the Settlor and members of his family, but in the event of failure of those trusts, there is a long-stop provision for the B Family Foundation. The Court is informed by counsel that this foundation is no longer in existence.
- 2 The trustee asserts that the assets of the Trust fund comprise a ranch in Montana and approximately 50% of a Delaware company that has a holding in a talent agency based in London and in New York. It has a further shareholding in two other companies which are thought to be dormant. Importantly for the purposes of the present application, the trustee holds an undrawn cheque (“the Madoff cheque”) in the amount of £211,379.27, issued from the Madoff Victim Fund. There is potential for further sums of money to be paid by the Madoff Victim Fund to the Trust. All distributions from this fund require the approval of the US Department of Justice.
- 3 3. The difficulty which has arisen is that the trustee has been unable to obtain banking facilities for the Trust, and has therefore been unable to present the Madoff cheque for encashment. In these unusual circumstances, the trustee comes to this court to seek directions pursuant to Article 51 of the *Trusts (Jersey) Law 1984* (Trusts Law) It is not a question of seeking the Court's approval for some momentous decision in accordance with the *Re S Settlement* [2001] JLR Note 37, *Re S Settlement* 2001/154 line of authority, but rather a question of seeking practical help.
- 4 The difficulty in obtaining banking facilities arises out of a conviction which the Settlor has in the State of New York in or about 2009. Following an investigation by the New York Attorney General and the US Securities and Exchange Commission, it transpired that the Settlor had been rewarded with at least US\$12 million in sham finders fees or placement agent fees in respect of investments into the New York State Pension Fund. The Settlor

cooperated with the authorities, and reached agreement with them. The upshot was that he has a conviction for a misdemeanour (he was permitted to withdraw his plea of guilty to a felony violation of New York's Martin Act) and he had to pay US\$12 million in penalties and forfeiture to New York State over a period of three years. In addition to the US\$12 million which has been paid, there was a separate agreement with the US Securities and Exchange Commission that he, the Settlor, would be barred from the securities industry.

- 5 The trustee says that it is unaware of any extant claims of any nature against the Settlor by reference to any of these matters or indeed with regard to the assets held by the Trust.
- 6 The Madoff cheque represents some compensation for losses sustained by the Trust in respect of the notorious Madoff fraud. In 2005 the Trust had invested over US\$1 million into the Palmer PPC Limited Trotanoy Investment Fund, which had itself invested into the Madoff scheme. The original source of this wealth was a series of commissions received into trust for services provided by the Settlor in setting up a number of funds. The payer of those funds is a manager of private equity funds exclusively dedicated to the Italian market, and it is subject to supervision and regulation by the Bank of Italy. There is no indication that the commissions paid were tainted in any way and at the time of receipt, the funds were checked with no suspicious matches or negative publicity.
- 7 When this representation was presented to the Royal Court on 28th September, the Court adjourned further consideration until 30th October, and directed that notice of the representation should be given to Her Majesty's Attorney General and to X bank Jersey ("the Bank") with which some negotiations were being carried out by the trustee. Neither the Attorney nor the Bank have attended before me, but I have seen an email dated 29th October, 2018, from the Bank to Advocate Pearmain in which the Bank says this:-

"Just a quick note to confirm that I am in a position to support you by accepting the funds into your client account pending direction from Court for the onward distribution. Whilst I am pleased to be able to support on this occasion it does not set precedent that we will be obligated in any way to accept any future funds for this structure."
- 8 The reference in that email is to the possibility of Advocate Pearmain's firm Voisin Law receiving the Madoff cheque into its client account. This proposal was made with a view to assisting the trustee which was unable to obtain banking facilities itself by reason of its association with the Settlor.
- 9 Applications of this kind bring into sharp focus competing legal principles. On the one hand, the provision of banking facilities to particular customers is a matter of choice for the bank in question, subject to any regulatory direction which may lawfully be given pursuant to the banking licence which has been issued. Understandably for both reputational and practical reasons, banks and other financial service institutions are reluctant to receive tainted funds, and sometimes indeed are reluctant to grant facilities to those who have been convicted of

criminal offences. This, of course, can cause real difficulty because the banking system is central to the international community's business, and to the ordinary lives of citizens everywhere.

- 10 The competing principle here is that the trustee is obliged under Article 21 of the Trusts Law to carry out and administer the Trust in accordance with its terms, and, subject to the terms of the Trust, so far as is reasonable to preserve and enhance the value of the Trust property. Of course it follows from this that there is an obligation, subject to the terms of the Trust, on the part of the trustee to gather in the Trust property. Here the trustee will be in possession of the Madoff cheque, (the original cheque is to be reissued), and it follows that it is its obligation to collect in those monies.
- 11 In the circumstances that I face here, it appears to me that the only order I am able to make is to direct the trustee to open an account with a bank in Jersey in the name of the Trust in order that the Madoff cheque can be presented for crediting to that account. I add the qualification that the bank account should be in Jersey only because the application for directions has been made to the Royal Court, and the views of the Royal Court in relation to this application are likely to be better received by a bank in Jersey than perhaps a bank in another jurisdiction.
- 12 It may be helpful to any local bank granting facilities to the trustee if I add the following comments.
- 13 13. In this case, there does not seem to be any doubt at all about the integrity of the proposed account holder, namely the trustee. The trustee is a registered Jersey trust company. The Island's protection against money laundering has a number of layers to it, but at least one such layer lies in the requirement that the Jersey Financial Services Commission have to be satisfied before registering a trust company providing trust services that it is a fit and proper person to do so. Banks are entitled to give some weight to that factor in their assessment of the risks of taking on a new account.
- 14 In this case, one of the discretionary beneficiaries of the Trust is the Settlor, who has a misdemeanour conviction following the settlement of a case with the Securities and Exchange Commission in New York. The bank which deals with this Trust will not have direct dealings with the Settlor. It seems to me that what the bank is really concerned with in such a case is to ensure that it is not likely to be the conduit for tainted monies.
- 15 That assessment of course is a continuing obligation not just for any bank opening the account but for the trustee as well. There may be all manner of facts which form part of the make up for that assessment and the Court is unable to express any concluded or definitive view. Fresh facts may emerge. Nonetheless I do feel able to say this.
- 16 Although the Settlor has the misdemeanour conviction to which I have referred, there is no

evidence before me to suggest that these funds represented by the Madoff cheque are tainted funds in any way. That is also the position of the trustee as a regulated financial services provider. What seems to me to be of particular importance in this respect is that it is obvious that the Madoff cheque represents compensation payable to the trustee as a victim of fraud, and not as the perpetrator of any fraud or other criminal offence. It would be really quite surprising if no bank were willing to assist a victim in the recovery of monies due to it. Furthermore, in this particular case, no cheques to victims are being paid out, as we are informed, without the sanction of the Department of Justice in the United States. One assumes that the need for that sanction arises because the Department of Justice are themselves concerned to ensure that the victims' fund is not used to reward criminals. It is not unreasonable to conclude that the Department of Justice must have reached the view that there is nothing tainted about these monies, not just the monies that have been paid out of course, but the original investment into the Madoff Scheme in the first place. Had there been any question about the *bona fides* of that investment, one cannot think that the Department of Justice would have authorised the issue of the Madoff cheque.

- 17 Advocate Pearmain suggested that Voisin Law would perhaps receive the monies represented by the Madoff cheque into its client account and the recent email from the Bank suggests that that bank would be prepared to facilitate that course. I give liberty to apply in case that remains the only way forward but in my judgment it is a second best option. The monies are due to the trustee, and the trustee should have banking facilities to enable it to receive those monies, where there is no evidence of any criminality attaching either to them or to the monies. In this context, the fact that the Settlor has a conviction is neither here nor there. Convicted criminals of the appropriate age are, for example, entitled to receive their State pension and, absent other identifiable risks it would be unreasonable for a financial services provider to take, one would expect banks to accommodate that.
- 18 For these reasons, I order VG Trustee Limited to open an account for the Trust with a bank in Jersey and present the Madoff cheque for credit to that account, with liberty to apply.