E Trust

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Judge:	Deputy Bailiff
Judgment Date:	03 April 2008
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Text

[2008] JRC 53

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Allo **and** Newcombe.

In the Matter of an Application by JA to Intervene in the Representaion of BA, SA and HA

And in the Matter of the E, R, O and L Trusts

Between
JA
Applicant
and
BA, SA and HA
Representors

and

Verite Trust Company Limited
Appleby Trust (Jersey) Limited

and

Advocate P. D. James (guardian ad litem and representative of the minor, unborn beneficiaries
Respondents

Advocate N. F. Journeaux **for the Applicant**.

Advocate M. J. Thompson **for the Representors**.

Advocate L. J. Springate **for Verite Trust Company Limited**.

Advocate F. B. Robertson **for Appleby Trust (Jersey) Limited**.

Advocate P. D. James **in person**.

Advocate A. D. Hoy **for Jemma Trust Company Limited**.

Authorities

In Re Abacus [2000] JLR 165.

Companies Act 2006.

Re a Settlement [1994] JLR 139.

Re Moritz [1959] 3 All ER 767.

Deputy Bailiff

THE

1 This is an application by JA for leave to intervene in certain proceedings instituted by representation by the Representors seeking directions as to whether Verite Trust Company Limited ("Verite") should be removed as one of the co-trustees of four trusts. Intending no discourtesy, we shall for convenience refer to the parties in the same manner as they were during the hearing. Thus we shall refer to the applicant as 'J', HA as 'H' and BA and SA as 'the settlors' or 'the parents' or 'B' and 'S' as the case may be.

The factual background

2 J and H are brothers. J is 16 years older than H. They are the children of B and his wife S. In May 1993 twelve discretionary settlements governed by Jersey law were established; six by B and six by S. In each case Verite was the trustee. These twelve trusts are referred to as the 'Family trusts'. The settlor of each trust settled one share in a company called A Limited ("the Company"). The Company is the parent company of a group of companies which carry on a successful business. J is the chairman and chief executive of the Company. By reason of the exercise of various options, the Family trusts between them hold approximately 89% of the issued share capital of the Company. A further 8% is held directly by members of the A family or other Family trusts and the balance is held by another family. Apart from modest amounts of cash, the sole asset of each Family trust is its shareholding in the Company.

3 The Family trusts were all in broadly similar form. Thus the beneficiaries included (a) the widow or widower of the settlor as appropriate; (b) the children and remoter issue of the settlor; and (c) the spouses, widows or widowers of the children and remoter issue of the settlor. Furthermore there was power in each case for the trustees revocably or irrevocably to declare that the beneficiaries should cease to include any particular beneficiary or class of beneficiaries in which case such persons became Excluded Persons and not entitled to benefit. In the case of a revocable exclusion, such persons remained Excluded Persons for so long as their exclusion remained un-revoked. As can be seen therefore J and H and their respective families were initially beneficiaries of all twelve of the Family trusts although, as we shall see, some were earmarked for the benefit of J's family and some for that of H.

4 On 25th May 1999, following discussions between the brothers, it was agreed to formalise matters further. Verite as trustee executed revocable deeds of exclusion whereby the beneficiaries of the four trusts which are the subject of the Representation were confined to the relevant settlor's widow/widower, H and his issue and any spouses etc of H and his issue. We shall refer to these four trusts as the 'H family trusts'. Similarly, in relation to the remaining eight trusts, the beneficiaries were confined to the settlor's widow/widower, J and his issue and the spouses etc of J and his issue. We shall refer to these eight trusts as the 'J family trusts'. Although the deeds were revocable, those in respect of the J family trusts cannot be revoked during J's life unless he has given his written consent and after his death may only be revoked with the consent of such a person as J may have nominated for that purpose during his life or by will. There are matching provisions in the deeds relating to the H family trusts so that the deeds can only be revoked with his consent during his life and thereafter with the consent of the person nominated by him. Thus the H family trusts (which own approximately 20% of the share capital of the Company) are held only for H and his family and the J family trusts (which own approximately 69% of the share capital of the Company) are held only for the benefit of J and his family. In each case the settlor's widow or widower may still benefit.

5 For the past few years J and H have been in dispute in relation to the affairs of the Company. Since 2005, together with their parents, they have been discussing ways in

which they might resolve their differences but so far to no avail.

6 From the creation of the Family trusts in 1993, the sole trustee had been Verite. However, against the background of this disagreement between the two brothers, the parents exercised their respective powers as settlor and appointed a co-trustee to each of the Family trusts to act with Verite. On 13th December 2005 Appleby Trust (Jersey) Limited ("Appleby") was appointed co-trustee with Verite of the four H family trusts and Jemma Trust Company Limited ("Jemma") was appointed as co-trustee of the eight J family trusts.

7 In October 2006 Verite issued two representations, one concerning the J family trusts and the other the H family trusts. In essence, the representation sought directions from the Court as to whether Verite should resign as trustee of some or all of the trusts. This was on the basis that a dispute had arisen between H and J, and H and the parents had requested Verite to resign as trustee of the H family trusts. Verite was concerned as to whether it was now in a position of conflict of interest. On 5th February 2007, Verite withdrew its representations. However, on 9th March 2007, the parents and H brought their current representation which seeks the removal of Verite as co-trustees of the H family trusts. The application has been adjourned on various occasions to enable 'without prejudice' negotiations to take place between the brothers but no resolution has yet been reached. A date has now been fixed for the hearing of the representation on 21st May 2008 and it is in those circumstances that J has proceeded with his application to intervene.

8 Although the representation and supporting affidavit of H give little detail of the alleged conflict of interest, H has sworn a second affidavit for the purposes of this application. In the affidavit he states that, because of the dispute between him and J in relation to the affairs of the Company (as to which he gives little detail) he is considering bringing a minority shareholder's petition (he is personally a shareholder in the Company) in the High Court in England in relation to the conduct of the affairs of the Company. He wishes the trustees of the H family trusts to consider whether they should join with him in bringing that petition. In order to progress this, he needs to discuss the position fully and confidentially with his trustees. He says that he cannot do this as long as Verite is a co-trustee because it is also trustee of the J family trusts and owes duties to the beneficiaries of those trusts.

The Letters of Wishes

9 The parties convened to the representation seeking removal of Verite as co-trustee of the H family trusts are the beneficiaries of those trusts (i.e. H's family and the minor and unborn beneficiaries) and Appleby as co-trustee. On the face of it, J is not entitled to be convened as he is not a beneficiary of those trusts; he is a stranger to them.

10 However J argues that he is the *de facto* settlor of these trusts and accordingly ought to be convened so that he has an opportunity of providing evidence and making submissions upon the proposed removal of Verite. He has produced an affirmation which goes into

considerable detail concerning the origin of the Family trusts and the various letters of wishes which have been written over the period. It is necessary for us to summarise the effect of his evidence briefly.

11 He explained how, in the years leading up to 1990, he had built up the Company as a successful company. He owned 45% of the shares. However, in the early 1990's the Company ran into financial difficulties as a result of the recession, the collapse of BCCI and other matters. Accordingly he entered into negotiations with the Company's bankers in an attempt to secure a rescue package to save the Company from insolvent liquidation. A plan was developed whereby the banks would acquire certain shareholdings in the Company; but, he explained, they were very keen to incentivise J in order that he should remain and steer the Company out of its difficulties so that the banks could recover their money. The arrangement reached was that various options would be conferred on the family. It was, says J, entirely his decision as to who should receive the benefit of these options. The banks would have agreed with any suggestion he made because he was the key person whom they wished to retain. Following receipt of tax advice, J arranged that the options should be conferred on the twelve Family trusts which would be established in Jersey by his parents, who were not domiciled in England. After the Family trusts were established (with an initial gift of £10) the relevant settlor transferred a single share of £1 in the Company to each of the Family trusts in October 1993. As a shareholder of the Company Verite, on behalf of the various trusts, then entered into a shareholders' agreement which conferred the relevant options. These options were subsequently exercised in 1997 so that, between them, the Family trusts now own approximately 89% of the Company.

12 Shortly after the establishment of the Family trusts a letter of wishes was signed by the settlor (being the relevant parent) of each trust on 27th April 1994. The Family trusts were divided into three groups. Four of the J family trusts were clearly intended for J and his family but there was provision for the benefiting of directors and employees of the Company if J so wished. The second group of the J family trusts were clearly intended solely for J and his family and the settlor's wishes in that respect were said to be 'irrevocable'. In relation to the four H family trusts the letters of wishes contained the following material provisions:-

(i) the trustee should consult J on the management, administration and investment policy of the relevant trust;

(ii) the relevant trust had been set up for the benefit of H and his family and consequently all the benefit under the trust should go to him;

(iii) nevertheless, if J requested the trustee to pass some or all of the benefit under the trust to other beneficiaries, the trustee should follow his wishes;

(iv) although the trust had been set up for the benefit of H and his family, the trustee should seek the wishes of J in relation to the trust and he might from time to time change his wishes.

13 As already mentioned, the position changed in 1999. This occurred because H wished to achieve greater certainty that only he and his immediate family could benefit from the H family trusts. In anticipation of the execution of the various deeds of exclusion, new letters of wishes were executed. The first one was on 3rd December 1998 signed by J. It was an over-arching letter of wishes which was expressed to apply to all twelve Family trusts. The key provision was that the letter expressed J's overriding wish that the shares in the Company held by the Family trusts should not be disposed of other than as part of a disposal of the entire family interest in the Company, including any shares held in various UK trusts. The letter also expressly requested the trustees not to divide the Company shares into smaller holdings, for example by passing blocks of shares to individual beneficiaries or by selling part of the shares to pass on a cash benefit to one or more beneficiaries. J expressed the view in the letter that any division or part disposal would reduce the overall value of the holdings of the Family trusts and might create problems by having dissident shareholders. On 1st February 1999, J signed further letters of wishes in respect of all twelve Family trusts. One letter dealt with the H family trusts and stated that the letter was subject to J's wishes concerning the shares in the Company as set out in the letter of 3rd December 1998. The letter then made it clear that it was J's irrevocable wish that the trustee should have regard to H's wishes with regard to any distributions from the trusts whether during his life or following his death. The position was of course formalised by the execution of the deeds of exclusion on 25th May 1999. As to other matters the letter said this:-

> *"Subject to this, in relation to other matters relating to the management policy of the trusts, I may wish to change my wishes.* If I do, I will write to you again, however I would like you to obtain H's consent before a new memorandum of wishes is substituted in place of this one."

14 On 10th November 2000 J executed a further overriding letter of wishes dealing with all twelve trusts and which was expressed to replace that of 3rd December 1998. However the material provision about keeping the holding of shares in the Company together was not altered. H countersigned the letter of wishes so as to consent to it in respect of the four H family trusts.

15 Finally, on the topic of letters of wishes, the second affidavit of H exhibits a letter of wishes executed on 18th July 2006 by both the settlors in which, having referred to the fact that in the original letters of wishes in April 1994, they had said that the trustee should consult J on the management, administration and investment policy of the four trusts, they said:-

> *"We now wish to revoke our previous wish in that regard and now ask that, during our life and after our death, you consult with HA alone with regard to the management, administration and investment policy of the four Trusts.* After his death, we ask that you consult a person nominated by him.
>
> *However, we confirm that it remains our wish, as expressly stated in the memorandum of wishes of 27th April 1994, that all the benefit under the four Trusts should go to HA."*

J's submissions

16 J and his family are clearly not beneficiaries of the H family trusts. Mr Journeaux accepted that non-beneficiaries are not normally convened to proceedings which seek the Court's direction to trustees. However, he pointed out that there was a discretion to convene non-beneficiaries where appropriate and referred to *In Re Abacus* [2000] JLR 165 where Grupo Torros, as a creditor of Sheik Fahad, was convened to an application on whether the trustees should be directed to make an appointment to Sheikh Fahad so as to reduce the debt which he owed to Grupo Torros.

17 He submitted that this was an appropriate case for the Court, in its discretion, to convene a non-beneficiary. He pointed out that J had strong connections with the H family trusts. Thus he was the effective settlor in that he arranged for the options in the Company to be acquired by the Family trusts. This was reflected in the original letters of wishes which provided that he should be consulted on matters of management, administration and investment policy even in relation to the H family trusts. The subsequent letters of wishes from J made clear his strong desire that the shareholding in the Company should not be sub-divided and should be retained as a whole for the benefit of the family.

18 Furthermore, he submitted, J had an interest which was directly related to the subject matter of the dispute, namely whether a minority shareholder action should be brought in connection with the affairs of the Company in the English High Court. He had this interest not only because of his desire on behalf of the family to keep the family interest in the Company intact, but he would also be directly affected by the outcome of the dispute. If the Court were to agree to remove Verite, then Verite would no longer be in the unique position of acting as a trustee of all the Family trusts. As a result, its ability to influence and hopefully resolve the family dispute would be greatly diminished. Furthermore, if, as H clearly believed, the removal of Verite were to improve the prospects of the trustees of the H family trusts participating in proceedings against J and/or the J family trusts, then J might suffer as a result of the Court's decision because he would have to defend proceedings launched against him. He thus had sufficient interest of his own to justify his inclusion as a party to the representation.

19 Mr Journeaux submitted that there were three stages which should be followed to resolve the differences which had arisen in the family. In stage one the beneficiaries should attempt to reach agreement themselves. This had been attempted without success. In stage two, the beneficiaries would explain the dispute to the trustees and ask the trustees what action they might take to find a solution which met the needs of all the beneficiaries of their various trusts. This action might involve the trustees using their powers, which in this case were linked to Verite's legal ownership of the majority of the Company shares. Stage two had not yet commenced in the present case. Stage three would arise if the trustees could not agree a solution using their own powers and sought directions from this Court as to whether they should take the dispute to trial in the English courts. Mr Journeaux submitted that it was essential that stage two should be pursued and that Verite should remain in place until this

had been tried. J wished to have the opportunity of putting these arguments at the hearing to remove Verite. The Court would be assisted by not only the presentation of evidence by J but also the making of submissions on these topics.

20 Finally, Mr Journeaux submitted that it was important that J should see all of the material placed before the Court in connection with the representation save for privileged information. Thus J should see at this stage the full scope of the allegations that are going to be made against J so as to justify relief under Section 994 of the Companies Act 2006, the particular relief which will be sought and the terms of any detailed letter before action as required by the English civil procedures rules. As Mr Journeaux put it right at the end of his oral submissions in reply, J wishes to know what is the justification for the possible company law claim against him. It will have a huge effect on the family structure and he wishes to know the factual basis of a claim which might destroy the family structure; he was entitled to know the allegations which were going to be made personally against him.

Discussion

21 When the Court sits in its supervisory capacity to consider directions or rulings it should give in relation to a trust, it has to consider in each case who should be convened to the hearing. The starting point is that the trust property is held beneficially for the beneficiaries and accordingly it is normally appropriate that they should be convened (see *Re a Settlement* [1994] JLR 139 at 144 per Bailhache, Bailiff). However, as that case made clear, it is not invariably the case that all the beneficiaries need to be heard. Many of them may have an identical interest; alternatively their interest may be extremely remote. It is ultimately a matter for the discretion of the Court as to which beneficiaries should be convened having regard to the nature of the particular application and the particular circumstances.

22 Even where a beneficiary has an adverse interest (e.g. he will be the opposing party in litigation which the trustee proposes to commence) it is still usually appropriate to convene that beneficiary to the application for directions. However, as is made clear in *Re Moritz* [1959] 3 All ER 767, the Court may in such circumstances order that some or all of the written material produced to the Court by the trustee or other beneficiaries is not supplied to the adverse party and may also require the adverse party to leave the Court whilst it hears the trustee and other beneficiaries about the strength or weaknesses of the course of action which is proposed. Such a procedure is frequently adopted in this Court.

23 As well as beneficiaries, the Court may think it appropriate to hear from others who have a close connection with the trust even if they are not beneficiaries. For example there may be a protector whose views would be material; and sometimes the nature of the issue before the Court may mean that is appropriate to hear from the settlor even if he is not a beneficiary. But again, whether this is appropriate will depend upon the circumstances.

24 Occasionally, but rarely, the Court may think it appropriate to hear from persons who are neither beneficiaries nor have the sort of connection just referred to. An example of this is the case of *Re Abacus* referred to by Advocate Journeaux. In that case Grupo Torros was a creditor of the settlor and had brought proceedings seeking to challenge the gifts into the trust. It also had a proprietary claim against some of the trust assets. The trustee sought directions as to whether it should distribute all the trust assets to the settlor (who was also a beneficiary) with a view to reducing his debt to Grupo Torros as his creditor. In its discretion the Court decided that it would be appropriate to convene Grupo Torros to the trustee's application on the basis that the company was not a mere creditor but asserted a proprietary interest in some of the monies and the Court felt that it would benefit from the detailed knowledge of the history of the matter which Grupo Torros possessed.

25 As Bailhache, Bailiff made clear at 168 in *Re Abacus*, the question is whether it is necessary that a party be convened in order properly to determine the trustee's application (or in this case that of the beneficiaries). If that test is satisfied, the Court has a discretion to convene the relevant party. It seems to us that the underlying rationale for convening a beneficiary is essentially two-fold:-

Neither of these considerations is likely to have such strength in the case of a person who is not a beneficiary. It is for this reason that it is only rarely appropriate to convene a stranger to the trust to an application for directions.

(i) It is likely that a beneficiary will have something material which the Court ought to be aware of before deciding what directions to give. Thus the view of a beneficiary on whether it would be right to take a particular course of action is clearly something relevant for the Court to know.

(ii) It may also be thought unfair for the Court to make a decision which would affect the trust (and therefore the interests of a beneficiary) without giving that beneficiary an opportunity of putting his observations to the Court.

26 J is a stranger to the H family trusts. He and his family are not beneficiaries and cannot become so unless the trustees revoke the 1999 deeds, which would require the written consent of H. Nor is J the settlor of any of the family trusts. He argues that he is the *de facto* settlor in that he organised the establishment of the Family trusts and procured the opportunity for the trusts to acquire the options. Furthermore he points to the original letters of wishes signed by the settlors which made it clear that he should be consulted in relation to the management, administration and investment policy of the trusts including the H family trusts. However that letter of wishes was revoked by the settlors in December 2006.

27 When considering whether this background makes it necessary to offer J the opportunity of being heard, it is necessary to concentrate on what the Court is actually being asked to consider in this particular representation. The sole issue for consideration at this stage is whether Verite should be removed as a trustee of the H family trusts leaving Appleby alone as trustee of those trusts.

28 J argues that this is a matter upon which he is entitled to be heard. We do not agree. The test is whether it is necessary that he be convened in order properly to determine the representors' application to remove Verite. In our judgment it is not necessary. We would summarise our reasons as follows:-

(i) The question of whether a trustee of a trust should be removed is quintessentially a question for the beneficiaries of that trust. The trustee holds the assets for the benefit of those beneficiaries and is under a duty to act solely in their best interests. It is hard to envisage circumstances in which, in order for the Court to decide whether there are grounds to remove the trustee, it would be necessary to hear from a person who is neither a beneficiary nor a person with a power of appointing new trustees.

(ii) The sole ground relied upon by the representors as justifying the removal of Verite is that, in view of the dispute between H and J and the fact that H wishes the trustees of the H family trusts to consider joining him in a company law action in England concerning the Company, Verite is in a position of conflict of interest. H argues that, in order that he can have full and open discussions with his trustee, that trustee must be someone who has no obligations towards J and his family. Whether this is a ground which justifies Verite's removal is not a matter upon which J needs to be heard.

(iii) What J says is that he has strong views and considerable information to put forward on the importance of keeping the family shareholding in the Company together. However we do not think that this aspect of the matter is directly relevant to the present representation, namely the removal of Verite.

(iv) J wishes to argue that Verite can fulfil a useful role by remaining as trustee of all the Family trusts. He thinks it could facilitate the stage two negotiations. However, that is to misunderstand the legal position. There are already two separate holdings in the Company. Verite and Appleby are the co-owners of the shares held for the H family trusts and Verite and Jemma are the co-owners of the shares held for the J family trusts. Thus Verite has already lost the opportunity of controlling matters as sole shareholder. But even if it were still the sole shareholder, this would not assist J in this argument. A trustee has to act solely in the best interests of the beneficiaries of the trust of which it is trustee. Thus, when deciding what to do as trustee of the H family trusts, Verite has to have regard solely to the interests of H and his family; and vice versa in relation to the J family trusts.

(v) It follows that the removal of Verite would make no difference to the legal position. Whoever is the trustee of the H family trusts must look at matters (including whether to litigate in England against J and the J family trusts) solely from the point of view of the best interests of the beneficiaries of the H family trusts. To that extent the identity of the trustee of the H family trusts is irrelevant.

(vi) We were left with an impression that one of J's reasons for wishing to intervene was to find out as much as possible about what H proposes to allege against him in any company law action in England. Thus he seeks an order that all documentation

filed by the representors in their representation be disclosed to J; and in paragraph 22 of his skeleton argument it is said to be appropriate for J now to be apprised of the full scope of the allegations that are said by H to be going to be made against J to justify relief under Section 994 of the Companies Act 2006 and of the particular relief which will be sought and against whom. This aspect was repeated in the oral submission summarised at paragraph 20 above. In our judgment such matters cannot be relevant when considering whether it is necessary to hear from J before deciding whether Verite should be removed as a co-trustee in light of the perceived conflict. Indeed, the fact that J clearly has interests of his own to protect and could in theory delay matters if he were convened as a party by, for example, appealing any decision which the Court made concerning Verite, might be thought to be an additional reason for not thinking it appropriate to allow him to intervene in the particular circumstances of this case.

29 In due course, whoever is trustee of the H family trusts will have to decide whether it is in the best interests of the beneficiaries of those trusts to join H in any proceedings which he launches as minority shareholder of the Company against the majority shareholder. This will require whoever is trustee to consider the position very carefully and obtain independent legal advice. It would be wholly insufficient for any such trustee simply to follow H's wishes without reaching an independent conclusion on what the best course of action for the beneficiaries of those trusts would be. Furthermore, it seems inconceivable that any trustee of the H family trusts would contemplate launching proceedings before it had explored with J and the trustees of the J family trusts whether any form of compromise could be reached so as to resolve the dispute without the need for legal proceedings. Thus, at that stage, the stage two discussions referred to by Advocate Journeaux would have to take place.

30 If the trustee concluded that it was the right course to institute proceedings, it would presumably issue a Beddoes application seeking the Court's approval to the institution of such proceedings. At that stage, one can at any rate see the argument that it might be appropriate to give J, notwithstanding his position as an adverse party, the opportunity of putting forward why he considered this not to be in the best interests of the beneficiaries of either group of trusts because of the damage that it might do to the sole underlying investment of all the Family trusts, namely the Company. The reason for thinking it might be appropriate to hear from him would be because of his alleged position as *de facto* settlor and the various letters of wishes indicating that his views should be sought even in relation to the management of the H family trusts. We emphasise that we are not indicating one way or another what our decision might be on such an application; this would depend upon the circumstances at the time. But we are stating that we can at any rate see the argument.

31 That is to be distinguished from the current application where we cannot see any grounds upon which it is necessary to hear J in order to decide the simple issue of whether, given the dispute which has arisen between J and H and given that H wishes to discuss with the trustee of his family trusts the possibility of those trusts joining him in litigation against J and the J family trusts, Verite should be removed on the ground that it is in an impossible

position. We do not consider that it is necessary to hear J on that narrow issue.

32 We therefore dismiss his application to intervene.