

J Trustee Ltd v A

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Jurats Averty, Le Cornu
Judgment Date:	16 January 2023
Neutral Citation:	[2023] JRC 6
Court:	Royal Court

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Text

Between
J Trustee Limited
Representor
and
(1) A
(2) B
(3) C
(4) D
(5) E
(6) F
Respondents

[2023] JRC 6

Before:

Sir William Bailhache, Commissioner, and Jurats Averty and Le Cornu

ROYAL COURT

(Samedi)

Trust — blessing of a momentous decision

Authorities

Trusts (Jersey) Law 1984

Re S Settlement [2001] JLR Note 37.

Kan v HSBC International Trustee Limited and Others [\[2015\] \(1\) JLR Note 31](#).

Advocate A. Kistler for the Representor.

Advocate S. M. J Chiddicks for the First Respondent.

The Second, Third, Fourth, Fifth and Sixth Respondents did not appear.

THE COMMISSIONER:

- 1 This judgment concerns an application by the Representor (the “Trustee”) for an order under Article 51 of the Trusts (Jersey) Law 1984 (the “Trusts Law”) approving or blessing the decision of the Trustee in principle to account to the Fourth and Fifth Respondents for certain foregone 2014 / 2015 capital distributions, paying them amounts equivalent to the sums foregone, and thereafter to distribute, gross of any tax payable, the assets of the Z Trust (the “Trust”), a Jersey law discretionary trust established by trust deed (the “Trust Deed”) dated 12 December 2011, by giving each of the Respondents as close as reasonably practicable a one-sixth share of the value of the Trust fund after deducting the Trustee's outstanding reasonable fees, costs and expenses, and thereafter terminating the Trust.
- 2 The Trust Deed was made by the settlors G and H (together, the “Settlors”) and the Trustee.
- 3 The Trust is governed by Jersey law. It provides that the beneficiaries of the Trust are the issue and remoter issue of the Settlors jointly who are aged 18 and over; the Settlors themselves and their joint issue under the age of 18 are excluded persons. The six Respondents are the children of the Settlors and have been duly convened. Their parents, the Settlors, have not been convened. By Act of the Court dated 7 October 2022, each of the convened parties is appointed also to represent their respective issue, unborn issue and remoter issue. The Trustee has power both to add beneficiaries and to add to the class of excluded persons, subject to the consent of the Settlors acting unanimously, but no persons have either been added or excluded.
- 4 The current assets of the Trust are in the region of £4.7 million, made up of shares and bonds in a range of non-UK listed entities.

- 5 The Trustee has wide discretionary powers of appointment over both the capital and income of the Trust and is not subject to any requirement to obtain consent from any third party before exercising such powers.
- 6 Although it is true that the joint issue of the Settlers under the age of 18 are excluded persons, they still have a contingent interest in these proceedings as they are excluded only until they reach the age of 18. As they have no current interest and in the light of the relatively modest Trust fund, it was not inappropriate for the Court to have appointed the convened beneficiaries as both their representatives and as representatives of any of the unborn and remoter issue, thus also saving costs.
- 7 Unfortunately, there has been a breakdown in the family relationships. Originally the Trustee had made regular payments to the adult beneficiaries in accordance with the early letters of wishes executed by the Settlers, but these ceased when the Trustee received from the Settlers a Letter of Wishes in November 2020 (the "November wishes") requesting the Trustee to terminate any regular distributions forthwith. The November wishes were executed in the context of the breakdown in family relationships. The Trustee had already commenced a review of the arrangements for the Trust and it seems to us the November wishes focussed its attention on the need to take time to consider its position. In the event, having given the November wishes the consideration that it was proper to do, the Trustee reached the conclusion that it was in the best interests of the beneficiaries as a whole, and a proper exercise of its discretion, to reinstate the regular distributions and review generally its administration of the Trust given the size of the Trust fund, the level of trustee fees and its policy of no longer holding Advisory Managed Portfolio assets, which comprised the bulk of the Trust assets, but insisting on the appointment of discretionary portfolio managers. If this policy were implemented, there would be the risk of significant transaction costs incurred which would deplete the value of the Trust fund.
- 8 The Trustee consulted with the beneficiaries, some of whom are resident in the UK, and each of them responded to indicate general support for the view that the Trust fund should be distributed and the Trust terminated. However, the beneficiaries were not in agreement as to how the Trust fund should be allocated between them. The First and Third Respondents considered that the Trust fund should be distributed equally between the six siblings. The Second, Fourth, Fifth and Sixth Respondents considered that any distribution should be to them only to the exclusion of their brothers. Although this position had not entirely changed by the time the Court hearing took place on the Trustee's application for its proposals to be approved and blessed, with the Fifth Respondent in particular expressing her disappointment at the Trustee's decision, all the siblings indicated that they accepted that decision and did not wish to challenge it in court.
- 9 The evidence before the Court is that each of the beneficiaries has some assets, and none of them are in a position of financial hardship. It is also clear that none of the beneficiaries have any independent employment income, and all would continue to have recourse to the Trust fund if it were not terminated.

- 10 For reasons which it is unnecessary to detail for the purposes of this judgment, the Fourth and Fifth Respondents received no capital distributions between July 2014 and October 2015. These were temporarily suspended in 2014/2015, although, notably, the suspension did not affect the Sixth Respondent as she did not start receiving capital distributions until 2016.
- 11 The Trustee formed the view that, in principle, the Trust fund should be split equally among the six siblings, compensating the Fourth and Fifth Respondents for those capital distributions which were suspended. In reaching that view, the Trustee had regard to the purpose for which the Trust was established, i.e. to benefit the siblings, and the wishes of the Settlers prior to the breakdown in family relationships, the value of the Trust fund and the needs, means and circumstances of the beneficiaries including the financial information they provided. The Trustee obtained tax advice in August 2022, details of which were put before the Court. The proposal of the Trustee is to distribute the balance of the assets of the Trust gross of any tax payable, but after deducting the Trustee's outstanding reasonable fees, costs and expenses incurred to date.
- 12 In bringing its application for a blessing of its decision, the Trustee has not proposed that the Settlers should be convened. This might be thought surprising. It was, after all, the bounty of the Settlers which provides the benefit which will devolve upon the beneficiaries if the appointments are made as contemplated, and those Settlers made provision for a trust period which would run for the maximum time that settlements can run under the proper law of the settlement from time to time, subject of course to any appointment by the Trustee during the Trust period to declare a shorter period. As a result of the November wishes given to the Trustee by the Settlers, it is clear that there is no current intention on the part of the Settlers that the present beneficiaries should benefit at all. For these reasons, it can be anticipated that the Settlers would be anxious to persuade the Court not to give its blessing to the decision which the Trustee has taken in principle.
- 13 When this point was put to Advocate Kistler on behalf of the Trustee, his response was that it was not realistic to expect the female respondents, the daughters of the Settlers, to give their views if the Settlers had been convened. The internal dynamics of the family would be such that it was unlikely that the daughters would wish to take up a position which was hostile to the wishes of their parents. Furthermore, the Settlers were of course excluded persons, and therefore had no interest in the Trust fund as such. The nature of the settlement which had been made in 2011 was such that the Settlers lost control over that property. As it was necessary that the Court should be advised of any views genuinely held by the beneficiaries, and those views would be unlikely to be expressed if the Settlers were convened, it was in principle appropriate not to convene the Settlers. Having considered the correspondence which the Trustee has had both with the Settlers and their Jersey lawyers and with the beneficiaries, we understand the Trustee's approach and accept the submission made that the Settlers should not be convened.
- 14 As indicated, the Trustee's in principle decision to terminate the Trust and distribute the

Trust fund is supported by all the convened beneficiaries, albeit the daughters of the Settlers are disappointed that the distribution has not been proposed in the form which they had requested. They nonetheless do not oppose the application to bless the decision. This position has primarily been advanced by Advocate JM Renouf, who, although instructed by the Fifth Respondent alone, asserted in correspondence that his instructions were that his client's position was shared by her sisters.

- 15 As set out below, the Court approves the application of the Trustee to have its decision to distribute the Trust fund among the current beneficiaries and terminate the Trust blessed. We have sat in private to hear the application as is customary for applications of this kind, and albeit we have decided against it for reasons which include the fact that the Settlers are excluded persons, we have considered whether the Settlers should be convened. We do not think it would be right, however, for the Settlers to be unaware of what has taken place. Notwithstanding that we have sat in private, we direct the Trustee to provide this paragraph from the Court's judgment to the Settlers promptly on the same being handed down.

The test

- 16 The test on whether to approve or bless a decision of this kind is well settled. On an application by a trustee for the Court's approval of a momentous decision, i.e. a decision of real importance for the trust, the Court must satisfy itself that (a) the trustee has made the decision in good faith; (b) the decision is one which a reasonable trustee, properly instructed, could have made; and (c) the decision has not been vitiated by any actual or potential conflict of interest. This was the decision of this Court in *Re S Settlement* [2001] JLR Note 37, approved by the Court of Appeal in *Kan v HSBC International Trustee Limited and Others* [\[2015\] \(1\) JLR Note 31](#).

Discussion

- 17 We are satisfied that the Trustee has made its decision in good faith. The factors taken into account are these:
- (i) The Trust, which is limited in value, was established for the benefit of the Settlers' adult children, and it is likely to be exhausted during their lifetimes.
 - (ii) Given the value of the Trust and the level of Trustee's fees it is more cost effective for the Trust fund to be distributed (subject to tax advice) to the beneficiaries, who can utilise and invest the funds as they see fit.
 - (iii) The majority of the beneficiaries have explained that they rely on the Trust fund to support their living expenses – therefore it is in their interests that the Trust fund be applied for their benefit.
 - (iv) The move from advisory management to discretionary portfolios would have the

consequence that the discretionary portfolio manager will incur transaction costs which would be an unnecessary expense if there is a call for a substantial part of the Trust fund for any one or more beneficiary.

- 18 In our judgment, the first three of these reasons are legitimate. If the decision had been taken purely on the ground of the transaction fees, we are not sure we would have been quite so comfortable; but the expressed thought processes of the Trustee justify the conclusion that it has acted in good faith. The essential point is that the Trust fund is diminishing in capital value and it is in the interests of the beneficiaries that the Trust be brought to an end before that value is reduced further.
- 19 In the circumstances, we are satisfied that this was a momentous decision, made in good faith.
- 20 The next question is whether or not the decision of the Trustee was a reasonable decision. In that context, it is of interest that the sons of the Settlers have always received more than the daughters. Indeed it was for this reason that the daughters urged the Trustee to the view that Trust fund ought to be distributed only amongst the female children of the Settlers. The daughters advanced the view to the Trustee that their brothers had been given significant financial support from their parents, and this had not been reciprocated in respect of the sisters. As a consequence of this, they were not financially independent and secure in the same way as their brothers who had been able to maintain a standard of living incomparable with that which the sisters now experienced. Some detail of the gifts made to the First and Third Respondents by their parents were set out, including a substantial cash sum paid to the First Respondent in 2018 on the promise that he would distribute the sum of €750,000 to each of his siblings, which, it is said, he has not in fact paid.
- 21 In our judgment it is not necessary in this case for us to have regard to non-Trust assets both because each of the beneficiaries has at least some non-Trust assets and because unequal payments to the male beneficiaries was the basis of the Settlers' wishes until the November wishes were expressed. We are far from saying that we would have taken the decision on the same basis but in our judgment the decision falls within the band of reasonable decisions which a trustee might make. At the margins, we have also had regard to the fact that, if we were to take any other view, it would be necessary to have some full scale trust litigation between beneficiaries who have shown no wish to litigate; or as an alternative we would see the Trust fund being progressively diminished over the next few years until it was uneconomic to maintain it.
- 22 The last consideration for us is whether the Trustee has any conflict of interest. No one has argued that it does have such a conflict; but we have considered whether the internal policy in relation to the move from Advisory Management Investments to a discretionary portfolio, which we assume has been adopted for the purposes of harmonised economic benefit across its trust operations, amounts to a conflict. In our view it is not such a conflict as requires us to set aside the decision. When settlors make arrangements for a large

corporate organisation to act as trustee, they must expect that the trust operations will be governed in accordance with the type of policies which large organisations adopt. This Court would certainly not say that it was contrary to trust law for discretionary investment policies to be adopted as opposed to an advisory management trust, albeit we have not been fully addressed on that issue; indeed, on the face of it, the discretionary manager may in some cases have a much better handle on appropriate investment policy for the particular trust than a less well qualified officer within the trustee organisation who has overall responsibility for trust administration in the case of particular trusts. In any event, even if we were to decide that there was a conflict, the nature of that conflict would go to the question of whether the Trust should be terminated and, in those circumstances, we would have taken the same decision as the Trustee on that narrow point.

23 For all these reasons we have concluded that it would be appropriate to bless the decision of the Trustee and we accordingly do so. Accordingly, we approve the Trustee's in principle decision to:

- (i) account to the Fourth and Fifth Respondents for their foregone 2014 / 2015 capital distributions, paying them amounts equivalent to the sums foregone.
- (ii) thereafter distribute (gross of any tax payable) the assets of the Trust, giving each beneficiary (as close as reasonably practicable to) a one-sixth share of the value of the Trust fund, after deducting the Trustee's outstanding reasonable fees, costs and expenses incurred to date; and
- (iii) terminate the Trust.

24 All the convened parties should have their costs incurred in or about this Representation paid from the gross of the Trust fund. The order is made in this way to pick up the possibility that individual beneficiaries have incurred costs in obtaining advice on the Trustee's proposals, even though they have not been represented before this Court.