

Re M and L Trusts

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	07 January 2003
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Text

[2003] JRC 2A

ROYAL COURT

(Samedi Division)

Before:

M C St J Birt, **Esq.**, Deputy Bailiff **and** Jurats Le Brocq **and** Bullen

In the Matter of the M Trust

Between
Nearco Trustee Company (Jersey) Limited
Representor
and
(1) AM
(2) ES
(3) J
(4) S

- (5) G
- (6) A
- (7) JS
- (8) GL
- (9) The LCLLPC
- (10) PS
- (11) RMB
- (12) Mrs GS
- (13) La RCHRF

(14) Advocate Ashley Hoy as representative of the unborn children, grandchildren and great-grandchildren of PS and any other contingent or unascertained interest under the M Trust

Respondents

In the Matter of the L Trust

Between

Nearco Trustee Company (Jersey) Limited
Representor

and

- (1) AM
- (2) PS
- (3) J
- (4) S
- (5) G
- (6) A
- (7) JS
- (8) GL
- (9) RMB
- (10) The LCLLPC
- (11) Mrs GS
- (12) La R CHRF

(13) Advocate Ashley Hoy as representative of the unborn children, grandchildren and great-grandchildren of PS and any other contingent or unascertained interest under the L Trust

Respondents

Advocate N J Chapman for the representor

Advocate L Springate for the second, third and fourth respondents

Advocate D J Benest for the fifth, sixth, eighth, tenth, twelfth and thirteenth respondents

Advocate A Hoy in person

Advocate D J Benest for the second, fifth, sixth, eighth, eleventh and twelfth respondents**Advocate L Springate for the third and fourth respondents****Authorities**

In re Moritz deceased [\(1960\) Ch 251](#).

Re Rabaotti [\(2000\) JLR 173](#).

[Re Lemos Trust Settlement](#) (1992–1993) CILR 26.

Application for directions by Trustee.

Deputy Bailiff

THE

- 1 This is an application by Nearco Trustee Company (Jersey) Limited (“the Trustee”) as trustee of two trusts, for directions on the part, if any, which it should play in proceedings instituted before the courts of the State of Illinois. We gave our decision on 17th December 2002 and now give reasons.

THE TRUSTS

- 2 The M Trust (formerly known as the P Family Trust) was established by instrument of trust declared by the Trustee on 6th March 1995. It is a discretionary trust. The settlor of the trust was PS (“the settlor”). The class of beneficiaries (after allowing for additions to the class made since 1995 pursuant to the power in that behalf conferred by the trust instrument) comprises ES (“the mother”), the children and remoter issue (present or future) of the settlor, JS, GL, the LCLLPC, the settlor, RMB, Mrs GS and La RCHRF.
- 3 The L Trust was established by instrument of trust dated 2nd October 1997. It is also a discretionary trust. PS was again the settlor. The beneficiaries are the same as for the M Trust save that the mother is not a beneficiary of the L Trust.
- 4 J is the daughter of the settlor and the mother. She is aged 25. S was adopted by the settlor and the mother. She is aged 17. She suffers from mental and physical disabilities which mean that she will never be in a position to look after herself. G and A are the children of the settlor by his second wife Mrs GS. They are minors.

- 5 Both trusts are expressed to be governed by the law of Jersey. They are administered in Jersey by the Trustee, which is a Jersey incorporated company carrying on the business of trustee in Jersey.

THE ILLINOIS PROCEEDINGS

- 6 The settlor and the mother were divorced in 1996. On 18th September 1996 the Domestic Relations Division of the Circuit Court of Cook County, Illinois County Department ("the Illinois Court") made an order in the divorce proceedings between the settlor and the mother based upon the agreement of the parties. The order granted a decree of divorce, gave sole care, custody and education of S to the mother and ordered the settlor to pay the monthly sum of \$3,500 as child support for S. In view of S's disabilities, it was acknowledged that she would require support after she attained the age of majority. The settlor was also ordered to pay the reasonable tuition, application fees, books and registration fees for S's primary and high school education and reasonable expenses for a college, university, vocational school or other learning institution thereafter.
- 7 On 5th August 1999 the settlor filed a petition in the Illinois Court seeking a reduction in the child support and educational payments for S on the basis that his income had decreased since the date of the order and he was unable to pay the same. We were informed that he owes \$60,000 arrears in respect of child support, \$24,000 arrears in respect of educational expenses and \$209,000 in respect of legal fees.
- 8 Had the matter rested there as a dispute between the settlor and the mother as to maintenance for S, the matter would have been relatively straightforward. However, in November 2001 the mother instituted a radical change to the nature of the proceedings. She issued a third party complaint joining the Trustee (in its capacity as trustee of the M and L Trusts) to the proceedings. This was served on the Trustee in Jersey on 12th November 2001. The complaint alleged that both trusts were operated at the behest and control of the settlor to shield and screen the assets of the settlor from enquiry by the mother and to place his assets beyond her reach in connection with the maintenance proceedings. The complaint sought an order that the Illinois Court should find that the settlor was in de facto control of the assets and income of the two trusts, that the protector should be ordered to dismiss the Trustee as trustee of the two trusts and replace it with a trustee chosen by the Illinois Court; and that the Illinois Court should enforce the support and education provisions of its judgment of 18th September 1996 against the trusts.
- 9 Jurisdiction over the Trustee was asserted on various grounds related to the fact that the Trustee, as trustee of the L Trust, had legal title (subject to any mortgages) to a condominium at Unit 3701, 800 North Michigan Avenue, Chicago ("the condominium"). The Trustee challenged the jurisdiction of the Illinois Court in respect of both trusts but that challenge was rejected on 29th May 2002 and a motion for reconsideration was denied on

23rd July 2002.

- 10 In the meantime, in completely unrelated proceedings in the District Court in the Northern District of Illinois, H Corporation had instituted proceedings against the settlor arising out of the sale of a company. In connection with those proceedings a subpoena was issued to the mother to produce various documents in her possession. On 6th August 2002 the Illinois Court ordered that the mother and her attorney were to be relieved from liability under the confidentiality agreement and protective orders of the Illinois Court. It is the Court's understanding that this means that any documents supplied to the mother in connection with the proceedings before the Illinois Court are liable to have to be disclosed by her to the Northern District Court for the purposes of the H proceedings.
- 11 On 3rd September 2002 the mother obtained a restraining order from the Illinois Court restraining the Trustee, as trustee of the L Trust, from removing any sale proceeds of the condominium from the State of Illinois and requiring it to deposit any such proceeds in an account at Midwest Bank. It was however directed to pay mortgage expenses etc in relation to the condominium.
- 12 On 6th June 2002 the mother served a notice on the Trustee to produce documents. On 12th September 2002 the Illinois Court granted an order requiring the Trustee to comply with that notice. The mother subsequently filed a motion for discovery sanctions against the Trustee for failure to disclose the documents as ordered. That application stands adjourned until 10th January 2003 pending the outcome of this hearing. The documents ordered to be produced are as follows:-

"1. All tax returns, filings, notices, and the like, filed in Jersey, Channel Islands, the United Kingdom, the United States or for any other taxing authority for the M Trust (formerly called the P Family Trust) and the L Trust from the date of their creation to the present.

2. All correspondence, including but not limited to, notes and memoranda of conversations, memos, e-mails and the like, sent by and between Nearco Trustee Company, Jersey, Ltd. and PS or any of his attorneys and/or agents, including but not limited to Louis Levinson, Ronald Tash, Lydia Kamerlink, Howard Lanzar, the firm of Katten, Muchin, Zavis, Burton Hochberg, the firm of Schiller, DuCanto & Fleck, Howard Rosenfeld, and the firm of Rosenfeld, Rotenberg, Hafron & Shapiro.

3. All records of any asset transferred by PS to the M Trust (formerly known as the P Family Trust) or the L Trust, including but not limited to, wire transfer receipts, communications from any brokerage firm, bank correspondence, and the like.

4. All communications by the M Trust (formerly known as the P Trust) or the L Trust with any accounting firm in relation to any tax matter affecting the trusts

whether in Great Britain, the Channel Islands, the United States or elsewhere, including but not limited to all communications with any accountant, law firm or representative of PS in regard to the declaration of income in respect of trust activities on PS's individual tax return.

5. All records of any distribution of income or assets from either the M Trust (formerly known as the P Trust) or the L Trust for the benefit of any beneficiary, including but not limited to, letters, notes, e-mails or other correspondence, receipts, bank or brokerage firm statements, and the like.

6. All balance sheets, accountants reports and the like indicating the income, assets or liabilities of the M Trust (formerly known as the P Trust) or the L Trust.

7. Copies of the current trust agreements with all amendments and attachments thereto for the M Trust (formerly known as the P Trust) or the L Trust or any other asset established by any of the following:-

a. PS;

b. M Trust (formerly known as the P Trust);

c. L Trust.

8. All records showing any of the assets or income for the M Trust (formerly known as the P Trust) or the L Trust from the date of their creation to the present not otherwise produced in response to request numbers 1–7.”

THE JERSEY PROCEEDINGS

- 13 Faced with this situation the Trustee issued two representations seeking the directions of the Court as to the steps which it should take in relation to the Illinois proceedings. The Court ordered that all the known beneficiaries should be convened and appointed Advocate Hoy to represent the interests of the unborn and unascertained beneficiaries. The Court also ordered that the protector of each trust should be convened. The protector has not appeared at the hearing but we are informed that, since the institution of the two representations, she has retired in favour of a new protector.
- 14 When a trustee seeks the directions of the Court in administrative trust proceedings, it has a duty to make full and frank disclosure to the Court. It follows that we have been given evidence as to the trust assets, the nature of the problems facing the Trustee in connection with the Illinois proceedings, the legal advice it has received and many other confidential matters. Clearly it is not appropriate for an adverse party in other legal proceedings to be present throughout the hearing. The long established position is well described in the English case of *In re Moritz deceased* ([1960](#)) [Ch 251](#) where the head note reads:-

“Where a trustee found himself compelled to ask for directions whether or not proceedings should be taken against a beneficiary, while it was proper

and indeed necessary to join the parties against whom the proposed relief was sought, it was not the practice in the Chancery Division that those parties should be present in chambers when the matter was debated, and they should not be furnished with the evidence upon which the court was asked to act.”

- 15 It follows that we have heard Advocate Springate and she was present for part of the submissions of the Trustee and the other beneficiaries. However we also heard submissions and evidence in her absence in respect of those aspects where we felt it would not be in the interests of the beneficiaries of the trusts for her to be present, bearing in mind the attack upon the validity of the trusts which the mother is bringing in the Illinois proceedings.

DECISION

- 16 The Court is sitting as an administrative court to give directions to the Trustee. We are not sitting to resolve legal rights. Our duty is to act in the best interests of the beneficial class as a whole.
- 17 The first issue which we must consider is whether the Trustee should be directed to take part in the Illinois proceedings. If it does so, it will clearly be bound by the rules of that court and will have to comply with any orders for disclosure of documents etc.
- 18 The difficulty with the Illinois proceedings at present is that, having started out as a conventional dispute between a mother and father as to the level and enforcement of a child maintenance order, the proceedings have now changed their character so that the validity of the two trusts will be adjudicated upon. These are trusts governed exclusively by Jersey law and administered in Jersey by a Jersey based trustee. On the face of it, this Court is the most appropriate forum to adjudicate upon whether the trusts are valid or whether, for the reasons put forward by the mother, they should be regarded as shams so that the assets belong in law to the settlor. Nevertheless the issue having been raised in the Illinois proceedings, we must consider whether the interests of the beneficial class as a whole would best be served by the Trustee participating in those proceedings or whether it would be more in their interests for the Trustee to take no further part.
- 19 Such a decision necessitates a consideration and discussion of many of the matters put forward in the absence of Mrs Springate and therefore cannot be published as part of this judgment. However, we are anxious that as much as possible of the judgment should be made available to all the beneficiaries and, through them, to the Illinois Court as appropriate. We will therefore confine ourselves to saying that, for the reasons set out in the confidential annexe to this judgment (which will be supplied only to the Trustee and Advocate Hoy until further order) we direct that the Trustee should take no further part in the Illinois proceedings. It follows that the Trustee should not comply with the order for

discovery of documents.

- 20 However we need to go on to consider certain other matters. Although there is no formal application before us, Mrs Springate sought to rely on the position of S as a beneficiary of both trusts and the mother as a beneficiary of the M Trust as entitling them to see trust accounting documents. She referred to the case of *Re Rabaotti* (2000) JLR 173 which held that there was a strong presumption that a beneficiary is entitled to see trust accounting documents, although the Court has a discretion to withhold documents where it is satisfied that this is in the best interests of the beneficiaries as a whole.
- 21 The difficulty at present is that the mother alleges in the Illinois proceedings that the trusts are invalid. If she is right, the beneficiaries under the trusts will be entitled to nothing. On the face of it, we think that any beneficiary would have a difficult task in suggesting on the one hand that she wishes to invalidate a trust but, on the other hand, asks the Court to order disclosure of documents to her in her capacity as a beneficiary so that she might use them in her action to invalidate the trust. It is hard to see that the making of such an order would often be in the interests of the beneficial class as a whole. That was the situation in the case of *Re Lemos Trust Settlement* (1992–1993) CILR 26 where certain beneficiaries had instituted proceedings in the Greek courts seeking to set aside a Cayman Island settlement. The beneficiaries then sought an order from the Cayman Island court that the trustee should be ordered to disclose trust documents to them. The court refused to grant such an order on the basis that it was not in the interests of the trust as a whole for documents to be provided in order that they might be used in proceedings elsewhere attacking the validity of the trust.
- 22 Having regard to the overall circumstances of this case, we are in no doubt that, for as long as the mother seeks to challenge the validity of the trusts in the Illinois proceedings, it would not be in the interests of the beneficial class as a whole for trust documents to be disclosed to the mother (whether in her own capacity or as guardian of S) so that she might use them in the Illinois proceedings.
- 23 However, we do not wish the approach of this Court to be misunderstood. Essentially, the Illinois proceedings are a dispute over child maintenance for S. It is only the mother's third party claim which has widened the nature of the proceedings. We fully understand the need for both the mother and the Illinois Court to be fully aware of the financial position of the settlor in deciding the issue of whether he can and should pay the arrears and whether the current maintenance order should be left as it is or modified. It is entirely reasonable that, when it is known that he is the settlor and beneficiary of two trusts, one of which owns the condominium in which he has lived, the mother and the Illinois Court should wish to know of the assets in those trusts and the level of possible provision which might be made from the trusts for the benefit of the settlor. On the facts of this case it seems to us entirely reasonable that the Illinois Court should be aware of the assets in the trusts (both now and historically) and the level of distributions which have been made to the settlor. This will enable the Illinois Court to fix upon the fair level of child maintenance taking into account the overall financial position of the settlor, including the possibility of any distributions from the trusts to him.

- 24 Accordingly we wish to make it clear that, in the event of the mother dropping the allegation of invalidity – so that the Illinois proceedings return to a straightforward dispute over child maintenance – this Court would be likely to view sympathetically any application by the mother and/or S for disclosure of the trust accounts (containing sufficient details to show the contribution and value of the trust assets and giving details of any distributions made to the settlor over the years). The documents listed in the ‘notice to produce documents’ referred to above go well beyond this and beyond what beneficiaries are normally entitled to. But the key requirement is that the mother and S – and through them the Illinois Court – be provided with sufficient information to assess the likely overall level of funds to which the settlor might be expected to have access.
- 25 Furthermore, these are trusts of which S is a beneficiary. It is therefore incumbent upon the Trustee to consider whether any distribution should be made for her benefit just as with any other beneficiary. In the event of the Illinois Court reaching a decision, based on all the evidence, as to the fair and correct level of child maintenance support for S, and the Trustee subsequently seeking directions from this Court for payment (either directly to the mother for S's benefit or to the settlor in order to enable him to meet any reasonable order) we have no doubt that the Court would view such an application sympathetically; and would take full account of the decision of the Illinois Court as to the fair and correct level of child support to be paid by the settlor in deciding what distributions should be made from the trusts.
- 26 Following a short adjournment after announcing our decision on the 17th December, Mrs Springate advised that the mother and her advisers felt unable to drop the allegation of invalidity of the trusts because this would apparently result in the automatic cessation of the restraint order in respect of the condominium. That represents the mother's only security at present because it is the sole trust asset situated in the United States. We understand the mother's concerns in this respect and can only suggest that the Trustee endeavour to offer some form of assurance to comply voluntarily with the terms of the restraint order in the event of it being lifted. If necessary we would be willing to hear an application that the Trustee should be directed to act in this manner. We can understand the mother's concern that she should not lose any security over any equity in the condominium.
- 27 It seems to us that this is a case which cries out for sensible resolution by the mother, the settlor and the Trustee. In summary, we do not consider that it would be in the interests of the beneficiaries as a whole for trust documents (other than those supplied already) to be disclosed for the purpose of litigation in the Illinois Court where the validity of the trusts is being attacked. However we are entirely supportive of the need for the Illinois Court to have an appropriate level of knowledge as to the financial position of the trusts and the possible benefits therefrom which the settlor might be expected to receive when it decides upon the level and enforcement of the child maintenance order for S. We stand ready to hear any application for further directions which may assist in this process.