

D (Trust)

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff:
Judgment Date:	05 July 2012
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Text

[2012] JRC 130

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and** Jurats Morgan **and** Kerley.

In The Matter Of A As Trustee Of The D Trust
And In The Matter Of Articles 51 And 53 Of The Trust (Jersey) Law 1984 (As Amended)

Advocate R. O. B. Gardner **for the Trustee.**

Advocate S. A. Edwards **for the Grandson Beneficiaries.**

Advocate P. D. James **for the Minor and Unborn Beneficiaries.**

Authorities

Trust (Jersey) Law 1984.

Re X Trust [\[2002\] JLR 377](#).

S Settlement [2001] JLR N 37.

Trust — application by the trustee to appoint all of the assets of the D trust to certain beneficiaries.

The Deputy Bailiff:

Introduction

- 1 The D Trust was established by a Declaration of Trust (“the Trust Deed”) executed on 12th December, 1990. It is a standard form discretionary trust and the trustee has broad powers of appointment with regard to the trust fund. The present trustee of the D Trust is A (“the trustee”). The classes of beneficiary are set out in the Second Schedule to the Trust Deed — they comprise family members (both close and remote) and past, present and future employees and directors of a group of companies (“the D Group”), established during the 1940s by G (“the settlor”), and now operating internationally across a wide range of fields including the manufacture and supply of a range of products for the telecommunications, data communication, computer, industrial and medical markets. Following the making of the Trust Deed, the settlor transferred to the trustee substantial assets to be held upon the trusts therein set out. The trustee is also a trustee of the D Family Trust, a separate trust in respect of which no directions are sought from the Court, because all the beneficiaries of that trust are of age and have agreed the proposed course of action.
- 2 The two sons of the settlor and the grandchildren and great-grandchildren of the settlor through his eldest son have been excluded as beneficiaries of the D Trust pursuant to the exercise by the trustee of its powers under the Trust Deed.
- 3 The settlor died in 1999. His last Letter of Wishes was dated 27th July, 1994. The Court's attention was drawn to the following relevant provisions:—
 - (i) The aim of the D Trust was asserted to be the holding together of all the enterprises within the D Group for as long as economically viable in order that the group of enterprises could be passed on to one or both of the grandson beneficiaries. If it turned out that neither of those grandsons wanted to or were able to take over the business, then the trustee should retain the business until such time as an economically viable sale was possible and thereafter the D Trust would be brought to an end and the net capital transferred to the family beneficiaries.

(ii) If either or both of the grandson beneficiaries took over the management of the companies the Trust might retain ownership for legal, fiscal or political reasons but the wish was expressed that the trustee should take advice from either or both of the grandsons who had taken over, on this hypothesis, the companies' management.

(iii) It was the settlor's preferred option that one or both of the grandson beneficiaries should take over the management of the D Group and that the trustee should then generally follow the wishes of such grandson or grandsons.

- 4 The 1994 Letter of Wishes contained a provision that the contents came into immediate effect and all existing instructions were cancelled to the extent that they were contradicted by the 1994 letter. This is relevant because by an earlier letter dated 11th December, 1990, his widow and younger son's wife were also to be regarded as principal beneficiaries with the grandson beneficiaries. The Court is satisfied that the two Letters of Wishes are in this respect mutually contradictory and therefore the provisions of the 1990 letter can be disregarded. The Court is comforted in that conclusion by the information that under the D Family Trust, the trustee intends to appoint significant sums to the four beneficiaries of that Trust which include the settlor's widow, his daughter in law and the grandson beneficiaries.
- 5 In addition, the settlor's widow, his daughter in law and the wife of the elder grandson beneficiary (the younger grandson beneficiary is unmarried) have written to the trustee to confirm that they consent to the proposed course of action. The charity Scope was served with the proceedings as a potential beneficiary but has not attended Court. There are residual potential charitable interests, and as a result HM Attorney General has also been served with the proceedings, but he has confirmed that he has no observations to make on the exercise which is now before the Court.
- 6 The more remote family members who are within the beneficial class have not been served with the proceedings. The trustee has had no contact with the members of this class, and indeed considers that it may be that they are unaware of their status as beneficiaries of the D Trust. The trustee has no intention in any event of benefitting the remote family members. As a result, those family members have not been convened and thus have not appeared.

Application

- 7 The trustee has formed the view that it is appropriate to appoint all of the assets of the D Trust to certain of the beneficiaries namely:—
 - (i) The grandson beneficiaries and the widow of the settlor; and
 - (ii) A new Swiss foundation which will operate for the benefit of present and future employees and directors of the D Group.

- 8 The effect of the appointments just described is that the D Trust will no longer have any assets within it. The decision to make these appointments is part of an overall plan which involves distribution of the assets of the D Trust and the D Family Trust. The trustee seeks the Court's ratification and approval of its decision pursuant to Article 51 of the Trust (Jersey) Law 1984 as amended ("the Trust Law").

Discussion

- 9 The decision which the trustee has made and for which ratification or approval is sought involves an assignment to the settlor's widow of two loans in the sum of CHF 4,276,566 and CHF 986,666 owed to the trustee by two companies within the D Group, the trustee noting that the settlor's widow would restate the loans into different loan agreements and donate the benefit of two loans in different amounts to the two grandson beneficiaries. The decision also involves a transfer of shares owned by the trustee to the settlor's widow on condition that she donates 40% of those shares to the elder grandson beneficiary, 40% to the younger grandson beneficiary and 20% to a recently established Foundation for the benefit of past, present and future employees and directors of the D Group.
- 10 We say immediately that in the context of the mechanics of the proposals, we do not regard these mechanics as amounting in any sense to a fraud on the power of appointment. Not only are the further transfers or gifts which are to be made by the settlor's widow to be made to persons or entities which are existing beneficiaries or a vehicle for existing beneficiaries, but in any event for the reasons to which we will shortly come, the transfers in this way are in our judgment for the benefit of the beneficiaries. This approach has been previously followed by this Court – see for example *Re X Trust* [2002] JLR 377.
- 11 In accordance with the authority of the *S Settlement* [2001] JLR Note 37, the Court's approach on this application is to consider the following: —

(a) Is the proposed action within the trustee's power or powers, having regard to the Trust Deed and/or the Trust Law?

(b) If it is within the trustee's power, is it a proper exercise of that power? The trustee must satisfy the Court that its opinion has been formed in good faith, that its opinion is one which a reasonable trustee might make and that it has not been vitiated by any actual or potential conflict of interest.

- 12 In its material parts, Clause 2 of the Trust Deed provides:—

"2 During the trust period the trustees shall stand possessed of the trust fund and the income thereof to hold the same upon the following trusts:

(a) Upon trust for the benefit of the beneficiaries or any one or more of them exclusive of the other or others in such shares and proportions and subject to such terms, limitations and conditions and with and subject to

such provisions for maintenance, education or advancement and such administrative powers and provisions and such protective and discretionary trusts whether relating to capital or income the same to be exercised at the discretion of the trustees or such other person or persons as shall be appointed by the trustees and such powers and provisions providing for the accumulation of income as the trustee shall from time to time appoint provided that such appointment shall not be made (or if made shall not be revocable) after the expiration of the trust period.

(b) In default of and subject to any such appointment as aforesaid UPON TRUST that the Trustees shall during the Trust Period at their discretion pay or apply the whole or such part as the Trustees shall think fit of the income of the Trust Fund and may pay or apply such part of the capital thereof to or for or towards the maintenance education advancement support or otherwise for the benefit of the Beneficiaries or any one or more of them exclusive of the other or others in such manner in all respects as the Trustees shall in their absolute discretion determine without being liable to account therefore PROVIDED THAT during the Trust Period instead of paying or applying the income as aforesaid the Trustees may accumulate the same or any part of the said income by investing the same and the resulting income thereof in or upon any of the investments hereby authorised to the intent that the accumulations shall be added to the Trust Fund as part of the capital thereof with power nevertheless for the Trustees to resort to the accumulations of any preceding year and to pay or apply the same as if income to or for the maintenance support or benefit of the Beneficiaries or any one or more of them."

- 13 Clause 5(a) of the Trust authorises the trustee, if exercising a power in favour of a particular person, to ignore the interests of any other person who might be interested under the Trust Deed. In particular no appointment is to be invalid on the grounds that any other potential object of the power is altogether excluded.
- 14 In the circumstances the Court is in no doubt that the trustee had power to make the appointments for which it seeks the Court's approval.
- 15 We now turn to whether this is a proper exercise of the power. It is right to say immediately that we have no doubt that the trustee's opinion has been formed in good faith, and that the trustee is not suffering from any actual or potential conflict of interest in relation to this proposed appointment. The fact that the trustee is also a trustee of the D Family Settlement is, so it seems to us on the papers put before us, immaterial for these purposes. No conflict arises from the fact that the D Family Trust is to be wound up at the same time as the D Settlement, assuming that the Court were to give sanction to this proposal.
- 16 We are therefore only concerned with the extent to which this decision is one at which the trustee could properly arrive.

- 17 The trustee has put before us four reasons for winding up this particular trust. The first is that the winding up on these terms will enable the settlement of litigation which is taking place in Switzerland, the results of which could potentially damage the trust fund. The second is that the winding up of the trust will enable the assets to be repatriated to Switzerland, which is what the settlor ultimately wanted to take place, subject to the views of the grandson beneficiaries. The third is that the winding up at this stage enables considerable savings to be made on potential tax liabilities in 2017. The fourth is that the exercise of discretion to make these appointments, in particular the exercise of discretion such that 20% of the relevant shares will vest in the Foundation, will alleviate the concern of the employees in the D Group. This is clearly not only consistent with the intentions of the settlor, but also is to the advantage of the grandson beneficiaries, the value of whose investments in the D Group will be very much affected by the ongoing support of senior executives in that Group.
- 18 We have noted that the elder of the two grandson beneficiaries only is currently involved in the management of the D Group, although the decision point has not yet been reached as to whether he would be able to run the businesses entirely. We have noted the underlying intention of the settlor was that the grandsons should have the businesses if they are prepared to be involved in them, but otherwise the benefit of the businesses would be for the family. It is clear that the settlor contemplated there would be a temporary holding arrangement until such time as it was possible to say whether the grandsons would or would not be involved in the businesses.
- 19 The Court is satisfied that there was a general intention on the part of the settlor for the grandson beneficiaries to benefit at some point, and that now is an appropriate point because there are risks to the trust fund being depleted by either or both of the litigation which is currently taking place in Switzerland and/or the adverse tax consequences in Switzerland if the appointments are not made. The Swiss litigation is not friendly litigation. It contains claims by the settlor's excluded younger son and the settlor's widow, the effect of which, if successful, might require trust assets to be removed from the Trust and placed back into the settlor's estate. This would be inimical to the interests of the beneficiaries of the Trust as a whole. The Swiss litigation has been settled conditionally upon the Court approving these arrangements and the result of approval being given therefore will be to remove this risk to the trust fund. That would be in the interests of the beneficiaries.
- 20 The Court gave special consideration to the fact that the result of the implementation of this decision would be that 20% of the shares in the D Group would vest in the Foundation, which would be run for the benefit of past, present and future employees and directors of that Group. It was apparent that although those employees are all beneficiaries, there was no intention expressed by the settlor to benefit the employees at large. The Court therefore wished to give consideration to whether an appointment of 20% of the shares in the D Group to the Foundation could really be said to be a proper exercise of discretion.

- 21 The first point to make about that is that Advocate Edwards, on behalf of the grandson beneficiaries, confirmed that they not only agreed with the proposal but welcomed it. We pressed her specifically on this point. On instructions she advised the Court that there was concern as to the possibility of deadlock between her respective clients, who recognised and appreciated that concern. The proposed appointment was a way of resolving any such deadlock. By having an independent third shareholder with a meaningful involvement, any problems between the two brothers should be avoided, and management would have a real interest in the administration of the Group and its ongoing success. Her clients specifically agreed the shareholding for the Foundation at 20%. This result was what they wanted and furthermore she confirmed that the two brothers had been separately advised in Switzerland. Their long term interest in the business meant that they were content to relinquish control to the extent of this 20% shareholding.
- 22 Advocate James, who acted not only for minor and unborn beneficiaries but also for the employees, confirmed to the Court that he had spoken to several of the senior executives of the D Group. He was unsurprisingly able to confirm that as representative of the employees, he considered the proposed decision of the trustee was entirely appropriate. But he also added that in relation to his functions on behalf of minor and unborn beneficiaries, he could also support the proposed decision. This was because the high point of minor and unborn beneficiary interest was the 1990 Letter of Wishes which in material terms had been revoked by the later Letter, and furthermore the proposed decision was in their interests because it would enable a more significant tax liability on their fathers to be avoided, it would make for a more harmonious environment as between them and their cousins and grandfather who were all excluded from benefit, and finally because the swelling of their father's estate would be in their interests by reason of their legitimate claims against the estate of their father.
- 23 The Court only has to be satisfied that the trustee has arrived at a decision which a reasonable trustee might make. On all the information which has been put before us, we have no doubt that that threshold has been met. Indeed, on the information which has been provided to us, the trustees proposed decision is not only the reasonable one, but is the right one.
- 24 For all these reasons we gave our approval to the proposed decision on 19th March and approved the decision proposed by the trustee to appoint the assets of the D Trust in the way proposed.