

HSBC Trustees Ci Ltd v Rearden and Ors

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	21 September 2005
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Text

[2005] JRC 130

ROYAL COURT

(Samedi Division)

Before:

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

Between
HSBC Trustees (CI) Limited
Representor
and
Michael Gaunt Rearden
First Respondent

and

Georgina Rearden

Second Respondent

and

Charles Rearden
Third Respondent

and

Belinda Rearden
Fourth Respondent

and

Timothy Rearden
Fifth Respondent

and

Advocate Philip Damian James appointed to represent the interest of any of the
unascertained beneficiaries of the Mrs M G Rearden 1983 Trust
Sixth Respondent

Advocate T. Le Cocq for the Representor.

Advocate P.D. James for the Sixth Respondent.

Authorities

In Re the R.F. Norman Settlement.

Representation by the Representor pursuant to Articles 26, 47 and 51 of the Trusts (Jersey) Law seeking the Courts approval for a direction in relation to a variation of the Trust deed.

Bailiff

THE DEPUTY

- ¹ This is an application for variation of a Trust established on 31st March, 1983, and known as the “Mrs M.G. Rearden 1983 Trust”, and we shall refer to it as “the Trust”. The Trust was established in Hong Kong and the original Trustee was the Hong Kong Bank Trustee Limited, a Hong Kong company.

- 2 On 7th February, 1992 the original Trustee retired and the Company then known as “Hongkong and Shanghai Bank Trustee (Jersey) Limited became Trustee in its place, with Jersey law replacing the law of Hong Kong as the proper law of the Trust. The applicant, HSBC Trustee (CI) Limited is the current Trustee.
- 3 The settlor clearly expected that the Trustee for the time being would be a professional trustee entitled to charge remuneration. There was a provision at paragraph 11 of the trust deed for the fees of the trustee, as provided for later in the Trust Deed, to be charged first against the income of the trust fund and only against the capital to the extent that the income was insufficient.
- 4 However, the only actual charging clause in the trust deed is to be found at paragraph 13 which reads as follows:

“The appointment of Hongkong Bank Trustee Limited (in this clause only referred to as “the Company”) shall be upon the Company's Terms and Conditions last published before the date hereof and the Company shall be entitled to charge remuneration calculated in accordance with such terms and conditions and the Company shall also have power from time to time to charge remuneration in accordance with any later published terms and conditions of the Company for the time being in force.”
- 5 Fees have in fact been charged, with the consent of the beneficiaries, since the Trustee was appointed in 1992. However, it has now been realised that there is serious doubt as to whether this is permitted, because paragraph 13 refers only to the original trustee. It does not provide for whoever is the trustee for the time being to charge remuneration.
- 6 There is power at paragraph 21 of the trust deed for the Trustee to vary the provisions of the Deed but the Trustee feels inhibited from exercising that power in this case to insert a remuneration clause because of the clear conflict of interest which would exist in such circumstances. It has, therefore, surrendered its discretion to the Court in connection with the exercise of that power.
- 7 It follows that the Court is now being asked to vary the Trust by inserting a trustee remuneration clause in fairly conventional form and also to approve that variation on behalf to the unascertained beneficiaries. The Trust is a discretionary trust and the class of beneficiaries is defined as Michael Gaunt Rearden, Timothy John Rearden and their respective issue. At present there are five beneficiaries in existence all of whom are adults and all of whom agree to the insertion of a trustee remuneration clause in the form proposed. Advocate James has been appointed to represent the unascertained beneficiaries and he supports the application.
- 8 The Court has had to consider similar applications before, in particular in the case of *In Re*

the R.F. Norman Settlement. Looked at narrowly the insertion of a remuneration clause would lead to moneys being paid to the Trustee which would otherwise have been available for the beneficiaries. Clearly, the settlor intended that there should be a professional trustee and that that professional trustee should be able to charge remuneration. In our judgment it is clearly in the interests of the beneficiaries that the assets contained in this Trust should be professionally managed and administered by those with appropriate professional skills.

- 9 It is also in their interests, that certainly so long as the Trust is administered in Jersey it should be administered by an organisation which is approved to act as a trustee by the Jersey Financial Services Commission under the relevant legislation and is regulated accordingly. Such an organisation will only agree to act if remunerated and it is clear that if these assets are to be managed by a professional trustee there must be a remuneration clause. We are satisfied, therefore, that the insertion of such a clause would be for the benefit of the beneficiaries, including the unborn beneficiaries, and we vary the trust deed by inserting a clause in the terms set out in the affidavit of Constance Clark.