The M Settlement

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Clapham, King
Judgment Date:	14 July 2009
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Text

[2009] JRC 140

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Clapham **and** King.

Between
DG, AN and TTL
And TT Limited
Representors
and
WM
First Respondent
EM
Second Respondent
DM, CB and GB

Third Respondents

and

DD
Fourth Respondent

Advocate E. C. P. Mackereth **for the Representors**.

Advocate G. S. Robinson **for the Third Respondents**.

Authorities

Trusts (Jersey) Law 1984.

In re the Esteem Settlement [2001] JLR 7.

THE COMMISSIONER:

1 On 11 th June, 2009, we gave directions for the appointment out of the remaining assets of a settlement created by the First Respondent ("WM") on 8th March, 1982, ("the settlement").

The Settlement

2 The settlement is now governed by Jersey law and is discretionary in form. The beneficial class includes the settlor, his spouse and his three children and remoter issue.

3 WM has three adult children, namely the third respondents ("the children") by his first wife ELM, who he divorced in 2002. In 2004, he married his second wife the Second Respondent EM. They separated last year and are in the course of divorce proceedings.

4 The settlement provides for a protector with powers *inter alia* to remove and appoint new trustees. WM is the current protector.

Assets of the settlement

5 The accounts of the settlement show that as at 5 th April, 2008, it had investments and cash of just over £3M. The trustees had guaranteed a loan facility from N M Rothschild & Sons (CI) Ltd to WM. A combination of a loan by the trustees to WM to meet his obligations to N M Rothschild when that facility was called in and the recent fall in the stock market have conspired to reduce the assets of the settlement to cash in the sum of £344,000, together with the benefit of the loan due by WM in the sum of £2.1M. A UK tax liability and the estimated costs of the application reduced the net cash available to approximately

£190,000, although the actual costs incurred were likely to reduce that amount even further.

6 The trust fund was now too small to justify the costs of administering the settlement and it was accepted by all the parties that it had to terminate. It was clear that WM was unable to repay the loan due by him and that this should therefore be written off. The issue was as to which of the beneficiaries the remaining cash should be appointed.

Convened parties

7 In addition to convening WM, the Representors had also convened the current trustee, DD, EM and the children. WM and EM submitted written representations to the Court but did not appear and we explain the position of the trustee, DD, below.

8 Although the Representors were acting as bare trustees of the assets of the settlement in circumstances we explain below and therefore arguably entitled to bring the application, for the avoidance of any doubt we granted them leave to do so under Article 51(3) of the Trusts (Jersey) Law 1984.

Events leading up to the Representation

9 Prior to 2 nd December, 2008, the Representors were the trustees of the settlement. Responsibility for the management of the settlement vested in DG whose two affidavits supported the application.

10 WM is 69, in poor health and alcohol dependent. Concerns have been expressed as to his rationality. He had become abusive and aggressive in his dealings with the Representors and their staff. He is furthermore in serious financial difficulty. On 10 th November, 2008, the Representors received a request from the settlor to pay him the whole of the trust fund. He said he wanted to pay his creditors. The Representors were not prepared to pay the trust fund to him, partly due to the level of his debts which a distribution would not fully discharge, thus not preventing his bankruptcy, partly due to his impending divorce and partly because it would result in the loss of the total trust fund and may not therefore be of any benefit to the beneficiaries as a whole. The Representors were also concerned about WM's state of health and as to whether the funds would in fact be used to pay creditors.

11 WM did not react well to this. He proposed to appoint family members namely his son DM, his daughter-in-law KM, his daughter CB and his former wife ELM as additional trustees, thus forming a majority over the Representors. The Representors wrote to the proposed trustees on 25 th November, 2008, setting out the reasons why they had declined to make the distribution requested and explaining some of their duties should they take on the role of trustee. It became clear that the proposed trustees were unwilling to take on that role. The Representors learned from ELM that, as part of her divorce settlement, it was intended that the trust fund would be used for the benefit of the children, something WM has

subsequently denied. This was also the expectation of the children.

12 WM then proceeded to exercise his powers as protector to remove the Representors as trustees and to appoint a family friend DD (the half brother of his first wife ELM) as sole trustee in their place and this was effected by a written instrument dated 2 nd December, 2008. The Representors however remained in possession of the trust fund which they continued to administer on DD's behalf.

13 It transpires that DD is himself 81 years of age and in poor health. Initially, he directed that £18,000 in cash held by the Representors should be distributed to WM which instruction was complied with. He then decided to pay the rest of the trust fund to WM, then changed his mind and then apparently changed his mind again all over a period of two weeks. At the same time, DM took advice from FSI who wrote formally objecting to any such distribution. They also cast doubt as to whether DD had in fact received independent advice as he had claimed. In the circumstances and with justification the Representors determined to seek the assistance of the Court.

14 On being notified of the intention of the Representors to bring an application to the Court, DD responded by e-mail on 2 nd January, 2009, in the following terms:-

> " *TO WHOM IT MAY CONCERN*
>
> *I have now had several days of peace over the holidays to consider my position re this aggravating Trust Settlement.* This is now my decision, which I expect all parties to accept in good faith. I am extremely fond of WM and his ex-wife ELM who is my half-sister. Both of them have given me great kindness and generosity over the past 30 years. I now find myself "pig in the middle" of a dispute which seems to oblige me to take sides. This I will not do. Irrespective of the merits of the conflicting parties I am now resigning from the matter and urge all concerned to reach a just and amicable settlement. DD."

15 It was pointed out to DD that as a matter of Jersey law he could not resign as a sole trustee unless another trustee was appointed in his place. He therefore remained in office. On being informed in April 2009, of the date fix and the methods by which he could put his views to the Court, he responded by e-mail of 22nd April, 2009, in the following terms:-

> " *Dear Mr Mackereth, In reply to yours of the 20 th.* I was unaware of any conflict of interest re the Trust between WM and his former wife ELM and their three children. In the light of my present knowledge I can see it was mistaken of me to accede to WM desire to have the Trust's funds released to him. In my opinion he is no longer in full possession of his former faculties and it will be far better for his own financial future if the Trust Funds, that is the portion he is entitled to, are managed by a third and sympathetic party. I will be unable to attend any meetings and hope to hear I have been removed as trustee. Yours sincerely, DD."

Surrender of discretion

16 It can be appreciated that the circumstances in which WM appointed DD as trustee raise some considerable doubt as to whether he was acting in accordance with his fiduciary duties and accordingly the appointment was susceptible to being set aside as a fraud on the power. However, in the light of the very depleted assets within the settlement which were being rapidly eaten into by way of costs, we were urged to take a pragmatic approach. DD had by his e-mails evinced a clear intention to surrender his powers as trustee to the Court. The assets were not held by him but by the Representors and by accepting that surrender, we were in a position to give directions to bring about the termination of the settlement. We agreed therefore to accept DD's surrender.

Suspension of protector's powers

17 The appointment out of any assets of the settlement required the consent of the protector. The settlement creates an office of protector and there is nothing to suggest that the powers vested in the protector were personal. WM was in a clear position of conflict but furthermore we had evidence before us showing that he was not in good health and was alcohol dependent. In addition, doubts had been expressed by those who had dealt with him as to his rationality. In the circumstances and in the exercise of the inherent power of the Court, we suspended the powers of the protector until further order, thus bringing into play the provisions of Clause 22(b) of the settlement to the effect that it would be read as though references to the protector or the consent of the protector were omitted.

Exercise of the trustees' powers

18 The potential objects of the trustee's dispositive powers were in practice WM, EM and the children and we take them in turn.

WM

19 The settlement was established with funds provided by WM and in his two letters of wishes he asked that he should be regarded as the principal beneficiary and for the trustees to consider any requests for distributions by him favourably. In his letter of 18 th May, 2009, he explained that the trust fund was set up by him in 1982 when he was non domiciled in the United Kingdom for the purposes of avoiding inheritance tax. His letter seeks the distribution of the remaining cash within the settlement to enable him to meet his debts as set out in a schedule appended to that letter. He wrote a further letter on 6th June, 2009, updating his schedule in manuscript.

20 WM's only asset (apart from the cash we refer to below) is a property he owns in Sevenoaks subject to a mortgage of £1.3M and which is currently on the market at an asking price of £1,650,000. In his letter of 18 th May, 2009, he says there is no prospect of

selling this property at a sensible price in the current market. The property is therefore let out at a monthly rental of £5,500. The mortgage payments are in a similar amount.

21 WM estimated his personal liabilities as at December 2008, at £281,000 to which must be added a separate list of sundry creditors he provided, totalling £37,351, bringing his liabilities up to £318,351. Within those liabilities there is a figure of £20,000 shown for legal advice for his current divorce proceedings which is taken from the figure DG himself estimated in December 2008, and which may well therefore be understated. Furthermore, the updated schedule still shows WM as holding £18,000 distributed to him in cash in December 2008, which in view of his pressing financial circumstances seems unlikely.

22 WM wrote a further letter showing the position as at 6 th June, 2008, but in our view this does not alter the underlying fundamental which is that the remaining assets within the settlement (£190,000 as at the date of the hearing, but in all probability less than that amount taking into account costs) will be insufficient to discharge all of his debts.

23 Furthermore, the schedule does not address his contingent liability to EM in the divorce proceedings. She currently has the benefit of freezing orders over the assets he does own and has the benefit of an interim maintenance order at the rate of £1,500 a month increasing to £2,500 per month from August 2009. WM's only source of income apart from the rent on the Sevenoaks property is his pension of £2,333 per month.

EM

24 Warners Solicitors, acting for EM wrote to the Court on 27 th May, 2009, seeking a distribution directly to her. It was a detailed letter. However, Warners wrote again on 10 th June, 2009, having reviewed the documentation filed as at that date, and rather than seeking a distribution to EM, supported WM's claim for the trust fund to be utilised either to pay his outstanding liabilities or to secure appropriate housing for him.

The children

25 The children were clearly in a very difficult position. DM filed an affidavit dated 4 th June, 2009, on behalf of himself and his sisters, setting out their position fully and helpfully. They are all financially independent but of moderate means. None of them have benefited from the trust fund (although they did receive a distribution of £100,000 each some time ago from another settlement). There are five grandchildren. Whilst very sympathetic and concerned about their father's position, they were very relieved that the Representors had declined to make the distribution sought by their father for a number of reasons. Firstly, they felt sure that paying over the money to him would not really help him to overcome his financial difficulties. Instead, it would simply be swallowed up by claims made by EM in the divorce proceedings or in meeting the claims of some of his creditors. In addition, their father had developed an unhealthy dependency on alcohol which caused them concern over his ability to act reasonably and rationally in relation to money. In view of this, they had some

considerable doubt that if the remainder of the trust fund were released to him he would utilise it to settle his debts, as was proposed. The risk was that he would invest it in speculative projects or in part purchasing additional property, which he would subsequently be unable to keep up the repayments on. Finally, they had been led to believe by their mother that the trust fund would ultimately fall to the benefit of either them or their own children.

26 The children had clearly gone to great lengths to resolve the situation with their father and thought they had reached an agreement with him which was set out in an open letter of 18th February, 2009, under which:-

(i) DD would retire in favour of the Representors.

(ii) WM would retire as protector in favour of DM.

(iii) The trust fund would be utilised to purchase a property to be owned by the trust in which WM would have a life interest.

27 This proposal had not been sent to the Representors for their consideration as to its feasibility and in any event it became clear that it was not acceptable to WM who rejected it.

28 The children's position is that the small balance left within the trust fund should now be preserved for the benefit of their own children, to give them a moderate head start in life. They therefore sought an order that the trust fund be distributed to them so that they could then ensure that they safe-guarded that distribution for the futures of their respective children.

29 Whilst the Representors were no longer trustees of the settlement, they had had a long involvement in the affairs of the settlement and we thought it appropriate to seek their views as to how the remainder of the trust fund should now be distributed. In their view, the trust fund should be advanced for the benefit of the children, who would in turn apply the same for the benefit of the grandchildren. They were of the view that any distribution to WM would only benefit those creditors who received payments but would not discharge all of his debts and thus be to his benefit. They would not have been minded to make any distribution to EM in view of the short duration of the marriage and in view of the indirect benefit she had received from the substantial distributions that had been made in the past.

30 We gave careful consideration to all of the information provided by the Representors and the convened parties and the submissions made to us. We were referred to the decision in the case of *In re the Esteem Settlement* [2001] JLR 7, where the Court considered whether a reduction in a debt is of itself a benefit as follows:-

"45. It is clear that a payment to the creditors of a beneficiary may be for the

benefit of the beneficiary and may therefore be made pursuant to a power of advancement. The leading authority for this (approved in *Pilkington (13)* is *Lowther v Bentinck (11)*. ***The beneficiary in that case was a life tenant under a will trust.*** There was power to pay up to one-half of the trust fund for his advancement, preferment or benefit. The life tenant had incurred substantial debts through speculating on the stock exchange, which meant that all of the income from the trust was charged to pay his debts. If the power of advancement was used to pay one-half of the trust fund to his creditors, that would clear almost all of his debts. The income from the remaining half of the trust would be sufficient to service the remaining debt and the balance would be available for him and his family. The life tenant requested the trustees to exercise the power of advancement in this manner by paying off his creditors. The court held that payment of one-half of the trust fund to the creditors would confer a very large benefit on him and that the trustees were entitled to make such a payment pursuant to the power of advancement.

46. In that case, the benefit to the life tenant was very clear. In *In re Price* ***(14) the position was rather different. Section 12 of the Lunacy Regulation Act 1862 enabled the court to order payments for the maintenance or benefit of a lunatic in certain circumstances. In that case the lunatic was confined in Broadmoor and there appeared to be no reasonable prospect of his ever being released. The lunatic owed a number of debts which exceeded his assets. His mother sought an order from the court that all of his assets, together with some of her own, should be used to pay off the debts completely. It was argued that such a payment would be for his benefit as it would result in the discharge of all his debts and would mean that if he came out of the asylum he would be free of debt. The Court of Appeal upheld the decision of Fry, L.J. at first instance to the effect that, on the basis that there was no reasonable prospect of his being released, there would be no benefit to him. The only persons who would in reality benefit would be his creditors. The payment could not therefore be made*** .

47. In our judgment, that decision is strongly against one of the trustee's submissions, namely that a mere reduction in debt is of itself a benefit because it means that, in strictly financial terms, the debtor is better off than before as he owes less money. On any view, a payment of only part of a debt must be less beneficial than payment of all of the debt. Yet, if the trustee's argument were right, the payment in Price would have been held to have been for the benefit of the debtor because it would have cleared all his debts. His strict financial position would have been much better. In our judgment, Price makes it clear that one is looking to more than mere bookkeeping in considering whether there is a benefit to a person in financial terms. One must stand back and consider whether his position after the payment would be better from a realistic and commonsense point of view."

31 Our starting point was to give favourable consideration to the application of WM. However the trust fund had reached a level where it was no longer cost effective to maintain it in existence. It was not realistic therefore to retain the remaining cash within the settlement

secure from WM's creditors, so as to provide benefits for him in his remaining years such as for example accommodation or nursing care. On the other hand a distribution to him personally would merely go to reducing his debts but would not discharge them. It would thus benefit those creditors who received payment but not WM, who would remain substantially indebted. From a realistic and commonsense point of view his position after such a payment would not be better.

32 EM was no longer seeking a direct distribution but we would not have acceded to it for the same reasons put forward by the Representors. We therefore concluded that the small amount now left in the settlement should go to the children and we gave directions accordingly.