

Minerva Trust Company Ltd v The 15 Adult Beneficiaries and Advocate Damian Evans (as representative of the minor, unborn and unascertained beneficiaries)

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Liston, Grime
Judgment Date:	10 April 2017
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Text

[2017] JRC 061

Royal Court

(Samedi)

Before:

Sir Michael Birt, Commissioner, and Jurats Liston and Grime

IN THE MATTER OF THE D SETTLEMENT

Between
Minerva Trust Company Limited
Representor
and
The 15 Adult Beneficiaries

First to Fifteenth Respondents

and

Advocate Damian Evans (as representative of the minor, unborn and unascertained beneficiaries)
Sixth Respondent

Advocate J. P. Speck for the Representor.

Advocate D. Evans appeared in person.

The Adult Beneficiaries did not appear and were not represented.

Authorities

Re S Settlement [2001] JLR Note 37 .

Re Otto Poon Trust [\[2015\] \(1\) JLR Note 31](#) .

Re Otto Poon Trust [\[2015\] JCA 109](#) .

Lewin on Trusts (18th Edition).

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

Trust — reasons for approval by the Court of a decision taken by the trustee to enter into Restructuring.

THE COMMISSIONER

- 1 This is an application by the trustee of the D Settlement (“the Trust”) for approval of a decision it has taken which is intended to enable one of the beneficiaries of the Trust to give effect to a decision of the Family Division of the High Court in London. The Court gave its approval at the conclusion of the hearing and now gives its reasons.

The Trust

- 2 The Trust was established by the settlor on 29th September, 1987. The Representor (“the Trustee”) is the current trustee of the Trust. Since March 2004, the proper law of the Trust has been the law of Jersey.
- 3 The Trust created a life interest in favour of the settlor but subject thereto is a discretionary

trust in reasonably conventional form. The beneficiaries are defined as including the settlor, the children and remoter issue of the settlor, the settlor's parents and their issue, blood relatives of the settlor who under the law of intestacy of his country of domicile would be entitled to share in his estate and any additional person appointed by the trustee. The living beneficiaries of the Trust at present are:

- (i) the settlor;
- (ii) the settlor's mother and father;
- (iii) the settlor's three adult children;
- (iv) the settlor's three siblings; and
- (v) nine nephews and nieces of the settlor, of whom three are minors.

- 4 Subject to the settlor's life interest, the trustee may with the consent of the protector, appoint the whole or any part of the capital of the Trust to or in any manner which is in the opinion of the trustee for the benefit of all or any one or more of the beneficiaries. The settlor also has power to revoke the Trust with the consent of the protector.
- 5 The Trust owns 96.38% of a Cypriot company ("the Holding Company"). The remaining 3.62% of the shares in the Holding Company are held by a trust established for the benefit of the settlor's wife ("the Y Settlement"). The Holding Company in turn owns 93.6% of a company incorporated in Gibraltar ("the Company"). The balance of the shares in the Company are held by persons who work in the business and are not members of the settlor's family.
- 6 The Company in turn owns indirectly (through various subsidiaries) a very valuable property investment business. Although this business has a very substantial capital value, it has borrowings and there is little spare liquidity. The nature of the property business undertaken is such that it often takes many years for projects to come to fruition.

The divorce proceedings

- 7 The settlor ("the husband") and his wife ("the wife") have been engaged in lengthy and acrimonious divorce proceedings in the Family Division in London. In December 2016, the judge in those proceedings, Sir Peter Singer, circulated a draft judgment. One of the key issues in the proceedings before the judge had been whether (as she contended) the wife should receive a substantial lump sum or other liquid payment or whether (as the husband submitted) there should be a Wells sharing order (i.e. an order that certain of the assets of the Trust be divided in specie) because of the damage which would be done to the business if assets had to be realised speedily in order to fund a lump sum payment. The draft judgment provided that the wife should receive certain lump sum payments and other assets (including the matrimonial home) but in relation to the business, acceded to the

husband's submission that the wife should be awarded a shareholding in the Company. However the judge adjourned for further consideration a number of points of detail, including the nature and terms of that shareholding.

- 8 The Trustee was consulted at this stage and expressed the firm view that the issue of redeemable preference shares in the Company with a fixed coupon (as suggested by the wife following receipt of the draft judgment) would not be acceptable because of the pressure on liquidity which would be caused. The Trustee (supported by the husband) preferred that she should receive a percentage of the ordinary shares of the Company.
- 9 In January 2017 there was a further hearing before the judge and he issued a second judgment on 30th January, 2017, which made more specific orders. In essence he directed that the wife should receive 23.41% of the ordinary shares in the Company but that the Y Settlement should in exchange give up its 3.62% shareholding in the Holding Company. He directed that there should be a shareholders' agreement in relation to the Company in order to protect the minority position of the wife and with a view to preventing disruption of the Company's business by a minority shareholder; and that this should be subject to urgent arbitration if the terms of such agreement could not be resolved by consent.
- 10 Since the second judgment there have been urgent negotiations and a submission to arbitration which has resolved disputed matters. The Court was advised that the shareholders' agreement was in virtually final form and that, subject to a few outstanding points which were still of concern to the Trustee, the Trustee is broadly content with the terms of the proposed shareholders' agreement.
- 11 Tax advice has been taken as to the most effective way of achieving the result mandated by the judge's order. This has been referred to as the "*Restructuring*" and it will comprise the following steps:
 - (i) There will be a sale of 23.41% of the ordinary shares in the Company by the Holding Company to the Trustee as trustee of the Trust. This sale will take place at market value and the consideration will be left outstanding in the form of an interest bearing loan note issued by the Trustee to the Holding Company ("Step 1").
 - (ii) The Trustee will make a capital appointment to the husband of shares in the Company. This appointment will be for 23.41% of the shares in the Company less the percentage of shares which are considered to be equal in value to the Y Settlement's 3.62% shareholding in the Holding Company ("Step 2").
 - (iii) Following appointment from the Trust, the husband will transfer the shares in the Company to the wife ("Step 3").
 - (iv) The Trustee will transfer the remaining shares in the Company held by it directly (of equivalent value to the Y Settlement's 3.62% shareholding in the Holding Company) to the Y Settlement, in exchange for the Y Settlement's shareholding in the

Holding Company. After this step, the Holding Company will be 100% owned by the Trust and 23.41% of the shares in the Company will be held by the wife or the Y Settlement ("Step 4").

(v) It is then proposed that the Holding Company will undertake a capital reduction to eliminate the loan balance created on the sale of 23.41% of the shares in the Company to the Trustee ("Step 5").

- 12 The Trustee has been advised that it is vital that steps 1–3 take place prior to 6th April, 2017, if very substantial tax charges are to be avoided. It is also preferable but not essential for Step 4 to be undertaken prior to 6th April, 2017.
- 13 It was in those circumstances that the Trustee sought the Court's approval as a matter of some urgency on the basis that this was a momentous decision.

The law

- 14 The approach of the Court where a trustee applies for approval of a momentous decision (i.e. a decision of real importance for the trust), is well established. It was first laid down in *Re S Settlement* [2001] JLR N 37 and was approved by the Court of Appeal in *Re Otto Poon Trust* [2015] (1) JLR N 31, *Re Otto Poon Trust* [2015] JCA 109. The Court must satisfy itself of three things:
- (i) that the trustee's decision has been formed in good faith;
 - (ii) that the decision is one which a reasonable trustee properly instructed could have reached; and
 - (iii) that the decision has not been vitiated by any actual or potential conflict of interest.
- 15 An additional factor in this case is that the wife is not a beneficiary of the Trust. As the appointment of the shares in the Company to the husband is to be made in the knowledge that he will then transfer those shares to the wife, the Court must clearly consider whether the exercise of the power would constitute a fraud on the power i.e. whether it has been made for the impermissible purpose of benefiting a non-beneficiary.
- 16 In this respect Lewin on Trusts (18th Edition) states at para 29–263:–
- “It is open to an appointee, moreover, to apply the property appointed as he wishes and in particular to apply it in favour of persons who are not objects of the power.*** An exercise of the power is not vitiated merely because the donee [of a power] is aware that the proposed appointee intends to do so, nor even if there is an arrangement that the appointee should do so, as long as

the donee's purpose in making the appointment is the benefit of the appointee and not the benefit of those who are not objects." ..."

17 Lewin goes on further to say at para 29–265:

"Since even an express arrangement to benefit a person who is not an object will not of itself invalidate the appointment if the purpose is the benefit of an object, it follows 'a fortiori' that an incidental benefit to such a person is unobjectionable. Hence trustees may exercise a power to pay capital to a beneficiary for the purpose of enabling him to meet, or making it easier for him to meet, an order made against him in proceedings for ancillary relief after a divorce in favour of someone who is not an object..."

18 An example of this is to be found in the case of *Re The X Trust* [2002] JLR 377 where the Court agreed that an appointment by the trustees of £1.8 million to the husband to enable him to meet a lump sum order for that amount in favour of his wife (who was not a beneficiary) was and was intended to be for his benefit and was therefore not a fraud on a power.

Application to the facts

19 The Trustee, having considered the matter very carefully (as can be seen from the voluminous documentation attached to the affidavits of Mr Neel Sahai on behalf of the Trustee) has concluded that it is in the best interests of the husband to make the appointment. We would summarise its reasons for so concluding as follows.

20 The husband very realistically accepted before the Family Division that the assets of the Trust should be considered as a resource available to him for the purposes of divorce, not least because he had in the past received a number of substantial capital distributions from the Trust. He argued before the judge for the sort of order which the judge eventually made i.e. an order giving the wife an interest in the Company rather than an order requiring him to make lump sum payments with the consequent pressure on liquidity of the business. He therefore very much wishes the Trustee to give effect to the Restructuring.

21 Of the adult beneficiaries, eight have replied and confirmed that they wish the Trustee to give effect to the Restructuring. The other adult beneficiaries have not responded but no one has communicated any objection to the Trustee.

22 The judge specifically considered the possibility of the Trustee refusing to give effect to the orders he had made (see para 70 of the second judgment) and indicated that in those circumstances the matter would have to be revisited. He commented *"I know that everyone concerned would be devastated if that were the outcome, and will be alive to the potential fiscal consequences of such an impasse"*.

- 23 The reference to potential fiscal consequences is a reference to the agreed fact that, if the Restructuring cannot be put in place prior to 5th April, 2017, there will be very substantial adverse tax consequences. That would clearly not be in the interests of any of the beneficiaries.
- 24 If the Trustee were to refuse to give effect to the Restructuring, it seems likely that the only alternative order that the Family Division could make would be to order the husband to pay a much increased lump sum to the wife. The husband has made loans to various companies within the business structure and the Trustee considers that the likely consequence of such an order would be a forced sale of some of the assets of the Trust. This would be extremely disadvantageous to the beneficiaries as it would result in a considerable loss of value.
- 25 Although in a perfect world, the Trustee would prefer not to have the wife (whose relations with the husband are poor) as a minority shareholder in the Company, the fact is that she has less than 25% and therefore cannot block an Extraordinary Resolution and the provisions of the shareholders' agreement provide, in the Trustee's opinion, adequate protection for both the Trust (through the Holding Company) and the wife and should prevent any disruption to the conduct of the underlying business.
- 26 The entrepreneurial driving force behind the business is the husband and the long-term interests of the beneficiaries are best served by the husband being able to devote his attention to such business without being distracted by continuing hostile matrimonial litigation or the need to find liquidity (which he does not have) to fund an increased lump sum payment.
- 27 A complicating factor has been that the wife has appealed against the judge's order. The Trustee has considered whether it should nevertheless give effect to the Restructuring because the effect of the appeal is not to stay the judge's order. The Trustee has taken detailed advice on this including advice upon the prospects of success of the appeal, the possible orders which the Court of Appeal might make and the tax position related to the Restructuring. The clear advice is that the Trustee should proceed with the Restructuring notwithstanding the wife's appeal. If the appeal were to be dismissed, the cost of delaying the Restructuring in terms of tax payable would be very substantial. It is vital that the Restructuring take place prior to 5th April, 2017, if possible. The Trustee is advised that the need to try and avoid such tax consequences outweighs the risk of any further tax consequences in the event of the Court of Appeal increasing or varying the nature of the award to the wife. The husband is not appealing the judge's order and accordingly, even if the appeal is dismissed, the Restructuring will still need to be carried out.
- 28 On behalf of the minor, unborn and unascertained beneficiaries, Advocate Evans noted that the effect of the Restructuring would be to remove assets, from which the beneficiaries

might in due course otherwise benefit, to the extent of the value of the shares in the Company transferred to the wife. However he considered that this was outweighed by the interests of the family as a whole in bringing an end to the acrimonious divorce proceedings, enabling the husband as the entrepreneurial driving force to continue to increase the assets of the Trust, and avoiding the adverse tax consequences which would follow from any alternative course of action or any delay in putting the Restructuring into effect. Taking these matters in the round, and noting the agreement of the parents of all the minor beneficiaries, he supported the Trustee's decision.

- 29 We have carefully considered the Trustee's decision and the reasons which it has given for concluding that it is appropriate to enter into the Restructuring. We have concluded that the decision is eminently reasonable and indeed the decision is not only clearly in the best interests of the husband but is also reasonable from the perspective of the other beneficiaries for the reasons articulated by Advocate Evans. We are satisfied that the decision is being taken for the purpose of benefitting the husband, not the wife and therefore is not a fraud on a power.
- 30 We therefore gave our blessing to the Trustee's decision to take such steps as may be necessary to give effect to the Restructuring.