Trident Trust Company Ltd (in its capacity as trustee of the B Trust) v A

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Jurats Crill, Christensen, William Bailhache
Judgment Date:	21 January 2020
Neutral Citation:	[2020] JRC 11
Reported In:	[2020] (1) JLR Note 3
Court:	Royal Court
Date:	21 January 2020

Text

[2020] JRC 11

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, **Commissioner, and** Jurats Crill **and** Christensen

Between
Trident Trust Company Limited (in its capacity as trustee of the B Trust)
Representor
and
1. A
2. B
3. C
4. D

5. E
6. F
7. G
8. H
9. I
10. J
11. K
12. L
13. M
14. N
15. O

Respondents

Advocate D. James **for the Representor**.

Advocate D. M. Cadin **for the First Respondent**.

Advocate C. J. Swart **for the Second to Thirteenth Respondents**.

The Fourteenth and Fifteenth Respondents did not appear.

Authorities

Trust — summons from the Representor seeking various orders

THE COMMISSIONER:

Introduction

1 The Court sat on 16 th December to hear a summons from the Representor seeking the following orders:-

(i) The time for fixing the date of the summons be abridged and that the summons and the representation be listed as a *cause de brièveté*;

(ii) Until further order, any act declared within the instrument of trust dated 10 th December 1985 establishing the B Trust ("the Trust") to require the consent of the protector should not require such consent;

(iii) The Representor be indemnified for its costs of and incidental to the summons from the Trust; and

(iv) For such further orders as the Court deemed just.

2 At that time, on behalf of the First Respondent, Advocate Cadin objected to the various claims for relief and in particular sought an adjournment. The Court gave judgment on 16 th December in which it said that it considered that there was substance in Advocate Cadin's objections. However, we said that there was evidence then available to us which provided a basis upon which it was proper to ask the Court to ensure that various payments were made to beneficiaries. Accordingly we indicated we would sit on 8 th January and we expected the Representor ("the Trustee") to have served the parties with a schedule of the payments which the Trustee would invite the Court to sanction. The nature of the Trustee's application to the Court for sanction was not a Re S style of blessing of the Trustee's proposed course of action – it was rather that pursuant to the terms of the Trust, the Trustee was unable to make payments of capital from the Trust fund without the approval of the protectors, and it was unclear both as to the present status of the protectors and as to their willingness to give the Trustee approval to make the necessary payments. In the context of the status of the protectors, the Trustee indicated to the Court in December that it considered the Fourteenth and Fifteenth Respondents had been properly appointed as protectors by the First Respondent, but the Trustee recognised that there were a number of concerns raised by the Second to Thirteenth Respondents regarding that appointment. It was clear from Advocate Swart's submissions that this was an accurate statement of his clients' position, although no formal challenge to the appointment of the protectors had been instituted. In fixing the 8 th January for the hearing to consider whether the Court should give approval to the Trustee to make the payments in question, we indicated that the Trustee should provide an affidavit in support with material which would be available to all parties, but if there was private information which the Trustee wished to place before the Court separately, not for circularising the parties, the Trustee had leave to follow that course in the usual way.

3 Immediately following the sitting of the Court, the Commissioner sat as a single judge to consider directions in relation to the final hearing of the amended representation, which is listed to take place on 19 th and 20 th March. Although no directions were in fact given, the Commissioner indicated that at the hearing in January, the Second to Thirteenth Respondents would be expected to confirm whether they intended to challenge the decision of the Trustee in respect of the matters identified at paragraphs F(i) to (iv) of the amended representation's prayer for relief, and in relation to those sub-paragraphs and paragraph G(1) and (2) of the prayer indicate the time period which was proposed for them to particularise their case. These issues came up for consideration accordingly when the Court sat on 8 th January.

4 In accordance with the directions given on 16 th December, the trustee did serve a schedule of payments which it was to ask the Court to sanction. Those distributions are as follows:-

(i) To the Eleventh Respondent – US$600,000

(ii) To the Ninth Respondent – US$620,805.87

(iii) To the Second Respondent – US$471,707.60

(iv) To the Fifth Respondent – US$1,599,174.49

(v) To the Tenth Respondent – US$620,805.87

(vi) To the T Trust – US$485,677.52 and €214,000

(vii) To the U Trust – US$320,130.21 and €238,000

(viii) To the Eighth Respondent — £50,000

5 The reasons why the trustee considered that the payments numbered (i) to (vii) ought to be made are linked to a failed investment orchestrated by the First Respondent in a company called R Company, that investment being made with the benefit of funds provided by the proposed recipients of the distributions in question. We have been informed that the sums respectively reflect monies belonging to those recipients which were paid to a company called S Company wholly owned by the Trustee, for onward transmission to R Company. Although the books and records of both the Trust and S Company show the incoming monies as loans made to S Company, it is not entirely clear whether the onward transmission of those monies to R Company by way of loan was as agent for disclosed principals and certainly some of the paperwork before us suggests that the First Respondent considered that there was a " *moral obligation*" to repay the monies to those persons or entities listed in the schedule, which rather suggests that no legal obligation existed. The Court makes no finding in that respect for reasons to which we will turn shortly.

Background

6 The background to the matters before us may be relatively swiftly summarised. The B Trust was established by a settlement made on 10 th December 1985 between the Second Respondent and the Trustee. The settlement is subject to the proper law of Jersey and the beneficial class includes the settlor, her siblings and their children and remoter issue respectively, and her father, the First Respondent. The settled fund was two bearer shares in S Company. The trusts of the settlement were broad discretionary trusts in favour of any one or more of the beneficiaries, but the Trustee's powers of appointment of capital, together with sundry other powers, could only be exercised with the consent of the protector. It appears to be common ground that the economic settlor was the First Respondent, who was also named as the first protector and it also appears to be common ground that the First Respondent was, apart from being economic settlor, protector and beneficiary, a strong influence on the trust and its administration. We will return to the protector powers later in this judgment.

7 The representation shows that the Trustee has since the inception of the Trust proceeded on the footing that during the First Respondent's lifetime, he would be the primary beneficiary, but after his death the Trust funds would be utilised for the benefit equally of his

children, the first generation beneficiaries, and their families. The First Respondent is now aged 91. He married his long-term partner, who is not party to these proceedings, in or about May 2018 and he has requested the Trustee to make his wife a beneficiary of the Trust so that she can receive, whether directly or indirectly, benefit from it. Unfortunately, relations between the First Respondent's wife and his children and their families appear to be extremely poor; we have not heard from her, but what we have seen from the Eighth Respondent are a series of allegations that the First Respondent's wife is in effect taking advantage of the First Respondent's alleged lack of capacity so as to prevent any contact between him and his children and wider family. They fear that the First Respondent's wife will take advantage of the situation for her financial benefit at their expense. As we understand it, the fear of the Second to Thirteenth Respondents is that the protectors, appointed by the First Respondent in March 2019, are likely to be unduly favourable towards the First Respondent's wife; and indeed as the protectors have had no, or no substantial, contact with the Second to Thirteenth Respondents, the latter feel that there is in fact no need for protectors at all given their father's recent lack of capacity. In that connection, there are proceedings which have been commenced in Country Q in which the First Respondent's capacity is currently being challenged, and if successful, these will presumably result in the appointment of a delegate or curator to act on his behalf. These proceedings, we are told, are due to be heard in May this year.

8 We add finally by way of background that the arrangements made by the First Respondent for the establishment of the Trust may have resulted in a tax liability, as yet unascertained, for the Second Respondent as the named settlor of the Trust. The arrangements have also resulted in a liability to tax on the part of the First Respondent. There is no doubt that for the purposes of making any of the scheduled payments, the Trustee will need to investigate carefully how such payments would be best structured for avoiding unnecessary taxation.

The hearing on 8th January

9 It is said by the Trustee that in order to make the payments in question, it will be necessary to make appointments of capital. Whether that is so or not seems to us to depend upon whether S Company is making a repayment of a debt, or whether the Trustee is making an appointment of capital to or for the benefit of one or more of the beneficiaries. We have approached this question at present on the basis that there is to be an appointment of capital, because it is not obvious that if it is the case that S Company is simply repaying its debts it is necessary to trouble the Court at all.

10 The Trustee and the Fourteenth and Fifteenth Respondents (the new protectors) have been communicating since the December hearing and the protectors have now given their consent to making the first seven scheduled payments. That being so, assuming there is to be an appointment of capital, the Trustee has resolved to appoint the capital sums and has the consent of the protectors to do so. Nothing further arises for this Court as a result in connection with those seven scheduled payments. We are not asked to bless the appointments as a momentous decision of the Trustee, and in our judgment that was rightly

conceded by Advocate James. There is therefore no Trust administration matter which arises in relation to the making of those payments, whether it be by way of appointment of capital or by way of repayment of debt.

11 The protectors have not consented to the payment of £50,000 to the Eighth Respondent, with an additional payment to him if necessary in respect of any tax he might have to pay on such appointment being made. The protectors have not consented because they say they have not received sufficient information in order to consider the exercise of the Trustee's discretion in this respect; and the reason they have not received that information is that the Eighth Respondent, although having an open communication with the Trustee, regards that communication as entirely confidential and refuses to allow the Trustee to disclose the details of his financial position to the protectors. He takes that view because of the connection between the protectors and the First Respondent's wife who, he thinks, may use the personal financial information so obtained to his prejudice. The evidence from the Eighth Respondent is that the fears which he has are shared by others of the Second to Thirteenth Respondents.

12 This is an impossible position for everyone. It is of course important that the Trustee is able to have confidential communications with the beneficiaries, but the beneficiaries themselves must appreciate that where the power of the Trustee to take action requires the approval of protectors, it is not only natural but necessary that the Trustee is able to share with the protector the information which the beneficiaries have provided. The protectors cannot meet their fiduciary functions without having the information to do so. It is apposite to add at this stage that, without making any findings as to the relationship between these particular protectors, and the First Respondent or his wife, their performance of their fiduciary functions as protectors requires them – absolutely requires them – to keep the confidential communications between the beneficiaries and the Trustee of which they must necessarily become aware, confidential to themselves as well. To the extent that the protectors might receive information from third parties about any of the beneficiaries, which may be information unknown to the Trustee, the protectors are duty bound to carry out such investigations independently as they can to identify whether there is anything of substance in that information which they or the Trustee ought to take into account. The fiduciary obligation is an onerous one, but what is clear is that the protectors do not have a client to whom they look for instructions. Their fiduciary functions under the Trust place them in a different category, whether the First Respondent who appointed them believes that to be the position or not.

13 The Trustee provided information to us in connection with the proposed appointment of £50,000 to the Eighth Respondent which we found convincing. Had it been made available to the protectors, and it was not made available for the reasons we have indicated, we have no doubt that the protectors, acting in accordance with their fiduciary functions, would have given their approval to the relevant appointment of capital. In the circumstances, the Court is prepared on this occasion to dispense with the requirement under the Trust that the consent of the protectors be obtained simultaneously with or before the appointment of capital is made and to approve the Trustee's proposed appointment as requested. We do

not know at this stage whether there will be any tax involved with making such an appointment, but, if it is involved, the Trustee may gross up the capital appointment to ensure that the recipient of it receives an amount of £50,000 net of said tax.

Other matters

14 On behalf of the First Respondent, Advocate Cadin submitted a draft order to us which covered other material. This was helpful, albeit the draft order operated more as an agenda for submissions than anything else.

15 The scheduled payments which the protectors agreed ought to be made were connected with the investment in R Company, as indicated above. It appears that, through the P Trust, the First Respondent's wife may also have made an investment in R Company. We have no adequate knowledge about these arrangements to make any comment or order, but we have noted that the Trustee has undertaken to take such steps as may be appropriate to make a repayment of the monies owed by S Company to the trustees of the P Trust or to whom they shall direct.

16 Similarly, the Respondents have allegedly incurred costs in relation to the voluntary disclosure process in Country Q regarding the taxation arrangements for the B Trust. Once again we have no sufficient information to make any comment or order, but we note that the Trustee has undertaken to take such steps as may be appropriate to facilitate a repayment to the Respondents of the costs incurred by them or on their behalf in relation to this SVDP process. The repayment of costs we take to be a repayment of proper costs actually incurred, because the phraseology of the draft order was " *on a trustee basis*" albeit the costs here were not being incurred by the Trustee.

17 The draft order provided that the Trustee should have its costs of the SVDP process on a trustee basis. Once again, it does not seem to us that we have sufficient information to make any order in this respect, and for the Trustee, Advocate James confirmed that he did not need this order. As he said, the Trustee would expect to pay itself its costs of that process as part of its fees and disbursements for acting as Trustee in the usual way.

Further proceedings

18 It is not obvious to us that with one exception – the validity of the appointment of the new protectors – there is anything further arising out of the representation for the Royal Court to consider. In normal circumstances, we would simply have indicated that the representation should now be withdrawn. However we have not done so because it seems to us that the validity of the protectors' appointment needs to be established one way or another. It is not good enough for there to be continuing uncertainty in this respect. The Second to Thirteenth Respondents have indicated that they do not feel free to communicate with the Trustee in such a way that the Trustee can pass on those communications to the protectors.

In effect that will paralyse the proper administration of the Trust, and the only outcome, other than continuing paralysis, would be a series of further applications to the Court by the Trustee asking for the Court's sanction to make particular payments because the protectors had, quite understandably, not given their approval as they had not had the information to consider it appropriately.

19 The Second to Thirteenth Respondents have had adequate time to decide whether they wish to bring a challenge or not. It seems that there are four potential grounds of attack:-

By contrast, the deed of 13 th March 2019 provides at paragraph 1 that:-

> *"In exercise of the powers conferred upon A by clause 23 of the Settlement and of every and any other enabling power contained in the Settlement, A hereby appoints N and O to be the joint protectors of the Settlement in place of A for all the purposes of the Settlement with effect from the date hereof."*

(i) At the time of his appointment of the new protectors, the First Respondent lacked capacity to do so.

(ii) Even if he had capacity to do so, the First Respondent did not use his protector powers to appoint successor protectors in a fiduciary manner and was wrongly motivated in that appointment.

(iii) The suitability of one or both of the Fourteenth and Fifteenth Respondents is such that they should not have been appointed as protectors.

(iv) For technical reasons, the appointment of the Fourteenth and Fifteenth Respondents as protectors fails. The basis of this ground of attack would be the inconsistency between the deed of appointment and the trust deed itself. Clause 24 of the trust deed provides that if there is more than one protector, the consent of one protector shall be sufficient, and clause 23.6 provides:-

"For the avoidance of doubt it is herein declared that there may be more than one protector and in such event the protectors shall act jointly and separately".

20 We obviously make no comment on any of those potential grounds of attack upon the appointment of the protectors. The first three of those grounds are grounds which would need to be asserted by the Second to Thirteenth Respondents. Advocate James for the Trustee has indicated in the course of argument that on the material which is available to it, it considers the appointment of the protectors to have been valid and effective and it will continue accordingly until a court orders otherwise. As the fourth potential ground of attack only arose during the course of the hearing, the Trustee had not fully considered that matter, and it may be that it will feel obliged to seek the Court's guidance in that respect in any event. No doubt in that connection the Trustee will take such advice as it thinks fit.

21 As far as the Second to Thirteenth Respondents are concerned, this Court is entirely

satisfied that, if they are to challenge the appointment of the protectors, they should be under a time limit for doing so. The possibility of such a claim is anticipated in the representation and accordingly we give direction to the Second to Thirteenth Respondents that if they wish to bring proceedings challenging the appointment of the protectors, they must file particulars of claim by no later than 14 th February 2020. Such particulars will form the basis of their claim and each of the parties will have the opportunity to file an answer to the particulars of claim – we order that such answers be filed within 28 days of the particulars of claim being filed, and we have extended the time provided by the Royal Court Rules to take account of the fact that the First and Fourteenth and Fifteenth Respondents are not in this jurisdiction. The fact that we have extended the time already does not preclude an application, based on its merits if any, for a further extension to time to file an answer.

22 Advocate Swart contended on behalf of the Second to Thirteenth Respondents that a material factor in deciding whether or not to bring such a claim would be whether the costs of doing so would be met out of the Trust fund. He takes the view that the Act of this Court of 16 th August 2019 enables the Trustee to pay out of the Trust fund the reasonable legal costs of instructing a single counsel to argue for a preliminary hearing to deal with the costs of such a challenge, such that a pre-emptive costs order might be made. We make no comment on whether that is the effect of the order of 16 th August 2019, because we have not been addressed on it, but we observe that it is open to the Second to Thirteenth Respondents to file a summons seeking a pre-emptive costs order in relation to the claim which they wish to bring and to make a date fix appointment so that the Court can be convened to consider that pre-emptive costs application. Whether the Second to Thirteenth Respondents can achieve that before 14 th February is not clear, but that has no impact upon our order that if the Second to Thirteenth Respondents, or any of them, wish to challenge the appointment of the new protectors, they must file particulars of claim by 14 th February 2020.

23 Advocate James submitted that the trustee should have its costs on a pre-emptive basis in respect of any challenge to the appointment of protectors. We have not seen the basis of any such challenge at this stage, and it seems to us that, while it may well be likely that such a pre-emptive order might be made, the matter should await some certainty as to what the nature of the application is.

24 The last matter which arose in the course of the hearing was the question of fees which the protectors wished to charge. The Trustee was anxious to emphasise that in its view the protectors had discharged their duties with diligence since the 16 th December hearing and there was no basis upon which as a matter of fairness they should not have their fees. However, there was a difficulty that the Trust deed did not provide for the payment of fees to a protector. In that connection, Advocate Swart's contention was that there was no need for protectors once the First Respondent retired from that role and as they allegedly took on the position in the apparent knowledge that there was no remuneration provision under the deed, they were not entitled to remuneration.

25 Once again we make no finding in respect of the various contentions but it seems to us to be difficult to conclude at present that the protectors are entitled to their fees from the Trust fund. Accordingly, it seems to us that either they or the Trustee should be considering whether to bring an application to the Court for a variation of the Trust deed to enable the payment of fees for protectors in the future, and of course that will be an opportunity for the Second to Thirteenth Respondents to put in their objections and subsequently for the Court to consider the matter.

26 As to the costs of and incidental to the hearing on 8 th January, it was agreed that the Representor should have its costs on the trustee basis and the Respondents should all have their legal fees on the indemnity basis.