G Trustees Ltd v Mr A

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Liston, Grime
Judgment Date:	05 October 2017
Neutral Citation:	[2017] JRC 162A
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Date:	05 October 2017

Text

[2017] JRC 162A

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner, and Jurats Liston and Grime.

In the Matter of the Representation of G Trustees Limited and in the Matter of the H And J Trusts

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984, as Amended

Between
G Trustees Limited
Representor
and
Mr A

First Respondent

and

Mrs C
Second Respondent

and

Mr D
Third Respondent

and

Mr E
Fourth Respondent

Advocate M. P. Renouf **for the Representor**.

Advocate D. Evans **for the First and Fourth Respondents**.

Authorities

In the Matter of the S Settlement [2001] JLR Note 37 .

Trusts (Jersey) Law 1984.

Representation of WW and XX re In the matter of the C Foundation [2011] JRC 231 .

Public Trustee v Cooper [2001] WTLR 901 .

Lewin on Trusts 19th edition.

Chellaram v Chellaram [1985] Ch. 409 .

Ewing v Ewing [1883] 9 App.Cas. 34 .

Crociani v Crociani [2014] UKPC 40 .

In the matter of M and Other Trusts re A B and C v Rozel Trustees Limited [2012] JRC 127 .

In the matter of the H Trust [2007] JRC 187 .

Spiliada Maritime Corp v Consulex Limited [1986] 3 All ER 843 .

Heinrich v Pantrust and Others re In the matter of the Brazilian Trust [2016] JRC 106A .

In the matter of the Manor House Trust [2015] JRC 208 .

Trust — challenge to jurisdiction of the Court regarding foreign trust.

THE COMMISSIONER:

1 This judgment is concerned with a challenge to the jurisdiction of the Court to give directions to a Jersey resident trustee in relation to a foreign trust.

2 The Representor, which is incorporated in and carries on a trust and company business from Jersey, applied for directions in relation to two family trusts:-

> (i) The H Trust created by the fourth respondent ("the Settlor"), originally with a Bermudan based trustee. The Representor was appointed trustee on 4 th April, 2013. It was originally held on discretionary trust for a class of beneficiaries composed of the Settlor's elder son, the first respondent, whom we will refer to as "the elder son", his daughter, the second respondent, whom we will refer to as "the daughter" and his younger son, the third respondent, whom we will refer to as "the younger son" and any other children and remoter issue of the Settlor and their spouses. The Settlor and his wife are expressly excluded from benefit. Pursuant to a deed of appointment executed in 2001, the income of the whole of the assets subject to the H Trust are now held on trust to be paid to the younger son during his lifetime.
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> (ii) The J Trust, declared by an Bermudan based trustee. The Representor was appointed trustee on 4 th April, 2013. The J Trust is held on discretionary trusts to appoint in favour of any of the class of beneficiaries composed of the elder son and the daughter (defined in the trust deed as "Principal Beneficiaries"), all of the children of the Settlor and their spouses, widows and widowers, children and remoter issue of the same. Subject to the exercise of such power of appointment, the trust fund is divided into half, with the income of half being paid to the elder son during his lifetime and thereafter held as to capital and income for such of his children as have reached 25, and likewise for the daughter as to the other half. The Settlor and his wife are again excluded from benefit.

3 The H Trust is governed by Bermudan law. Clause 2 of the trust deed is in these terms:-

> *"Proper Law*
>
> *This Settlement is established under the laws of Bermuda and subject and without prejudice to any transfer of the administration of the trusts hereof to any change in the Proper Law of this Settlement and to any change in the law of interpretation of this Settlement duly made according to the powers and provisions hereinafter declared the Proper Law of this Settlement shall be the law of Bermuda which shall be the forum for the administration thereof."*

4 The J Trust is also governed by Bermudan law. Clause 19 of the trust deed simply

provides:-

> *"19 The law of Bermuda shall be the proper law of this Settlement."*

5 There are two other family trusts of which the Representor is not the trustee.

Background

6 The application was concerned principally with the J Trust, which, through BVI incorporated companies, owns a large country house in Europe and other assets.

7 The country house was purchased by the Settlor many years ago, and he devoted a great deal of time and expense to restoring it, before settling it into the trust structure he had created. It is currently let to the Settlor at an annual rental of €100,000, in respect of which there are arrears of rental as at 5 th April, 2017, of €501,559.2. The running expenses of the country house are significant – to the order of £500,000 a year. The Representor has allowed this to continue because of the family's attachment to the country house and to their strong desire to keep it in the family. It is a very valuable asset, but the only significant income it generates is the rent due from the Settlor. In addition to the rental arrears, the Settlor has considerable indebtedness to all four family trusts and to his bank.

8 A note produced by the Representor following a family meeting in July 2016 sets out the financial position of all four family trusts, showing substantial assets on a consolidated basis but borrowings of one third of their value. As the note says:-

> *"Viewed on a consolidated basis, the financial position of the trusts can be regarded in two different ways.* There are substantial assets and there are borrowings of approximately one third of the value of the assets which suggests a healthy financial position. The alternative view is that this initial view masks the true position because the trusts are unable to service the borrowings out of income and the greater part of the assets are not suitable for low cost bank lending purposes, which means the trust borrowings are expensive, and the borrowings increase quickly as the interest rolls up."

9 The J Trust has inter-trust debt, but also has substantial charges over the country house in favour of third party lenders, the first of which comes due for repayment in December of this year.

10 Following numerous unsuccessful efforts to find alternative long-term financing, and many suggestions from the Settlor and the elder son as to potential sources of alternative finance, from which nothing concrete has ever emerged, it was concluded, following discussions, that the country house would have to be sold. This was acknowledged in a letter from the Settlor of 3 rd October, 2016, in which he confirmed that if re-financing arrangements were

not completed by Easter 2017, then the country house would have to be sold to a third party.

11 No such re-financing has been achieved. The only remotely credible alternative put forward by the Settlor and the elder son is the sale of the other assets held within the four trusts, but as the Representor points out, that would leave the trusts with no income producing assets whatsoever, only the country house, and no way to service the running costs of that property. It would also be insufficient to deal with the whole of the third party debt, which would require servicing.

12 Once it became clear that the Representor wished to proceed with the marketing and sale of the country house on a controlled basis, the Settlor and the elder son wrote to the Representor saying that they had lost trust and confidence in it, and wished to bring about the appointment of a new trustee. A new trustee has been identified by them which was prepared to pursue their alternative plan, a plan which the Representor regarded as financially suicidal for the family. This has created divisions within the family in that the daughter opposed a change of trustee and supported the proposal that the country house be sold, as did the younger son.

13 Marketing of the country house began on 12 th June, 2017, but it became clear to the Representor that the resident staff had instructions from the Settlor and/or the elder son to frustrate any attempt to market the property by showing potential buyers around. It appeared that they had been told that the Representor had already been removed as trustee. A substantial property of this kind requires time to market, and the Representor is understandably concerned to avoid a distressed sale at an impaired value. There is urgency as the first of the secured debts comes up for repayment this December.

14 It is not necessary for this judgment to go further into the issue, as it was clear to the Court that the Representor required the protection of the Court. The Representor sought the Court's approval of its decision to market the property, on the basis that it would return for approval of any decision to sell. The Court was satisfied, applying the test in the case of *In the Matter of the S Settlement* [2001] JLR Note 37, that the Representor had the power to procure the sale of the country house, that its decision to market the country house had been formed in good faith and was a reasonable one which had not been vitiated by any actual or potential conflict of interest.

15 Accordingly, the Court approved the decision of the Representor to market the country house. The Court also directed the Representor to remain as trustee of the trusts until further order of the Court, and ordered the Settlor and all of the Respondents to take all reasonable steps within their power to facilitate the marketing of the country house, and to take all reasonable steps within their power to allow access to the country house, when reasonably required by the Representor or the appointed agents for that purpose.

Jurisdiction

16 Advocate Evans, for the Settlor and the elder son, submitted that the Court lacked jurisdiction to give directions to the Representor. He accepted that under Article 5 of the Trusts (Jersey) Law 1984 ("the Trusts Law") the Court had jurisdiction where ***"a trustee of a foreign trust is resident in Jersey"***, as is the position here. However, Article 50 provides that Part 4 of the Trusts Law ***"shall apply to a Jersey trust and, to the extent that the context admits, shall apply to a foreign trust"*** (his emphasis). This application was being brought under Article 51 of the Trust Law, which authorises a trustee to apply to the Court ***"for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the Court may make such order, if any, as it thinks fit."***

17 The provisions of Article 51 gave statutory effect, he said, to the Court's inherent jurisdiction over Jersey trusts, relying on this limited extract from the judgment of Sir William Bailhache, then Deputy Bailiff, in the case of *Representation of WW and XX re In the matter of the C Foundation* [2011] JRC 231, where he said, at paragraph 13:-

> ***"Article 51 confers a general discretion on the Court to make orders in relation to a trust if it thinks fit.*** This gives statutory recognition of the Court's equitable jurisdiction in relation to trusts."

That equitable jurisdiction, said Advocate Evans, included the jurisdiction to give directions of the kind made in *Public Trustee v Cooper* [2001] WTLR 901, in respect of Jersey trusts.

18 By way of reminder, *Public Trustee v Cooper* envisaged at least four situations in which a court would be asked to adjudicate on a course of action proposed or taken by a trustee; in short:

> (i) where the issue is whether some proposed action is within the trustee's powers;
>
> (ii) where the issue is whether the proposed course of action is a proper exercise of the trustee's powers where there is no real doubt as to the nature of the trustee's powers and the trustee has decided how it wants to exercise them but because the decision is particularly momentous, the trustee wishes to obtain the blessing of the court;
>
> (iii) where the trustee wishes to surrender its discretion to the court because of deadlock or conflict; and
>
> (iv) where the trustee has actually taken action and that is being attacked as being either outside its powers or an improper exercise of its powers.

19 Advocate Evans argued that the jurisdiction under *Public Trustee v Cooper* concerned the private domestic relationship between the trustee and its beneficiaries. It is, he said, uniquely governed by the proper law of the trust, and the Court giving such directions would

do so in exercise of its own inherent jurisdiction over trusts governed by its own domestic law. As Hart J explained in *Public Trustee v Cooper*:-

> ***"The ability of trustees to make such applications derives from the peculiar relationship of trusts to the courts of Chancery and is no doubt founded in the jurisdiction of this Court in an appropriate case itself to execute a trust."***

20 The Royal Court, he argued, had no inherent jurisdiction over any trusts other than those governed by Jersey law; it has jurisdiction over foreign trusts only by virtue of the Trusts Law, and only to the extent that such jurisdiction is conferred by the Trusts Law. Importantly, Article 51 is qualified by Article 50. If Article 50 is to have any effect, it must be read as limiting the circumstances in which the powers given in Article 51 can or should apply to the foreign trust. Otherwise, he said, Article 50 would be otiose.

21 Advocate Evans said there were three compelling reasons why Article 51 should not be construed as giving the Court jurisdiction over foreign trusts for the purposes of *Public Trustee v Cooper* applications:

(i) If it were to exercise such jurisdiction, it would have to apply foreign law, for which purpose expert evidence of the law and practice of the foreign court would be needed;

(ii) In exercising that jurisdiction, it would be usurping the inherent jurisdiction of the foreign court; and

(iii) There would be no certainty that the foreign court would recognise a decision of the Court purporting to bless a controversial and "momentous" decision by the trustees.

22 Advocate Evans acknowledged that there are cases in which the Court receives evidence of foreign law through the calling of appropriately qualified experts, but where the trustee has the alternative course of making its application in the court whose substantive law governs the trust, the need for expert evidence adds, he said, an unnecessary level of cost which would normally fall on the trust assets. It was one thing, he said, for a court to apply foreign law on the basis of expert evidence; it was another for it to purport to exercise the inherent jurisdiction of the foreign court. In exercising the jurisdiction under *Public Trustee v Cooper*, the Court is not really asking itself what the foreign court would do in applying its own law; rather, it is putting itself in the place of the foreign judge in exercising his or her powers.

23 For that reason, he said, there was a real and entirely justifiable possibility that the foreign court, in this case the courts of Bermuda, would not recognise a decision of this kind made by a court of a different jurisdiction. The beneficiaries of the trusts, particularly the minor and unborn beneficiaries, might challenge the decision of the Representor at some point in the future, notwithstanding the Court's approval. If they brought such a challenge in the courts

of Bermuda, it is entirely plausible that the court might feel itself free to reach a different decision. Since the whole purpose of a *Public Trustee v Cooper* application is to give certainty, it is difficult to see, he said, why a trustee would be satisfied with less.

24 Advocate Evans did not dispute that the Court could, in appropriate circumstances, give directions to the trustee of a foreign trust in relation to claims made against the trustee by third parties, but that would not normally or necessarily involve the application of a foreign system of law.

Decision on jurisdiction

25 Part 4 of the Trusts Law contains a number of general provisions, but in our view there is nothing in the context of Article 51 which limits the Court's powers to Jersey trusts. In the case of *The C Foundation* it had been argued that the Court's power to appoint a new trustee under Article 51 of the Trusts Law was a power of last resort, and quoting fully from the response of the Court at paragraph 13:

> ***"13 Article 51 confers a general discretion on the Court to make orders in relation to a trust if it thinks fit.*** This gives statutory recognition of the Court's equitable jurisdiction in relation to trusts. It is a wide and vibrant jurisdiction. The power to appoint new trustees existed prior to the enactment of the Law, as is apparent from the most cursory search of the **Tables des Décisions**. There is nothing in Article 51 which provides any straitjacket to the powers which are there set out."

26 The Court is given jurisdiction over Jersey resident trustees of a foreign trust under Article 5 of the Trusts Law. It is a jurisdiction that is given over the Jersey resident specifically in its capacity as trustee of that foreign trust. It would be self-defeating if the Trusts Law were on the one hand to give the Court jurisdiction over a Jersey resident trustee in that capacity and on other hand to then curtail the Court's ability to do anything to enforce that foreign trust by limiting the Court's powers under Article 51 to Jersey Trusts. There is every good reason for the Court, having been given jurisdiction over a Jersey resident in that capacity, to have all of the powers available under Article 51 to enforce that foreign trust. We rejected the suggestion, therefore, that the Court's powers under Article 51 were limited in this way.

27 In any event, we have no doubt that prior to the enactment of the Trusts Law, the Court had jurisdiction over Jersey resident trustees of foreign trusts, on the basis that its jurisdiction acts upon any person whom it finds in its jurisdiction. The point is made in this extract from Lewin on Trusts 19th edition, Chapter 11:

> ***"11–007 As to subject-matter, since equity acts in personam, working on the conscience of the trustee to compel performance of the trust, the general rule is that the English court can enforce a trust whenever the trustee can be brought before it.*** Once the trustee is before the court, the full

trustee remedies are generally available (though it may of course be difficult to enforce an order if both trustee and trust property are abroad). It does not matter that the governing law of the trust is not English or that the trust property is not in England and Wales. But any relief granted will take account of the foreign elements in the case. Hence, for example, a vesting order, which in a wholly domestic context would usually accompany an order removing trustees, would be unlikely to be effective to divest shares in a foreign company; but the court, acting in personam, may make an order against the trustees requiring them to resign and to vest the trust assets in new trustees .

11–008 Similarly, a trustee may invoke the assistance of the English court to determine a question arising in the administration of the trust, even though the proper law of the trust is not English and the trustee himself is based abroad."

28 In *Chellaram v Chellaram* [1985] Ch. 409, it was held that the English court had jurisdiction over the trustees of trusts governed by Indian law with assets outside India, who were born and domiciled in India, but who also visited London regularly, where such administration as there was took place. In his judgment, Scott J made reference to this passage from the judgment of the Earl of Selborne LC in the House of Lords' decision of *Ewing v Ewing* [1883] 9 App.Cas. 34:

> ***"The jurisdiction of the English court is established upon elementary principles.*** The courts of equity in England are, and always have been, courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Europe, in the colonies, and in foreign countries: …. A jurisdiction against trustees which is not excluded ratione legis rei sitae as to land, cannot be excluded as to moveables, because the author of the trust may have had a foreign domicil; and for this purpose it makes no difference whether the trust is constituted inter vivos or by a will, or mortis causa deed."

He also quoted from the judgment of Lord Blackburn in the same case, who agreed:

> ***"It was argued that the domicil of the testator being Scotch, the Court of Chancery had no jurisdiction at all; that the jurisdiction depended on the domicil of the testator, or at least on the probate in England, and was therefore confined to the comparatively small part of the property that was obtained by means of the English probate.*** I do not think that there is either principle or authority for this contention. The jurisdiction of the court of Chancery is in personam, it acts upon the person whom it finds within its jurisdiction and compels him to perform the duty which he owes to the plaintiff."

29 If the Jersey Court were to refuse jurisdiction over a Jersey resident trustee of a foreign trust, to compel performance by that trustee of its duties under that foreign trust, it could

leave the beneficiaries of that foreign trust without a remedy. As Advocate Renouf said, it is fundamental to the good administration of trusts that the Court should exercise the personal jurisdiction it has over that Jersey resident trustee, just as this Court would expect a foreign court to compel a trustee in its jurisdiction to compel performance of its duties under a Jersey trust.

30 As to whether the court of the proper law will respect orders made by this Court over trustees in its jurisdiction, Scott J in *Chellaram* said this:

> ***"There are two other associated points which I should now deal with.*** As an adjunct to his submission that the English courts lack the power to remove trustees of foreign settlements, Mr Miller submitted that if such an order in the in personam form were made the defendants could not safely obey the order without first obtaining confirmation from the Indian courts that it would be proper for them to do so. Further, he submitted, his client ought not ***to be subjected to such an order unless it were clear that Indian law would regard them, if they did obey, as discharged from their fiduciary obligations under the settlements*** .
>
> ***It would be a matter entirely for the defendants and their advisers what steps they take in the Indian courts, but for my part, I am not impressed by the proposition that such confirmation would be necessary.*** The English courts have jurisdiction over these defendants. An objection to the exercise of jurisdiction on forum conveniens grounds has been taken and I must deal with it, but if in the end the case continues in England, I would expect that the Indian courts, for reasons of comity, would afford the same respect to orders of this court as in like circumstances and for the same reasons English courts would afford to theirs .
>
> ***Mr Miller suggested to me that I would give short shrift to an order of a foreign court removing a trustee of an English trust; but if the English trustee had been subject to the jurisdiction of the foreign court exercised in like circumstances to those in which English courts claim and exercise jurisdiction, I can see no reason why I should recoil from an order in personam made by the foreign court against an English trustee, and if the order has been given effect to by, for example, the trustee transferring trust assets in England into the names of new trustees, I can see no reason why an English court should question the efficacy of the transfer.*** All of this assumes, of course, that there were no vitiating features in the manner in which the foreign order was obtained."

31 For the same reasons, we would expect the courts of Bermuda, for reasons of comity, to afford respect to the directions we have given to a Jersey resident trustee of a Bermudan trust, in the same way that we would afford the same respect to directions given by the courts of Bermuda to trustees of Jersey trusts resident in its jurisdiction.

32 There was nothing in the provisions of the J Trust which purport to exclude the jurisdiction of this Court by conferring exclusive jurisdiction on the courts of Bermuda; the trust deed simply provides that it shall be subject to the proper law of Bermuda. Clause 2 of the H Trust did provide that *"Bermuda shall be the forum for the administration"* of the H Trust, but that did not purport to confer exclusive jurisdiction upon the courts of Bermuda. The forum of administration in this context, in our view, means the place where the trust is administered in the sense of its affairs being organised (see *Crociani v Crociani* [2014] UKPC 40 at paragraphs 17 and 18); although in practice neither trust is administered in Bermuda.

33 There are a number of examples of cases in which the Court has given directions to Jersey resident trustees of foreign trusts, including *In the matter of M and Others Trusts re A B and C v Rozel Trustees Limited* [2012] JRC 127 and *In the matter of the H Trust* [2007] JRC 187.

34 In conclusion, the Representor is resident in Jersey and we found that we did have jurisdiction under Article 51 to give directions to it in its capacity as trustee of both trusts.

Forum non conveniens

35 In the event of the Court finding that it had jurisdiction, the Settlor and the elder son applied for a stay on the grounds that Jersey was not the appropriate forum for the hearing of the representation.

36 It is clearly established that the test, as set out in *Spiliada Maritime Corp v Consulex Limited* [1986] 3 All ER 843, is not merely that the burden of proof rests on the Representor to persuade the Court that Jersey is the most appropriate forum for the hearing of its representation, but that it has to show that this is clearly so. This test has been considered and applied in a number of Jersey cases, most recently in *Heinrich v Pantrust and Others In the matter of the Brazilian Trust* [2016] JRC 106A, *In the matter of the Manor House Trust* [2015] JRC 208 and *Crociani v Crociani* [2014] UKPC 40.

37 It would seem that the Settlor and the elder son had initiated proceedings in Bermuda for the removal of the Representor as trustee of the J Trust, although service had not yet been effected on the representor and the matter had not proceeded to any hearing. It was not in any event an application for directions to be given to the Representor.

38 We took those early steps in Bermuda into account, but in our view, the Representor clearly discharged that burden for the following reasons:

(i) It is resident in Jersey.

(ii) The administration of the trusts is carried on in Jersey.

(iii) Four of the five directors of the Representor are in Jersey, with the remaining director in Paris. Although it is the latter who conducts the relationship with the beneficiaries, all board meetings are held in Jersey.

(iv) Two of the three adult beneficiaries and their families and the Settlor are UK domiciled and resident. The remaining beneficiary, the elder son, has another Channel Islands address for service, but is largely in South Africa, where he has business interests.

(v) There are no assets in Bermuda. The assets are in Europe and England and held through BVI companies.

(vi) As pointed out in *Spiliada*, it is necessary to look at the relevant ground invoked by the Representor, and in this case, no remedy is being sought against any of the respondents. They are convened so that they can express their views as to how the Representor should be directed.

(vii) There are no liquid assets within either trust and the Representor is having to personally fund the application for directions. Requiring it to apply in Bermuda would add, unfairly in our view, to the costs burden it faces.

(viii) As Advocate Renouf for the Representor put it, everything is this side of the Atlantic, other than the proper law of the trusts.

39 Advocate Evans supported his application by criticisms of the conduct of the Representor and of its case, but had to accept that in terms of convenience, the only factor in favour of Bermuda was the proper law. All of the other factors weigh heavily and decisively, in our view, in favour of this jurisdiction. We therefore rejected the application for a stay on the grounds that Jersey was the most convenient forum.