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## **C Trust Company Ltd**

**Jurisdiction:** Jersey

Judge: Jones JA

Judgment Date:21 January 2010Neutral Citation:[2010] JCA 17Reported In:[2010] JCA 017Court:Court of AppealDate:21 January 2010

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**Text** 

[2010] JCA 17

**COURT OF APPEAL** 

Before:

Dame Heather Steel, **Q.C., President**; M. S. Jones, **Esq., Q.C., and**; Miss Clare Montgomery, **Q.C.**.

In the Matter of the Representation of the C Trust Company Limited

And in the Matter of the Roneragh Trust and the Milan Trust

Between
The C Trust Company Limited
Representor
and

Advocate Mark Howard Temple as guardian for LD and ZD

and

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MS KD JD MaD MD Respondents

Advocate L. J. Buckley for MS.

Advocate J. Harvey Hills for the Trustee.

Advocate M. H. Temple Guardian ad Litem.

Advocate O. Blakeley for MD.

## **Authorities**

Trusts (Jersey) Law 1984.

Jersey Evening Post v Al Thani [2002] JLR 542.

European Convention on Human Rights.

Human Rights (Jersey) Law 2000.

Jones JA

- 1 This is the judgment of the court.
- 2 The respondent to this appeal is the trustee of the R Trust and the M Trust ("the trusts") which were settled by KD in 1995 and 2000 respectively. The ascertained beneficiaries of the Trusts are KD, JD, MaD, MD, MS, LD and ZD.
- 3 JD, MaD and MD are the adult children of KD and his ex-wife, AD. KD and AD separated in 1991 and reached a settlement regarding financial provision in 1997. They were divorced in 2005. KD and MS began a relationship in 1997. LD and ZD are their minor children.
- 4 Proceedings against KD for ancillary relief were commenced by AD in the Family Division of the High Court of England and Wales in 2005. The claims made by AD in those proceedings caused MS to fear that her position and that of her children, as beneficiaries of the trusts, was insecure. MS has produced to the trusts a detailed memorandum intended to demonstrate that she made a substantial contribution to the trust funds. She was concerned that her contribution was invisible to the English court. After taking advice, she applied to

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the trustee for a distribution of 50% of the trusts' assets.

- 5 By Representation, dated 5th February 2009, the trustee sought approval under the provisions of Articles 51 and 53 of the <u>Trusts (Jersey) Law 1984</u> of certain decisions made by it in relation to each trust. One of these decisions, as interpreted by the Royal Court, is that, without fettering its discretion, it is its intention to appoint 40% of the net assets of the trusts to and for the benefit of MS and her two children (who will then cease to be beneficiaries of the trusts) such appointment not to be made until after the termination of the English proceedings and subject to the further sanction of the Royal Court. In other words, the trustee would not consider that proportion of the assets of the trusts to be available for distribution to KD. By Act of Court, dated 12th March 2009, the Royal Court approved that decision.
- On 1st April 2009, during the course of a hearing in the High Court, AD and KD reached a compromise of AD's claim, involving payment to AD of an agreed capital sum, to be made in two instalments. The terms of the settlement were recorded in a Memorandum of Understanding but, as it was explained to the trustee, there would potentially be a major tax advantage if any payment made by KD to AD was financed out of trust funds and made otherwise than in the performance of a legally binding obligation. KD confirmed to the trustee that it was his wish that the trustee should make this funding available to enable him to pay AD each of the instalments.
- 7 Payment of the first instalment was due on 1st May and was duly made, financed by way of a loan advanced by the trustee and secured over property owned by KD.
- 8 On 15th May 2009, following the convening of a trustee meeting, the trustee issued a Summons seeking directions from the court with regard to:-
  - (i) a proposal that the trustee should render financial assistance to KD to enable him to make payment to AD of the agreed sum, and
  - (ii) the next steps to be taken in respect of the trustee's provisional decision, which had been blessed by the Royal Court on 12th March 2009, to apply funds to and for the benefit of MS and her children.
- 9 After further procedure in the court below, the details of which it is unnecessary to rehearse in this judgment, the Royal Court fixed a hearing on the trustee's application, to take place on 5th October 2009.
- 10 On 23rd September, the trustee provisionally decided that it would assist KD by waiving the security which it holds over a property in France and which is owned by KD, to the extent necessary to leave him with sufficient free proceeds on its sale to enable him to remit the second instalment to AD. ("The decision of 23rd September".)

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- 11 On 24th September 2009, the Trustee applied *ex parte* for directions " *as to the management of the hearing on 5th October 2009 and in particular as to disclosure of evidence.*" The Royal Court had declared AD hostile to the trusts. The court was told that, by this stage, relations within the family were, as the Royal Court has described them, " *fraught*". The trustee was concerned that there was a real risk that evidence filed by it in these proceedings might be disclosed by the parties to AD, either deliberately or inadvertently, to the prejudice of the trust estates. In these circumstances, the trustee was anxious to preserve the confidentiality of advice which it had obtained and of communications with individual beneficiaries. The Royal Court, therefore, directed the trustee not to disclose its evidence to the other parties.
- 12 The court was informed that the beneficiaries were aware of the terms of the trusts, of the proposal to facilitate the second payment and of the value of the trust assets. They had also received the accounts of the trusts to 5th April 2009. The court gave liberty to the beneficiaries to apply for further information to enable them to make informed submissions the court. The second part of the trustee's Summons, which concerned its provisional decision to apply funds to and for the benefit of MS and her children, was adjourned.
- 13 Between 24th September and 5th October, there were significant developments. On 1st October, at the instigation of AD, the High Court issued a letter of request which sought the civil extradition to England of the trustee's managing director, Peter Watts, where he would be compelled to provide to AD copies of the affidavits sworn by him and filed on the *ex parte* application and for the 5th October hearing. On 2nd October 2009, again at AD's instigation, the High Court issued a letter of request seeking the presentation to the Royal Court of Mr Watt's affidavits.
- 14 When the Royal Court convened on 5th October 2009, AD sought to intervene in the application for directions. Her application was refused. (An attempt by her to be joined to the proceedings had also failed on 10th March 2009.) Counsel for the trustee then began his submissions, but the hearing could not be concluded on 5th October, and it was adjourned, part heard, until 9th October.
- 15 On 7th October, the trustee learned that KD was taking active steps to petition for his own bankruptcy. The trustee's view was that its provisional decision to release its charge over KD's French property was no longer appropriate, since it would only serve to augment the estate available to KD's creditors, should he become bankrupt. Further, it was suggested to the trustee that it was possible that any payment to AD from the trusts might be capable of being set aside as a preference.
- 16 The trustee took insolvency advice from counsel, and a trustee meeting was convened on 8th October. At that meeting, it was decided that the decision of 23rd September could no longer stand and that the most the trustee could do in the circumstances was to invite KD to give full details of any proposal to petition for bankruptcy as a matter of urgency and for the

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trustee to apply to return to court in one month's time in the event that KD had not petitioned for his bankruptcy. An email to that effect was sent to the Royal Court on the same day, for the attention of the Commissioner and Jurats.

- 17 When the adjourned hearing resumed on 9th October, Advocate Harvey-Hills for the trustee told the court what had happened since the previous hearing, and explained the trustee's current position in these terms:-
  - "... the Trustee met again yesterday and it took the decision that it did not consider it possible at this stage for its original decision [i.e. the decision of 23rd September] to remain in place. The new development had changed that and the Trustee had taken the view that the appropriate course of action was to take no steps for the time being, ... ... to write to (KD) to ascertain his intentions in relation to the proposal to have himself declared bankrupt and then to review the position within one month with a view to applying once again to the Court for a direction."
- 18 It is clear from the terms of a number of exchanges which passed between the court and counsel during the hearing that the Royal Court understood the trustee to be seeking approval only of the decision to wait for a month and then to review the position. An observer might have thought that any argument about the propriety or otherwise of the decision of 23rd September was now moot, but the Commissioner invited parties to address the court on the matter on the view that "we may not agree with the Trustee that (its decision to facilitate) should be deferred". By the time the court rose on 9th October, neither Advocate Buckley for MS nor the Guardian ad litem had completed their submissions on the decision of 23rd September. They had however, voiced their opposition to that decision and had informed that Royal Court that there were substantial grounds for their opposition. These grounds raised issues concerning, among other things, the value of the trusts, the tax implications of the proposed facilitation of the payment by KD to AD, the reasonableness of such facilitation, KD's current wishes, and whether the court should approve a decision of the trustee which was contrary to the wishes of the settlor and certain of the beneficiaries. Advocate Blakeley for MD had asked for an adjournment to allow him an opportunity to take instructions and to advise his client and that request had been refused.
- 19 Prior to the next hearing, which was fixed for 16th October, the court circulated a draft judgment. The draft contained the following passage:-

"At the resumed hearing on 9th October, Mr Harvey-Hills for the Trustee informed the Court and the parties, which now included MD represented by Mr Blakeley, of the Trustee's current position, namely that it should do nothing for the time being other than to ascertain from KD his intentions in relation to his proposal to have himself declared bankrupt and that the matter should be reviewed in 28 days." (Paragraph 27)

That was said in the context of the court's having noted that, on 8th October, the trustee's

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decision was that the decision of September 23rd "could no longer stand." (Paragraph 26)

20 Paragraph 44(ii) of the draft, however, was in these terms:-

"The Trustee's decision of the 23rd September 2009 and confirmed on the 7th October (now suspended) to facilitate the second payment by KD to AD by releasing its security over the French property is approved."

- 21 At the hearing which was held on 16th October, representations were made by all parties who had been present on 9th October, to the effect that the Royal Court should not purport to approve the decision of 23rd September, because it no longer stood, and was not a decision which the Royal Court had been asked to bless. It was also submitted to the court that there was what was described as a procedural irregularity, namely that two of the parties present had not completed their submissions, and that MD had been disadvantaged by the refusal of the request for an adjournment.
- 22 Following these submissions, the Royal Court amended the draft judgment. Among a number of changes which were made, what had been paragraph 44(ii) became paragraph 45(ii), and its terms were adjusted so that it then read:-

"If and when KD reconsiders his position and withdraws the threat of bankruptcy, the facilitation can proceed without further reference to this court but on notice to the parties and subject to the parties having liberty to apply back to the court to address it further on the proposal;"

23 Two Acts of Court were issued on 16th October. One, which we will refer to as "the first Act of Court" was in these terms:-

"Upon the Court delivering judgment and for the reasons set out therein, the Court:-

- 1. approved the position taken by the Representor during the course of the hearing namely that its decision to facilitate the second payment by (KD) to (AD) could not stand in the face of (KD) taking active steps to petition for his own bankruptcy;
- 2. directed that if and when KD reconsiders his position and withdraws the threat of bankruptcy, the facilitation can proceed without further reference to this Court, but on notice to the parties and subject to the parties having liberty to apply back to the Court to address it further on the proposal;
- 3. directed that if proceeded with, the Representor may raise the funds by such other means as it may in its discretion deem fit;
- 4. directed that the Court shall be addressed on the proposal that the

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## Representor disclose its evidence to Advocate Temple;

- 5. granted leave that the judgment and Act of Court may be disclosed to the parties in the English proceedings and through them to the High Court; and
- 6. granted liberty to apply to the Representor and the parties."

The second Act of Court contained the same orders, but numbered differently.

- 24 The directions and the grant of leave contained in paragraphs 2, 3 and 5 of the first Act of Court, and their equivalent in the second Act of Court, have been appealed by MS, the Guardian ad litem, and MD. The trustee adopts a neutral position.
- 25 At the outset of the hearing before this court on 18th January 2010, Mr Buckley made an application to have the proceedings conducted in private. In support of that application, he submitted that, when the court is considering private trust matters, there is an exception to the general rule that proceedings should be conducted in open court. He pointed out that the proceedings which gave rise this appeal were heard in private. His application was supported by Mr Harvey-Hills and Mr Temple.
- We were not minded to grant that application. The principle of open justice forms part of the Law of Jersey and is of such constitutional, legal and practical importance that the court should depart from it only if it is necessary to do so in the interests of justice. (See, generally, *Jersey Evening Post v Al Thani* [2002] JLR 542, at paragraphs 12–16, and the cases there cited.) Having regard to (i) the subject matter of this appeal, i.e. the circumstances in which the court below had issued the orders which were challenged, and (ii) the terms of the parties' written contentions, it was not obvious to us that it would be necessary for confidential information to be disclosed during the hearing. We proceeded, therefore, to hear argument in open court, reserving to any party the right to renew the application to be heard in private if, at any stage in the hearing, that appeared to have become necessary in the interests of justice.
- 27 When Mr Harvey-Hills rose to address us, he renewed the application and, further, asked to be heard alone, advising us that he considered that it would be necessary for him to disclose confidential information during the course of his submissions. We granted him leave to address us in private and alone, but with the proviso that, if he came to matters which could properly be aired in public, he should advise us so that the other parties could be invited to return to court. In the event, having heard Mr Harvey-Hills, we took the view that the substance of his submissions could be aired in public, without the need to disclose anything confidential and, at our invitation, he did so. Consequently, we have been able to determine the issues in this appeal on arguments which were all presented in open court.
- 28 Having regard both to parties' written contentions and their oral submissions, it is clear to us that the following matters are not in dispute:-

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- (i) By email sent to the Royal Court on 8th October, and in his submissions during the hearing on 9th October, Mr Harvey-Hills advised the Royal Court that the decision of 23rd September had been departed from and that the trustee no longer sought the approval of the Royal Court in respect of it;
- (ii) At no time did the trustee seek the approval of the Royal Court of any decision to raise the funds which may be necessary to facilitate payment to AD by such means as it may in its discretion deem fit, nor had any such decision been taken;
- (iii) By the close of the hearing on 9th October, the only decision before the Royal Court of which its approval was sought was to take no steps for the time being, to write to KD to ascertain his intentions in relation to the proposal to have himself declared bankrupt and then to review the position within one month with a view to applying once again to the court for a direction;
- (iv) The Royal Court gave judgment and issued the Act of Court without having heard submissions from MD on any of the issues before it, and without having heard full argument from MS or the Guardian ad litem.
- 29 It is also not a matter of contention in this appeal that it is a cardinal rule of natural justice that all parties to a dispute such as this should be given a reasonable opportunity to be heard before the matter is determined. The question is not whether the ultimate decision was correct, but whether the court's decision was reached in a process that was fair. In this case, MS, the Guardian and MD contend that the Royal Court breached that principle of fairness. We agree.
- 30 Advocate Harvey-Hills explained to us that it became evident to him, during a hearing in private in the court below, that the Commissioner was concerned that, if the Royal Court were to approve only the decision to do nothing for the time being and leave the initiative with KD by giving him one month to decide whether or not he would seek his own bankruptcy, the High Court might take the view that the trustee was not exercising its independent judgment but, instead, was deferring inappropriately to KD by letting him have effective control of the activities of the trust. The Commissioner appeared to be anxious about the consequences which that impression might have for the trust estate, in the London proceedings. The Commissioner had in mind, among other things, the risk of AD's seeking a binding order from the High Court, with the possible adverse tax implications that that would have for any facilitation that the trustee might ultimately decide to provide.
- 31 We have no doubt that, in acting as it did, the Royal Court had in mind the best interests of the trust and of the beneficiaries. We note, also, that the court below directed that, in the event that KD withdrew the threat of bankruptcy, the facilitation could only proceed on notice to the parties and subject to the parties having liberty to apply back to the court to address it further on the proposal. In our view, however, these considerations do not vitiate the unfairness. In this case, the principle *audi alterem partem* required that parties should

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have been given a fair hearing and that the court's deliberations should have been informed by their submissions. The parties were entitled to be heard before the decision was made, and that entitlement was not met by giving them the opportunity to apply to challenge the court's decision at a later time.

- Onvention on Human Rights, which now forms part of the domestic law of Jersey (Human Rights (Jersey) Law 2000). She does so, however, only in support of the proposition that she was entitled to expect that the judgment appealed from would only be given after a fair hearing. She has not sought to advance any basis on which we could properly hold that, in the circumstances of this case, Article 6 was engaged. So to hold, we would have to be satisfied that the proceedings in the court below determined MS's civil rights or obligations. It is not immediately obvious that the determination of these proceedings, raised by the trustee of a discretionary trust under the provisions of Articles 51 and 53 of the 1984 Law, qualifies as the determination of the civil rights or obligations of a named beneficiary of that trust, and we would not be prepared to decide the point in the absence of full submissions and the citation of appropriate authority. Given, however, that MS advanced argument to the effect that there had been a breach of the rules of natural justice in the court below, in support of which authority was cited, we were content to decide this appeal by application of the customary law.
- 33 For the foregoing reasons, we allow this appeal. Paragraphs 2, 3 and 5 of the first Act of Court, and their equivalent in the second Act of Court will be set aside, as will paragraphs 4 and 6, and their equivalent, their having been superseded. Paragraph 1 stands, as does its equivalent, because there was no opposition to it in the court below, and this court was specifically asked to preserve it.
- 34 Mr Harvey-Hills advised us that matters continue to develop, and that the trustee is not in a position to seek further directions. In these circumstances, we remit the case to the Royal Court, leaving it to parties to seek such orders as are required at the appropriate time.
- In the written contentions for MS, and in the Notice of Appeal for MD, we are invited to remit to a court constituted differently from the one which pronounced the orders now set aside. Whilst lack of impartiality is hinted at, there was no express complaint to that effect, and during the course of the hearing the suggestion that the Royal Court should not convene as previously constituted fell away. Consequently, we make no order in that regard.

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