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H Trust v X TrustCompany Ltd

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	12 April 2006
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Text

[2006] JRC 57

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats de Tibbo **and** Le Cornu.

Between
In the matter of the H Trust
X Trust Company Limited
Representor
and
(1) R W
(2) S W
(3) R C W
(4) A P
(5) H H

(6) G P

(7) Advocate Claire Davies (as representative of the minor and unborn beneficiaries)
Respondents

Advocate G. S. Robinson for the Representor.

The First Respondent was not represented.

Advocate J. P. Michel for the Second Respondent.

The Third, Fourth, Fifth and Sixth Respondents were not represented.

The Seventh Respondent appeared in person.

No Authorities

Deputy Bailiff

- 1 This is an application for directions by X Trust Company Limited ("the Trustee") as trustee of a settlement known as the H Trust. We gave our decision on Friday and now give brief reasons.

The background

- 2 The H Trust ("the Trust") was established by deed dated 8th May 1992 between S Holdings SA (as settlor) and Q Trustees (Channel Islands) Limited as original trustee. The Trustee was appointed as trustee in place of the original trustee on 14th February 1997.
- 3 The Trust is a discretionary trust. The present beneficiaries are the first respondent ("the husband"), the second respondent ("the wife"), the third and fourth respondents who are the two adult children of the husband from his previous marriage, the fifth and sixth respondents (who are the spouses of the third and fourth respondents) and the three existing grandchildren of the husband. Any future issue of the husband would also be beneficiaries.
- 4 The assets of the Trust (held through various companies) comprise essentially an investment portfolio, land in Canada, a villa in Portugal (although there is a question as to whether this is an asset of the Trust) and two flats in Scarborough. The Trustee estimates the overall value of the Trust as being in the region £2.6 million although the wife contends that the various pieces of real property may be worth more than is estimated by the Trustee.
- 5 The husband and the wife were married in 1983 but the wife has now instituted divorce

proceedings in the Family Division of the English High Court. In March 2005 she obtained a freezing injunction from the High Court in respect of the husband's assets and by order of justice dated 29th March 2005 a freezing injunction was granted by this Court in respect of the assets of the Trust. Certain variations have taken place since then in order to allow the Trust to continue to fund the maintenance of the husband and the wife.

- 6 The Trust was originally expressed to be governed by the Law of England whose courts were given non exclusive jurisdiction. On 25th November 2005 the Trustee exercised the powers conferred by Clause 8.2 and 9.1 respectively of the trust deed in order to change the proper law of the Trust to that of Jersey, to confer exclusive jurisdiction over all matters and disputes arising out of the Trust or the trust deed on the courts of Jersey and to make certain other amendments to the trust deed.
- 7 On 20th January 2006 the wife obtained an order from the High Court joining the Trustee to the English proceedings and a further order restraining the Trustee from executing, if it had not already done so, a deed of variation changing the proper law of the Trust; taking any further steps in relation to the same, if such deed had been executed; or taking any steps to remove the wife as a beneficiary of the Trust. Those injunctions were confirmed on 10th February when the Trustee did not appear.
- 8 On 16th January 2006 the husband's English solicitors sent a proposal to settle the matter to the wife's English solicitors. They sent a copy of the letter to the Trustee and asked whether the Trustee would be prepared to provide funds to implement the proposal in the event that it was acceptable to the wife. On 20th January the Trustee replied with a detailed letter but essentially it stated that it would not be willing to agree to the proposal as it failed to take account of the limited assets in the Trust and of the need to have regard to the interests of those beneficiaries other than the husband and the wife.
- 9 On 27th January 2006 the Trustee issued a representation seeking directions from this Court. Following an interim hearing on 9th February the matter came on for hearing last Friday. The three matters upon which the Trustee sought the approval of the Court were:-
 - (i) Its decision to change the proper law and jurisdiction clauses of the trust deed;
 - (ii) its decision not to submit to the jurisdiction of the English High Court; and
 - (iii) the stance which it had adopted in relation to the requests made to it by the husband and the wife.

We will take each of these in turn.

(i) The change in proper law

10 The Trustee has taken its decision in relation to this matter. It has executed a deed changing the proper law from English Law to Jersey Law and conferring exclusive jurisdiction upon the courts of Jersey. Although the wife has expressed certain reservations about the decision, there is currently no challenge to its validity. In the circumstances we do not see any need for directions from this Court. The Trustee has made its decision and has acted upon it. There the matter rests. In the circumstances we decline to make any order in relation to this part of the Trustee's application.

(ii) Submission to the jurisdiction of the English court

- 11 This part of the application is rather different. The Trustee seeks approval of its decision not to submit to the jurisdiction of the English court. That is a continuing and significant matter such that it is reasonable to seek the approval of the Court.
- 12 Significant consequences may flow from a decision by a trustee of a Jersey trust to submit to the jurisdiction of the Family Division of the High Court ("the Family Division") or indeed any other court considering the matrimonial affairs of beneficiaries of a trust. Any order subsequently made by the Family Division would be made in proceedings to which the trustee had voluntarily submitted and in which therefore it had full opportunity to put forward submissions on the order which the court should make. It follows that the trustee would be in some difficulty in arguing subsequently before this Court against the proposition that any order of the Family Division relating to the Trust should be enforced without re-consideration of the merits of such order.
- 13 Conversely, if the trustee has not submitted to the jurisdiction of the Family Division, any order of that court will not be enforceable in Jersey under the rules of private international law. On any subsequent application to this Court to vary the trust so as to achieve the effect of any variation or other order made by the Family Division, this Court would have complete discretion as to the course it should take.
- 14 In this respect it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this Court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This Court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has therefore a very different focus from the Family Division.
- 15 It follows that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act

to the detriment of the beneficiaries of a trust when the primary focus of that court is the interests of the two spouses before it. It is more likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this Court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases – e.g. where all the trust assets are in England – it may well be in the interests of a trustee to appear before the English court in order to put forward its point of view because the English court will be able to enforce its order without regard to the trustee or this Court by reason of the location of the assets.

- 16 The observations which we have made do not lead to the conclusion that this Court will ignore a decision of the Family Division or other overseas court. Far from it. That court will have investigated the matter very fully and will have made a decision intended to achieve a fair allocation as between the spouses. In such cases the interests of comity as well as the interests of the beneficiaries will often point strongly in favour of this Court making an order which achieves the result contemplated by the order of the Family Division. Indeed this Court has made such orders in the past and will no doubt do so again in the future. But the significant factor from the point of view of whether the trustee should submit to the jurisdiction of the overseas court is that it will remain a matter of discretion for this Court as to the course it should take in the light of the overseas order if the trustee has not submitted, whereas if the trustee has submitted, the overseas order is likely to be enforced without reconsideration of the merits.
- 17 For these reasons we approve of the Trustee's decision not to submit to the jurisdiction of the Family Division in this case.
- 18 We should add that a decision that the Trustee should not submit to the jurisdiction is separate from the question of provision of information. It seems to us important, in this case, that the husband and the wife should have the fullest information concerning the financial affairs of the Trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position. It is our understanding that the wife has received the necessary information, but if this understanding is incorrect and further information is requested, the Trustee should make the fullest information available to both parties and, through them, to the Family Division should this become necessary.

(iii) Approving the stance to date of the Trustee

- 19 Thirdly the Trustee seeks the Court's approval of 'the stance which has been adopted by the Trustee in relation to the requests made to it by the husband and the wife'. This is far too vague and the Court is not willing to give such open-ended approval. The only specific matter to which we were referred in this context was the offer made by the husband's solicitors in their letter of 16th January 2006, which the Trustee refused to support. But that offer was never accepted by the wife and is accordingly academic. In the circumstances it is not appropriate to seek the Court's direction. If and when the parties reach agreement, the

Court would be willing at that stage to consider any application for directions in respect of any decision by the Trustee to agree to or reject such agreement. Accordingly we make no order on this third aspect of the application.

Postscript

- 20 The Court would like to take this opportunity of emphasising some of the remarks which it made during the course of the hearing. On the evidence before the Court, the trust fund appears to comprise almost the entirety of the assets available to provide in future for the husband and the wife. The marriage has been a long one and the assets were contributed to the Trust by the husband during the course of the marriage. The Trustee has used the trust fund to maintain the husband and the wife at a high standard of living in recent years as a result of which the capital appears to have been somewhat depleted. No payments have been made to or for the benefit of any of the other beneficiaries.
- 21 The marriage has now come to an end and clearly the wife has to be provided for as well as the husband, albeit that it would seem that both will have to live at a reduced standard as compared with the somewhat unrealistic level which has been provided in the past. The wife remains a beneficiary at present by reason of her status as a spouse and, even following decree absolute, it would be open to the Trustee to appoint her as an additional beneficiary. In the circumstances it would seem, on the face of it, entirely appropriate that the Trustee should agree to assist in giving effect to any reasonable arrangement reached by the parties in relation to their financial affairs. The funds in this case are limited and it cannot be in the interests of the husband or the wife (as beneficiaries) or the trust fund (and the other beneficiaries) for these limited funds to be spent on litigating this matter (whether before the Family Division or this Court). We hope very much that the Trustee, the husband and the wife will all give due consideration to this aspect of the matter.