S andL and E v Bedell Cristin Trustees

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	10 August 2005
Neutral Citation:	[2005] JRC 109
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Court:	Royal Court
Date:	10 August 2005

Text

[2005] JRC 109

ROYAL COURT

(Samedi Division)

Before:

M C St J Birt, **Esq., Deputy** Bailiff **and** Jurats Bullen **and** Allo

S
Representor
and
L
First Respondent

and

E
Second Respondent

and

Bedell Cristin Trustees Limited (formerly Serine Limited) as Trustee of the L Settlement
Third Respondent

Advocate P.C. Sinel **for the Representor**.

The First Respondent in person.

Advocate T.J. Le Cocq **for the Third Respondent**.

The Second Respondent did not appear and was not represented.

Authorities

Trusts (Jersey) Law 1984.

In Re S Settlement (Jersey Unreported 2001/154)

Lewin on Trusts (17 th Edition).

Application for an interim payment from a trust fund and the exercise of the Courts Jurisdiction under Article 51 of the Trusts (Jersey) Law 1984.

Bailiff DEPUTY

1 This is an application by the representor (“S”) for an order that the Trustee make an interim distribution out of the trust fund. It raises a point of principle concerning the exercise of the Court's jurisdiction under Article 51 (formerly 47) of the Trusts (Jersey) Law 1984 (“the 1984 Law”).

The Trust

2 The L Settlement (“the Trust”) was established by declaration of trust executed on 19 th April 1989 by the third respondent (“the Trustee”). The deed defined the first respondent (“the settlor”) as the settlor. The original beneficiaries were the settlor, his mother and father and his issue through all degrees. His parents have since died and he has no issue. In October 1990, at the request of the settlor, S, the second respondent (the settlor' brother) and the RNLI were added as beneficiaries by the Trustee.

3 By Clause 1(a) (xiv) the ‘Initial Period’ was defined as the period commencing on the date of the Trust and ending on the death of the settlor or such earlier date as the Trustee should

declare to be the termination of the Initial Period. Any such declaration might be expressed to apply to part only of the trust fund.

4 During the Initial Period, the Trustee is to pay the income to the settlor and has power, exercisable from time to time at its discretion, to pay capital to or for the benefit of the settlor or, with the consent of the settlor, any one or more of the other beneficiaries. After the Initial Period, the trust fund is held upon conventional discretionary trusts for the beneficiaries.

5 On 7 th July 1989 the settlor settled £636,891 on the terms of the Trust. He added further smaller sums in 1992 and 1994.

S's claim

6 From about 1980 to 1999 (the exact dates appear to be in issue) the settlor and S were in a relationship. They lived together initially in Bristol, then the Isle of Man and finally the Republic of Ireland. They also carried on a scrap yard and motor vehicle spare parts business in partnership from 1980 until April 1989.

7 According to S, the partnership business was carried on from a plot of land (Plot 1) purchased by the settlor in 1977 for £1,700 with the help of a loan of £1,000 from his father. Further land, (Plot 2), was purchased in about November 1988, the purchase price being provided by a mortgage of £282,000. She asserts that the mortgage instalments were paid out of the partnership income. This plot was purchased in the sole name of the settlor. Plot 3 was purchased in 1988 for £14,057 and was funded by an overdraft extended to the partnership. Plot 3 was acquired in the joint names of the settlor and S.

8 There is no dispute that all three plots were sold as one parcel of land in July 1989 for the aggregate sum of £985,000. After clearing the mortgage and paying selling costs, the net proceeds amounted to £636,891. This sum was paid to the settlor who then settled it on the terms of the Trust as described earlier.

9 S claims that, after a small allowance for the amount contributed by the settlor to the purchase of Plot 1 before he met S, the net proceeds of the sale of all three plots belonged to her and the settlor in equal shares. She therefore alleges that approximately half of the initial settled funds belonged to her. The settlor, on the other hand, denies that this was so and asserts that all of the settled funds belonged to him. It appears that he will say that the equity in the land was all attributable to Plot 1 and that this plot was acquired and paid for by him before he met S.

10 S's claim was first brought to the attention of the Trustee in about 2001. Thereafter there was considerable correspondence and debate as to whether S proposed to attack the Trust or seek payment out of it as a beneficiary. Eventually she issued a representation in

October 2004 and the Trustee issued one in November 2004. The matter is proceeding upon S's representation and a hearing date has been fixed for November 2005. The case is proceeding on the basis that S is not attacking the validity of the Trust in any way. She and the Trustee wish the Court to determine whether she contributed to the settled funds and if so what proportion. The Trustee has made it clear that it considers this an important matter in the exercise of its discretion. It has made it clear that if S did contribute to the trust fund, then on the information currently before the Trustee, it would be its intention (without fettering the future exercise of its discretion) to take into account the wishes of S in relation to that proportion of the current trust fund which represents that contribution. Conversely, if it is determined that S did not contribute to the trust fund, then on the information currently before the Trustee, it would be its intention (without fettering the future exercise of its powers) to exclude S as a beneficiary.

11 The assets of Trust currently comprise of approximately £360,000 of portfolio investments and a substantial property valued at just over €3 million. This is the home of the settlor and is apparently in a certain amount of disrepair. The investments are used to produce an income for the settlor and to pay the Trustee's fees and expenses.

This application

12 For some time S has been asking for an interim distribution of £50,000. We have not seen all the correspondence but have been shown a letter dated 6 th May 2003 from Sinels asking for an interim distribution of £50,000 for S so that she could pay their fees and put them in funds. Matters obviously continued to be discussed between Sinels and Bedell Cristin (acting for the Trustee) and on 2 nd August 2004 in connection with the request for a distribution, Bedell Cristin wrote to Sinels asking for details of S's means, her needs, the value of the distribution she was requesting and what she intended applying the funds to. We have not been referred to any reply to that request but on 12 th January 2005 Sinels renewed the request for an interim distribution of £50,000 for legal fees. This was repeated on various occasions in early 2005 and Bedell Cristin asked for clarification as to whether this was for past or future fees.

13 On 20 th April Sinels wrote to Advocate Clyde-Smith (who had by then been instructed by the Trustee) specifically requesting the Trustee to exercise its power to terminate the Initial Period in relation to £50,000 in order to enable a distribution to be made to S for her to finance her legal fees in the proceedings. On 27 th April they clarified that she had paid Sinels about £11,000 and now owed them a further £40,000. On 6 th May Bedell Cristin wrote saying that the Trustee had considered S's request for a distribution of £50,000. Having expressed surprise at the amount, the letter stated that, until such time as S's claim in respect of being a settlor of part of the trust funds had been determined, the Trustee was not prepared to exercise its discretion in her favour in relation to the request for a payment of £50,000 for legal fees. Somewhat confusingly, the letter went on to say that the Trustee would take a neutral position and surrender its discretion to the Court in relation to the forthcoming summons, which we take to be a reference to the summons currently before us

requesting an interim distribution.

14 On 11 th May S duly issued a summons requesting that the Court order the Trustee to make an interim distribution and/or loan to S in the sum of £50,000 "…….. or such greater or lesser amount that the Court may deem fit". Subsequently, by letter dated 21 st June, Advocate Clyde-Smith clarified that, on the factual basis set out in paragraph 4 of his letter (subsequently accepted by Sinels) the Trustee was not surrendering its discretion to the Court and was not willing to exercise its discretion to make an interim payment to S.

15 With the Court bundle, S filed a draft affidavit setting out details of her income and expenditure. She runs a landscape gardening business and she and her husband had a combined income for the year ending April 2005 of some £18,000. They have savings of some £11,681. The affidavit confirms that she is indebted to Sinels in the approximate sum of £50,000 for legal fees to date. Although she has a conditional fee arrangement with Sinels in respect of the current litigation (as Mr Sinel confirmed) it appears that that firm is no longer willing to fund the litigation to trial in November 2005. Accordingly, if a distribution is not made to enable Sinels to be paid, they will no longer agree to act for her.

16 During his submissions — and much to everyone's surprise — Mr Sinel said that the application was in fact for a distribution of £100,000 of which £50,000 was to pay Sinels' fees and £50,000 was for the various items of expenditure listed in paragraph 11 of S's affidavit. These include certain expenses in connection with her business, some household furniture and kitchen equipment, household decoration, carpets for the house and a holiday.

The Court's jurisdiction under Article 51 (formerly 47)

17 As already mentioned, the Trustee asserted both in correspondence and before the Court that it had not surrendered its discretion to the Court on this matter. Mr Le Cocq submitted therefore that the role of the Court was limited to consideration of whether the decision of the Trustee refusing to make an interim distribution to S was a decision which a reasonable trustee properly instructed could arrive that or was vitiated by some other factor such as bad faith, partiality etc. The Court could not simply substitute its own view for that of the Trustee unless the Trustee were to surrender its discretion to the Court; whether it wished to do that was entirely a matter for the Trustee.

18 In support of his submission Mr Le Cocq referred us to *In Re S Settlement* (Jersey Unreported 2001/154) and certain paragraphs from Lewin on Trusts (17 th Edition). *In Re S Settlement* this Court listed four different categories of case where the Court has to consider decisions or proposed decisions by trustees. The first is where the issue is whether some action is within the trustee's powers. The second is where there is no doubt that the trustee has the necessary power but it seeks the approval of the Court to its decision as being one of particular importance or significance. The third is where the trustee surrenders its

discretion to the Court and the Court agrees to accept such surrender; and the fourth is where a decision already taken by a trustee is attacked as being outside its powers or an improper exercise of those powers. The Court went on to emphasise that, where the trustee surrendered its discretion, the Court would exercise its own discretion and reach its own decision whereas, in cases falling within the second category, the Court would not substitute its own decision for that of the trustee; it would merely consider whether the trustee's decision was one which it could reasonably have reached.

19 Mr Le Cocq submitted that this was derived from and was consistent with the position in England, which was conveniently set out at page 759 onwards in Lewin under the heading 'Control by the Court'. He referred us in particular to the following passages:–

> ***"29–87***
>
> ***Where power discretionary***
>
> ***Where a power is given to trustees to do or not to do a particular thing at their absolute discretion, the court will not restrain or compel the trustees in the exercise of that power, provided that their conduct is informed, bona fide and uninfluenced by improper motives;***
>
> ***"It is settled law that when a testator has give a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly."***…….
>
> ***29–100***
>
> ***Impropriety and like cases***
>
> ***Apart from enforcing the trustees' duty to consider the exercise of discretionary powers and actually to exercise powers which they are required to exercise, the court will interfere with the exercise or non-exercise of powers on a number of other grounds, as follows:***
>
> > ***(i) Trustees must act only within the terms of the power.*** They must of course confine the exercise of a power of appointment to the class of objects identified by the donor and otherwise in accordance with the trust instrument but the principle goes further than that: they must exercise a power for the purpose for which it was conferred. Thus a power of advancement or a similar power is not properly exercised if the purpose of the payment is not to benefit the recipient but to benefit someone else and a power to amend the rules of a pension scheme could not be exercised to enable a holding company to retain a surplus on a sale of its subsidiary. The rule against committing a fraud on a power is a branch of the same principle.

(2) Consistently with that principle, the court will interfere if trustees are actuated by caprice or spite. Where trustees had power to raise up to a moiety of the corpus of settled share and to apply it for the benefit of the testator's daughter in such manner as they should think fit, one was willing to exercise the discretion but the other spitefully declined because the daughter had married without her consent; the court decided to exercise its control over the discretion of the trustees and ordered them to raise out of the corpus of the settled share a sum sufficient to pay the legacy duty on the share, as the daughter had sought.

(3) Similarly, the exercise of a power pursuant to an underhand bargain, or otherwise corruptly or partially, will attract the intervention of the court.

(4) Trustees must not act perversely, i.e. they must not take a decision to exercise their powers which no reasonably body of trustees could arrive at. But the discretion to exercise a power is that of the trustees, not that of the court, unless they have surrendered their discretion to the court: thus a decision not perverse in that sense cannot be challenged merely because the court would have reached a different decision. [Emphasis supplied]

(5) Trustees are also bound to act fairly in exercising their powers by holding an even hand between all the beneficiaries; but it is thought that a challenge for want of fairness could succeed only if it could be brought under one of the other heads discussed in this paragraph.

(6) Where a discretionary power is exercised in a manner dangerous to the trust the court will interfere. Thus it will do so where there is an investment, or a failure to change an investment, on a security which is hazardous or insufficient.

(7) A trustee will not normally be able to exercise a fiduciary dispositive power conferred on him in his own favour, unless he has been authorised to do by the terms of the trust or has been placed in a position of conflict by the settlor or the terms of the trust.

(8) the exercise of a power on the part of the trustees may be vitiated if, though they have considered the matter without impropriety, they have failed to take into account considerations which they should have taken into account or have taken into account considerations which they should not have taken into account. Thus if trustees have purported to exercise a power of advancement by way of settlement in ignorance of the fact that significant limitations contained in the settlement were

> void for perpetuity, the entire exercise of the power is invalid. The rule is not limited to cases where the exercise of the power is partially ineffective by reason of some other rule of law or some limit on their discretion but applies to any failure of the kind stated. But the court cannot interfere unless it is clear that had they had a proper understanding of the effect of their act they would not have acted as they did; it seems not to be enough that they would have realised that what they were doing was to some extent unsatisfactory. Nor, it seems, can the rule operate so as to invalidate the appointment of a new trustee. Moreover, the rule operates to invalidate a purported exercise of a power by trustees; it does not apply in the converse case, so as to permit the court to treat them as having exercised a power which they have not in fact exercised on the ground that the failure to exercise it was caused by a misapprehension and that they would have done so if properly informed."

20 Mr Sinel was extremely dismissive of Mr Le Cocq's submissions and categorised them as wholly misconceived. He referred to Article 51(2) of the Trusts (Jersey) Law 1984 which is in the following terms:–

> ***"The Court may, if it thinks fit:–***
>
> ***(a) make an order concerning:–***
>
> ***(i) the execution or the administration of any trust;***
>
> ***(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise:***
> ***…….***"

He pointed out that, pursuant to paragraph (3) of the Article, a beneficiary had a right to bring an application under paragraph (2) and that what was what S was doing. The wording of paragraph (2) was wholly unqualified; it entitled the Court to make an order 'relating to the exercise of any power'. There was no mention of it only being able to do so if the trustee had surrendered its discretion or if there was some vitiating factor in relation to any decision taken by the trustee. He distinguished the position in England where the Chancery Division had developed its supervisory jurisdiction over many centuries and where the self-imposed limitations described in Lewin may well be applicable. The position could not be transposed to Jersey where there was a statutory jurisdiction and the wording of the statute was unlimited and unqualified. It followed, he said, that the Court simply had to consider whether, in its discretion, it thought it right that an interim distribution should be made to S and, if so, to order the Trustee to make such a distribution. It did not have to find the Trustee's decision to be unreasonable. Indeed it could take a decision even if the Trustee had not yet done so. A beneficiary could apply to the Court at any time and ask it to direct a

distribution.

21 Mr Le Cocq replied that the effect of Mr Sinel's construction would be to substitute the Court as trustee and would lead to every beneficiary disappointed by a trustee's decision coming to Court in the hope of an alternative decision. Indeed, on Mr Sinels's argument the beneficiary could apply to the Court without even waiting for a refusal from the trustee. He submitted that the jurisdiction under Article 51 had to be exercised upon a principled basis and that the appropriate principles were those developed by the English courts.

22 The Court agrees with Mr Le Cocq. Although the wording of Article 51(2) is indeed wide and the Court may have a theoretical jurisdiction to make an order as Mr Sinel submits, the jurisdiction of the Court must be exercised on a sensible and principled basis. A settlor does not choose the Court as a trustee; he chooses his appointed trustee. It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. If Mr Sinel's argument were to be accepted, the effect would be to constitute the Court as a trustee. That is not the Court's role. The Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court does not simply substitute its own discretion for that of the trustee unless the trustee surrenders its discretion to the Court and the Court agrees to accept such surrender (which it is not obliged to do).

23 We are not to be taken as approving every part of paragraph 29–100 of Lewin which we have set out above. We have not analysed or heard argument on every sub-paragraph in detail. But in our judgment the paragraph provides a helpful guide to the sort of circumstances in which the Court is likely to intervene in relation to a trustee's decision where the trustee has not surrendered its discretion. We draw particular attention to paragraph (4). The Court cannot overturn a decision of a trustee which has not surrendered its discretion to the Court, merely because the Court would have reached a different decision. It may only intervene where the decision is one which no reasonable trustee could arrive at. All of this is consistent with the fundamental concept of trust law which is that the discretion of a trustee is conferred upon that trustee and the beneficiaries have to live with the decision of that trustee unless it is vitiated by one or more of the sort of circumstances set out in Lewin.

24 In this case the Trustee has not surrendered its discretion to the Court. It follows that this Court may not exercise its own discretion on the question of whether it would be right to make an interim distribution to S. The Court may only consider whether the decision of the Trustee to refuse such a distribution was an unreasonable decision or is vitiated in any other way.

25 We would add that, towards the end of his reply, Mr Sinel raised a question as to whether the Trustee had in fact refused to make a distribution. Mr Le Cocq assured us that the Trustee had indeed made such a decision and certainly that appears to be the natural reading of the correspondence placed before us notwithstanding the slightly confusing

reference to the surrender of discretion in the letter of 6 th May. We proceed on the basis that the Trustee has refused to make such a payment. If it were to be the case that the Trustee has in fact not yet decided whether to accede to S's request and is simply failing to consider the matter, the outcome would be that the Court would order the Trustee to make a decision on how it wished to exercise its discretion in relation to S's request but the manner in which it chose to exercise that discretion would still rest with the Trustee.

Should the Court order an interim distribution?

26 Mr Le Cocq submits that the decision to refuse an interim distribution of £50,000 (which was what the Trustee had been asked for) could not possibly be categorised as unreasonable. He points out that this was not a conventional discretionary trust. As outlined above, the Trust contains a life interest in favour of the settlor who is therefore entitled to the trust income. It also gives a power to advance capital to the settlor during the course of his life interest. The Trust is clearly intended to be primarily for the benefit of the settlor during his lifetime. This is confirmed by the fact that capital can be paid to another beneficiary during his life but only with the consent of the settlor. This is clearly not a fiduciary power but is one which the settlor may exercise entirely as he sees fit. So, in essence, during the settlor's lifetime, income is paid to him, capital may be paid only to him or someone else with his consent and no other beneficiary can benefit without his consent. The settlor has not consented to S receiving £50,000 or indeed any other sum.

27 There is of course the overriding power in the Trustee under Clause 1(a)(xiv) to terminate the Initial Period in respect of all or part of the trust fund. This would have the effect of terminating the settlor' life interest in respect of that part of the trust fund and creating conventional discretionary trusts in respect of that part of the fund, under which capital or income could be paid to any one or more of the beneficiaries. Mr Le Cocq submitted that this was clearly a power which was not to be exercised in the ordinary course of events. To so treat it would render the provisions in favour of the settlor meaningless. If a decision to terminate the settlor's life interest and pay capital to another beneficiary without his consent could be taken simply as a matter of ordinary discretion on the part of the Trustee, there was no point in having created the life interest in favour of the settlor; it would have been simpler just to have created a conventional discretionary trust from the start. Mr Le Cocq submitted that the ability to terminate the Initial Period was intended for exceptional circumstances; for example if the settlor were to need protection from himself because he was an inveterate gambler or otherwise a spendthrift or if he were to become incapacitated.

28 In our judgment Mr Le Cocq's submissions are entirely correct. The power to end the Initial Period and therefore bring to an end the settlor's preferential position in relation to both income and capital of the trust fund is not to be equated with an ordinary discretionary power to pay income or capital to a beneficiary. It is a power to be used sparingly and in exceptional circumstances. The trust deed clearly intends that the trust fund should be available primarily for the benefit of the settlor (or others with his consent) during his lifetime.

29 The Trustee's approach is that whether or not it should exercise the power conferred by Clause 1(a)(xiv) to terminate the Initial Period in respect of some of the trust fund will turn on the question of who contributed the trust fund. This seems to us to be eminently reasonable in the particular and unusual circumstances of the case. If S did not in fact contribute any of the settled funds and they all belonged initially to the settlor, one has a situation where, at the request of the sole provider of the trust fund, she was added as a beneficiary at a time when was living with him and he hoped to marry her. Now the relationship is ended and she is married to another man. The settlor no longer wishes her to benefit. In the circumstances there would seem to be no particular reason for the Trustee to terminate the settlor's life interest in respect of some of the trust fund in order to make a capital payment to S; on the contrary it would seem entirely reasonable for the Trustee, at the request of the settlor, to exclude her altogether as a beneficiary in view of the change in circumstances since she was originally added.

30 Conversely, if S provided nearly one half of the trust fund, it would seem thoroughly unreasonable now to exclude her as a beneficiary and very reasonable to decide that, in relation to that proportion of the trust fund which reflects her initial contribution, the settlor's preferential position by reason of his life interest should be terminated by ending the Initial Period so that that part of the trust fund could be applied for any of the beneficiaries including S.

31 It follows, submits Mr Le Cocq, that until the Court has determined at the hearing in November whether, and if so to what extent, S contributed to the trust fund, it is perfectly reasonable for the Trustee to conclude that it should not pre-judge the position by terminating the settlor's life interest in respect of any part of the trust fund and distributing it to S.

32 We entirely agree. In our judgment the Trustee's decision cannot possibly be categorised as an unreasonable one; on the contrary it would appear to be eminently reasonable.

33 Initially Mr Sinel submitted that, if no interim distribution were made, S would be prevented from bringing a perfectly meritorious claim in respect of the Trust because of her inability to pay what is owed to her lawyer. However, during the course of the hearing, he was forced to concede that this would not be so. If the Court were to refuse an interim distribution and if Sinels were therefore to revoke the conditional fee agreement, it would seem from S's financial position that she would undoubtedly be eligible for legal aid. A new lawyer could therefore be appointed on legal aid in ample time for the hearing in November. She would therefore still be legally represented, if not by Mr Sinel.

34 Mr Sinel's second string to his bow was to submit that, even if the decision of the Trustee was not unreasonable, it had been vitiated by reason of partiality or partisanship on the part of the Trustee. When pressed as to exactly how the Trustee had been partial or partisan, Mr Sinel referred to the fact that the Trustee had refused to give any grounds for its decision to

refuse a payment; it had made several capital advances to the settlor whilst at the same time refusing to make a distribution to S; and it had not taken a 'balanced' decision. He went so far as to describe this as 'Alice in Wonderland trusteeship'.

35 As to these submissions, we would comment that it is trite law that a trustee does not generally have to give reasons for exercising a discretion (see Article 29 1984 Law (Revised Edition)). As to the payments to the settlor, the very best that S can hope for is that something approaching one half of the trust fund may be freed from the settlor's preferential position by termination of the Initial Period. That is because at least half was undoubtedly contributed by the settlor. The amounts advanced to the settlor do not exceed this proportion and there would seem to be no reason why the settlor should be starved of distributions which the Trustee would have been perfectly willing to make had there been no litigation, where such distributions are made out of that part of the trust fund which will remain available for him no matter what the outcome of the litigation. As to the question of balance Mr Sinel pointed out that the Trustee did not obtain details of S's financial position before it refused the distribution of £50,000. However the Trustee had asked Sinels for such information back in 2004 but no such information had been supplied until a day or two before this hearing. In the circumstances we do not see that any criticism can validly be made of the Trustee for proceeding to reach a decision (which was being pressed for forcefully by Sinels) without the benefit of such information. In any event, we now have such information and we do not think that it leads to a different conclusion. In the circumstances we do not find that the Trustee has acted in a partial or partisan manner.

36 For the reasons which we have given, we are of the clear opinion that the decision of the Trustee to refuse a payment of £50,000 (let alone one of £100,000 if it had been asked to consider this) cannot be categorised as unreasonable, nor is there any other vitiating factor in its decision such as partiality or partisanship. The Court therefore declines to interfere with the decision and order that a distribution be made. On the contrary, had the Court felt able to accept Mr Sinel's submission that it had an original jurisdiction and could exercise its own discretion, it would have done so in the same manner as the Trustee i.e. to refuse any interim distribution pending resolution at the hearing in November of the issue of who contributed the trust funds.