

Representation of Y Re W Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith OBE., Jurats Dulake, Hughes
Judgment Date:	30 September 2022
Neutral Citation:	[2022] JRC 203
Court:	Royal Court

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Text

In the Matter of the Representation of Y

and

In the Matter of the W Trust

and

In the Matter of Article 51 of the Trusts (Jersey) Law 1984 (As Amended)

Between

Y

Representor

[2022] JRC 203

Before:

J. A. Clyde-Smith OBE., Commissioner, and Jurats Dulake and Hughes

ROYAL COURT

(Samedi)

Trust.

Authorities

Trusts (Jersey) Law 1984 (As Amended).

Booth v The Viscount [2022] JRC 062.

Trusts (Jersey) Law 1982.

Advocate J. M. P. Gleeson for the Representor

Advocate J. P. Speck as *amicus curiae*

THE COMMISSIONER:

- 1 On 7th September 2022, the Court confirmed the ongoing existence of the W Trust and appointed the Representor Y (“Y”) as trustee. We now set out our reasons.
- 2 The W Trust was declared by Caversham Trustees Limited (“Caversham”) on 13th May 1996. It is a discretionary trust in familiar form and governed by Jersey law. The beneficiaries were Y and his late brother, T (“T”). The initial property of the W Trust when declared was the issued share capital of Company 1 (“Company 1”), a company incorporated in the Cayman Islands, which was settled by T.
- 3 The W Trust is one of three trusts associated with the wider Z family, all of which were administered by Caversham. A dispute arose between members of the family led by R (“R”), the father of Y and T, and Caversham over fees and costs of administration and that dispute was compromised with a consent order dated 6th August 2004 (“the Consent Order”), issued under a representation brought by Caversham, to which R, Y, T and five other members of the family were respondents.
- 4 The recitals to the Consent Order recorded that the respondents had confirmed in writing to Caversham that none of them was a minor or an interdict and that they required Caversham to terminate all three trusts. Schedule 1 to the Consent Order listed the assets of the W Trust as the issued share capital in Company 1, which in turn owned Property 1 and certain film rights.
- 5 The operative part of the Consent Order provided expressly for the termination of the other two trusts and how their assets were to be distributed, but in relation to the W Trust, it simply provided as follows:

“In relation to the [W] Trust, the film rights owned by [Company 1] shall be distributed in accordance with paragraph 1.1 below.”

6 Paragraph 1.1 is in these terms:

“1.1 The assets of the Trusts shall as set out above be distributed by [Caversham] to [R] or to any other person, on the written directions of all beneficiaries of the Trusts”

- 7 The Consent Order is silent about Property 1, which the evidence before us shows was and is the main place of residence of Y. Under paragraph 3 of the Consent Order, R was to pay the reasonable costs of and incidental to the termination of all three trusts, and the distribution of the assets, including Caversham's internal costs and its legal fees.
- 8 On the 18th November 2004, Caversham transferred the whole of the shareholding in Company 1 to R and with it both the film rights and Property 1. On the same day, the administration of Company 1 was moved away from Caversham with R, T and Y and another being appointed directors.
- 9 In his representation, Y states that he and his brother agreed to the terms of the Consent Order on the strength of an assurance from their father R that he would settle the assets transferred to him upon new trusts upon the same terms as (*inter alia*) the W Trust. R failed to do so. In his affidavit of 23rd June 2022, Y states that in any event he did not consent to the transfer of the shares in Company 1 to R, as required by the Consent Order, who was not a beneficiary of the W Trust. He says, therefore, that the transfer was made in breach of trust. In the circumstances, the W Trust was not terminated, because it retained a valuable asset, namely the cause of action to recover the Company 1 shares from R. T died intestate on 9th October 2005, leaving Y as the sole remaining beneficiary of the W Trust.
- 10 In 2017, R brought proceedings in his name, and that of Company 1 (of which Y was no longer a director), against Y and other members of the Z family, alleging unfair prejudice in the conduct of another Z family company. That claim was dismissed in the judgment of the English High Court dated 4th March 2020 and on 26th March 2020 R was ordered to pay interim costs in the amount of £125,000. Having failed to comply with the terms of that order, he was declared bankrupt on 11th December 2020 and a trustee in bankruptcy appointed. In his judgment, Mark Cawson QC, sitting as a High Court Judge, found R to be an unreliable and unsatisfactory witness (paragraph 34) and Y to be a good, essentially reliable witness, whose evidence generally accorded with the contemporaneous documents and the inherent probabilities of the situation (paragraph 36).
- 11 In or about November 2014, R procured financing from Standard Bank (Jersey) Limited, secured on Property 1, where Y and his family reside. The bank took steps to secure repayment of this borrowing and issued possession proceedings. In his second affidavit of

- 2nd September 2022, Y explains that as he was no longer a director of Company 1, the bank would not deal with him and his only remedy was to take an assignment of the bank's legal mortgage, which he did with money borrowed from friends and business contacts, through a company formed for that purpose, Company 2, with the bank being paid £786,967.59.
- 12 Schedule 5 to the trust instrument provides that the liquidator of the last surviving trustee shall have the power to appoint new or additional trustees. Caversham was summarily wound up on 21st July 2016 with no liquidator being appointed. It cannot now exercise the power of appointment of new trustees and Y accordingly sought an order confirming that the W Trust continued to subsist and that Caversham was no longer trustee and appointing him as trustee, so that he can recover from R the Company 1 shares.
- 13 In a detailed letter of 5th September 2022, Advocate Speck raised a number of questions in relation to the transfer to R that he advised required consideration. It was necessary to conduct a review of the files held by at least two Jersey law firms that were involved in 2004 and the files of Caversham, which are now held by JTC, which had acquired the clients of Caversham but not the business. As he said, it must be the case that if the transfer was valid, then the W Trust does not subsist; it would have no assets and would have been terminated.
- 14 Concerned at the costs likely to be involved in this process, Advocate Gleeson suggested a two-stage process, the first stage being to seek orders from the Court as to the subsistence of the W Trust in holding a cause of action against R arising out of the transfer and Y's appointment as trustee. In the second stage, Y, as trustee, will investigate the transfer and if so advised, issue proceedings to challenge the transfer as invalid, and recover the Company 1 shares. He indicated that his father R and the trustee in bankruptcy will be joined in any such application and he expressed some hope that R or his trustee in bankruptcy might voluntarily transfer the Company 1 shares to Y as trustee, which would avoid the need for proceedings.
- 15 Furthermore, having been appointed trustee, Y would be much better placed to investigate the transfer and to obtain access to any relevant trust records. Assuming no trust existed, JTC had taken the view that it held the records of Caversham as *bona vacantia* for the Receiver General. It was concerned about allowing Y access to these records in that the files may contain legally privileged documentation, personal data protected through the Data Protection legislation, trustee decision making resolutions and other documentation belonging to Caversham as trustee which would not normally be disclosed to a beneficiary. With the Court confirming that the W Trust has continued to subsist and with Y being appointed trustee, JTC (and any other third parties holding trust documentation) should have no difficulty supplying access to those records on reasonable terms as to the cost of providing the same.

- 16 Recognising the concern as to costs, Advocate Speck was content to advise the Court to proceed in this way and the Court was only concerned therefore with whether the W Trust still was in existence, and if so, with the appointment of a trustee.
- 17 There had been some discussion between counsel as to the threshold that needed to be met in deciding that the cause of action constituted property still subject to the W Trust. It had been suggested that Y might be required to demonstrate to the Court that the cause of action is realistic enough to constitute an asset of the trust by way of analogy to that of a strike out application; in other words, Y was required only to show the reasonable cause of action with some chance of success when only the allegations are considered and if the allegations disclose some cause of action or raise some question fit to be decided by the Court. The fact that the case may be weak or even not likely to succeed would be no ground for striking it out and therefore no reason for the Court to find that the W Trust does not still hold an asset.
- 18 At the hearing, counsel did not pursue the application of any particular test, but submitted, and the Court agreed, that it must proceed on a principled basis. There must be a reasonable basis upon which the Court can conclude that a cause of action arises and that it is not appointing a trustee to a cause of action that is frivolous or hopeless, or which may give rise to vexatious litigation used to harass a third party, in this case, between Y as trustee and his father R or more accurately, his trustee in bankruptcy. It seems to the Court that the position is similar to the basis upon which the Viscount might consider assigning a cause of action back to a bankrupt – see *Booth v The Viscount* [2022] JRC 062. We bear in mind that in the context of Jersey trusts, Y, as trustee in pursuing R or his trustee in bankruptcy in this jurisdiction, would be protected by Article 32 of the Trusts (Jersey) Law 1982 (“the Trusts Law”), under which his liability would be limited to the assets he holds on trust. He could therefore issue proceedings without the usual personal risk as to an adverse costs order. Whether such protection would extend to any proceedings he might bring in the English jurisdiction is another matter.
- 19 We are not going to conduct an analysis of the arguments for and against the validity of the transfer. We acknowledge that there are a number of arguments that could be deployed in support of its validity, but we concluded that there is a proper foundation for a claim in invalidity for the following reasons:
- (i) Under the Consent Order, it was only the film rights that were to be transferred out of the W Trust, not Property 1, which was, and is, Y’s main residence;
 - (ii) R is not a beneficiary of the W Trust; and
 - (iii) Y has stated on oath that he did not give his consent to the transfer.
- 20 These factors allowed us to conclude that a cause of action had arisen in the W Trust and that accordingly, it remains in existence. Caversham had ceased to be trustee on its

dissolution, with no liquidator being appointed, and therefore the Court had the power under Article 51(2)(a)(ii) of the Trusts Law to appoint a new trustee.

Conclusion

21 In conclusion, the Court:

- (i) confirmed that the W Trust had continued to subsist;
- (ii) confirmed that Caversham ceased to be trustee when it was dissolved;
- (iii) appointed Y as trustee of the W Trust pursuant to Article 51 of the Trusts Law; and
- (iv) declared that Y as trustee was entitled to disclosure of documents forming part of the records of the W Trust from any third party who may hold the same on reasonable terms as to the cost of the provision thereof.