A Settlement

Jurisdiction:	Jersey
Judge:	Martin JA
Judgment Date:	22 December 2010
Neutral Citation:	[2010] JCA 231
Reported In:	[2010] JCA 231
Court:	Court of Appeal
Date:	22 December 2010

Text

[2010] JCA 231

COURT OF APPEAL

Before:

James McNeill, **Q.C., President**; John Martin, **Q.C., and**; Clare Montgomery, **Q.C.**.

In the Matter of the B Settlement

And in the Matter of the D Settlement

And in the Matter of the C Settlement

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

Between
RBC Trust Company (Jersey) Limited
Representor
and

E
F
G
H
I
J
K
Appellants/First Respondents

and

Advocate Claire Davies, appointed to represent the grandchildren and remoter issue of D
Second Respondent

and

L
J
N
M
O (both on their own behalves and representing their own children and remoter issue)
Third Respondents

and

J
Fourth Respondents
P
Q (both on their own behalves and representing their own children and remoter issue)

N. L. M. Langlois **for the Appellants.**

Advocate D. M. Cadin **for the Trustee.**

Advocate S. J. Young **for the Third and Fourth Respondents.**

Authorities

Trusts (Jersey) Law 1984.

Lewin on Trusts, 18th edition.

Mubarak [2008] JRC 136 .

A Settlement [2010] JRC 085 .

UCC v Bender [2006] JLR 269 .

Re The Esteem Settlement [2001] JLR N 8 .

In the matter of the Internine and Azali Trusts [2006] JLR 195 .

In re C. A. Settlement [2002] JLR 312 .

S, L and E v Bedell Cristin Trustees Ltd [2005] JRC 109 .

Schmidt v Rosewood Trust Ltd [2003] 2 AC 709 .

In re Broere Trust [2003] JLR 509 .

UBS Trustees (Jersey) Limited v Ismail [2003] JRC 147 .

Butt v Kelson [1952] Ch 197 .

Application for leave to appeal against a decision of the Royal Court dated 4 th May, 2010.

Martin JA

Introduction

1 This application for leave to appeal raises important questions as to the scope of the power available to the Royal Court under Article 51 of the Trusts (Jersey) Law 1984 to "make an order concerning … a beneficiary or any person having a connection with the trust".

2 At the conclusion of the hearing of the application, we stated that we gave leave to appeal and allowed the appeal. These are our reasons for doing so. In these reasons, we refer to the applicants as the appellants.

3 By Act of Court dated 4 May 2010 the Royal Court (Clyde-Smith, Commissioner, and Jurats) ordered the appellants to disclose documents relating to certain aspects of the affairs of six companies incorporated in the Republic of Ireland ("the Irish companies"). RBC Trust Company (Jersey) Limited ("RBC"), on whose Representation the order was made, has as trustee of three connected trusts direct or indirect interests ranging from 33?% to 100% in these companies. The appellants are directors of the companies, and beneficiaries of the trusts. They seek leave to appeal against the disclosure order.

Background

4 From 1938 onwards three brothers, D, B and C, established and ran in Ireland a joint business through the Irish companies. These companies are AA; Z; CC; MM; BB; and Y.

5 In 1959 each of D and B settled his interest in the Irish companies on discretionary trusts.

The two settlements were and are governed by Irish law. In 1974 RBC became trustee of the settlements.

6 In 1983 C settled his interest in the Irish companies on discretionary trusts. RBC is the trustee of the settlement, which is governed by the law of Jersey.

7 Under the terms of each settlement, the beneficiaries include the wife and issue of the settlor, and the brothers of the settlor and their wives and issue. In each case, the settlor expressed in a letter of wishes a desire to the effect that the trustee would in exercising its discretion regard the immediate family of the settlor as the primary beneficiaries.

8 B and C both died in 1991. D died in 2004.

9 The shares in the Irish companies have at all relevant times been held in the following way. The interests of the three settlements in AA, Z, CC and MM are held through a Jersey company called EE. RBC holds one third of the shares in EE directly as trustee of the D settlement, a further third directly as trustee of the B settlement, and the remaining third indirectly through a BVI company called NN, all of whose shares are held by RBC as trustee of the C settlement. EE holds all of the shares of Z and MM, but only 50% of the shares in AA. It also holds 100% of the shares in PP, a Jersey company which in turn holds all the shares in CC. Thus RBC indirectly holds all the shares of Z, MM and CC, and 50% of the shares in AA.

10 As trustee of the B settlement, RBC holds one sixth of the shares in each of BB and Y. It holds a further one sixth of the shares of those companies as trustee of the C settlement, making a total of one third of the shares.

11 The 50% of the shares in AA and the two thirds of the shares in BB and Y that are not held directly or indirectly by RBC are held by FF, a company associated with all or some of the appellants.

12 The appellants are members of D's family, and are beneficiaries under his settlement (and also under the other two settlements). They are also directors of the Irish companies, and have for some years been managing their affairs.

13 In 2001, beneficiaries of the B and C settlements raised with RBC concerns about the way in which the affairs of the Irish companies were being conducted. RBC sought information from the appellants; and, having failed to obtain what it regarded as satisfactory responses, took two related steps. First, it procured the appointment of sufficient new directors of Z, CC and MM to give EE, and hence RBC, a majority at board level. A proposed attempt to do the same thing in relation to AA was withdrawn when the board of that company gave certain undertakings that RBC considered adequate. Secondly, it caused the articles of

association of Z and CC to be amended to include the following provision:-

> *"Upon receipt of a written request from a Shareholder Majority the Company shall furnish to the members (or their nominated consultants, valuers or other advisers) to such an extent and in such form and detail as the Shareholder Majority may from time to time require particulars of any matter concerning and arising out of the present or past activity of the Company including without prejudice to the generality of the foregoing a breakdown of the administrative expenses of the Company for the past and current years."*

14 One of the new directors appointed to Z, CC and MM was W of DD, chartered accountants. In May 2009 W produced a draft report for EE into the affairs of those three companies, and also into the affairs of AA, whose directors had supplied information. The report concluded that "potentially excessive" directors' remuneration and secretarial and administrative expenses had been paid by the companies, although the remuneration was on balance justified; and that there were potential tax liabilities, including liabilities to interest and penalties, associated with the excessive payments. Primarily because of these potential tax liabilities W and the other EE directors resigned, leaving the appellants once more in control of the companies.

15 The aggregate amount of remuneration and secretarial and administrative expenses paid by Z, CC and AA to the appellants or entities associated with them between 2000 and 2007 came to just under €3m.

16 In response to W's report, the appellants engaged a tax consultant, OO, and a solicitor specialising in tax matters, QQ, to review the issues raised by the report. OO has made two affidavits in these proceedings, and there is also in evidence a letter from QQ. The view they express is, in summary, that the tax returns of the companies have been completed in a way that can be justified; that in the absence of fraud or negligence, neither of which exists, the Irish revenue authorities cannot make inquiries in respect of any return made more than four years previously; and that the companies are under no obligation to bring matters specifically to the attention of the authorities. In addition to this, S, the accountant to the Irish companies, has made an affidavit explaining the accounting treatment of remuneration and expenses.

17 In a letter dated 7 October 2009 W's firm, DD, stated that these materials did not alleviate their concerns in relation to the tax issues.

These proceedings

18 RBC has since 2007 regularly sought directions from the court in relation to its investigations into the Irish companies. Following receipt of W's report and the responses to it, RBC convened the present parties to a hearing at which it proposed that an order be

made requiring the appellants to provide information about the affairs of the Irish companies. That hearing took place before the Royal Court on 2 October 2009.

19 At the hearing, as it had done previously, RBC surrendered its discretion to the court because of a number of conflicts which it considered inhibited it from properly exercising its discretion. The court accepted the surrender.

20 In its judgment following that hearing, delivered on 25 November 2009, the Royal Court identified as live issues before it the actions of the appellants as directors and the tax affairs of the Irish companies; the separation of the interests of the settlements or some other resolution or programme for resolution; certain steps taken by RBC at the direction of the court; and a complaint by the appellants about the level of RBC's fees. It then identified four concerns on which it would wish to be satisfied before making an order for disclosure, and adjourned the hearing to enable a mediation to take place.

21 The four concerns identified by the Court were as follows:-

> (i) These three trusts have invested through [EE] and the starting point would ordinarily be that any causes of action within the corporate structure would be pursued by the companies themselves in the usual way. Thus, [EE] would use its controlling interest in [Z] to procure that [Z] took action against the directors in the Irish courts, the natural forum.
>
> (ii) When a trustee surrenders its discretion to the court, the court has no greater powers than the trustee has either under the trust deed or the general law (see *Lewin*, 18th edition paragraph 29–301 and *Mubarak* [2008] JRC 136). Does the trustee have the right enforceable in law to require the [appellants] to provide it with information in relation to the Irish companies of which they are directors because they are beneficiaries? Put another way are beneficiaries under an obligation in law to provide the trustee with information they hold as directors of companies in which the trust has an interest?
>
> (iii) If the [appellants] are potential defendants to proceedings at the instance of the Irish companies, is it an appropriate use of the Court's power on a surrender of discretion by a trustee shareholder to order what would in effect be pre-trial discovery directly to the shareholder?
>
> (iv) Can the [appellants] properly be required by this Court as beneficiaries of the settlements to use their powers as directors to obtain from the Irish companies information that is confidential to those companies (and not ordinarily available to shareholders) and pass it on to the trustee? In particular is it appropriate in the context of [AA], in which the settlements do not have a controlling interest?

22 The mediation presaged in the judgment of 25 November 2009 ultimately failed, and the matter was restored for hearing before the Royal Court. The hearing took place on 9 April

2010, and resulted in the Act of Court dated 4 May 2010 which is the subject of this application for leave to appeal.

The Royal Court judgment

23 The decision resulting in the Act of Court of 4 May 2009 was contained in a judgment of the same date given by the Commissioner. In it, he identified as the central issues before the court (i) the actions of the appellants as directors and the tax affairs of the Irish companies; and (ii) the separation of the interests of the settlements or some other resolution or programme for resolution (paragraph 5); and in paragraph 10 he said this:-

> ***"We do not accept [the] assertion that there is nothing further for the [appellants] to disclose.*** The matter is canvassed at paragraphs 19–26 of the ***Court's judgment of 25th November, 2009, but the advice of [DD] in its letter of 7th October, 2009, is clear and we accept it.*** Serious issues have been raised as to the propriety of the remuneration paid to the [appellants] and the administration fees paid on their instruction by the Irish companies to companies associated with the [beneficiaries of the D settlement]. If fairness is to be achieved between the beneficiaries of all the three settlements, then these issues need to be fully investigated. We regard it as intolerable that the [beneficiaries of the D settlement] should stand before us seeking a separation of these trust assets but declining to disclose to us and to the other respondents information in relation to those assets which they alone hold. Is it appropriate therefore for the Court to use its powers under Article 51 of the Trusts (Jersey) Law 1984 to order disclosure from the [appellants]?"

24 In answering that question, the Court made extensive reference to an Opinion obtained by RBC from English leading counsel, Elspeth Talbot Rice QC. In short summary, that Opinion expressed the following views:-

> (i) Article 51 was in very wide terms and could be viewed as an extension of the powers available to a trustee;
>
> (ii) The Court technically had jurisdiction to order directors of companies owned by a trust, as persons having a connection with the trust, to disclose to the trustees information relating to those companies;
>
> (iii) The question was whether it was appropriate to exercise that jurisdiction;
>
> (iv) The jurisdiction had to be exercised on a sensible and principled basis as an element of the court's role in supervising decisions of trustees;
>
> (v) The jurisdiction should not be used so as to order pre-action disclosure;
>
> (vi) It might be an objection to use of Article 51 in relation to companies that the effect would be to give shareholders more information than they would be entitled to as a

matter of company law;

(vii) Because of the amendment to the articles of Z and CC, RBC could inevitably procure disclosure relating to those companies; and that fact might well justify a disclosure order under Article 51 in relation to them;

(viii) An order in relation to those companies would not cause the directors to break a duty of confidentiality;

(ix) The position was different in relation to the other companies because the shareholders had no greater entitlement to information than that afforded by the general law;

(x) The directors could not object to a disclosure order on jurisdictional grounds, since they had submitted to the Jersey jurisdiction.

25 Having identified these points from leading counsel's Opinion, the Commissioner stated that “counsel was not asked to opine upon the information balance amongst the beneficiaries of the three settlements and the impediment that imposes upon the Court in its supervisory capacity to give directions for the separation of the interests of the three families held through their respective settlements”. He then stated (paragraph 23) that the Court adopted counsel's reasoning in relation to Z and CC, but had concluded that disclosure should also be ordered in relation to AA, BB and Y for three reasons. First, the companies could be considered as family companies; secondly, the directors had submitted to the jurisdiction and had filed evidence that needed to be tested by disclosure and cross-examination; and thirdly:–

> ***“We are not concerned here with a stranger to the settlements or potential plaintiff in proceedings against the settlements seeking pre-action discovery.*** RBC and all of the beneficiaries seek the assistance of the Court in its supervisory capacity in giving directions for the separation of the interests of the three families in the underlying assets of the three settlements. That cannot, in our view, be achieved in a just manner without investigating the extent to which the [appellants] may have already benefited improperly from those assets. Those directors on the one hand seek (as beneficiaries) the assistance of the Court in separating out the interests of the [D] family in the trust assets and on the other hand decline to give the Court the information it requires to do that. In our view, no real issue of confidentiality arises and the interests of justice require that the information be provided.”

26 The resulting Act of Court required disclosure of the following:-

> ***“1. In relation to CC and Z:***
>
> ***(1) Full supporting documentation in relation to pension payments;***
>
> ***(2) For the years 2000 to 2009 and for the period 1 January 2010 to 30 April***

2010, full breakdown of individual items comprising the secretarial and administration expenses;

(3) Copies of all tax advice relied upon by the directors;

(4) The Audit, Tax and correspondence files of S for the period 1 January 2000 to 30 April 2010 including all correspondence in relation to tax and/or tax treatment received or given by S concerning the tax affairs of the companies between 1 January 2000 and 30 April 2010.

2. In relation to AA:

(1) A complete analysis of the Administrative Expenses included in the financial statements for the periods 2000 to 2009;

(2) Analysis of turnover for each of the years 2000 to 2009, detailed profit and loss accounts for each of the years 2000 to 2009 and schedules detailing the makeup of profits on disposals of fixed assets for 2003, 2006 and 2007 to 2009;

(3) The Audit, Tax and correspondence files of S for the years 2000 to 2010 including all correspondence in relation to tax and/or tax treatment received or given by S concerning the tax affairs of the companies between 2000 and 30 April 2010.

3. In relation to Y and BB:

(1) The Audit, Tax and correspondence files of S for the years 2000 to 2010 including all correspondence in relation to tax and/or tax treatment received or given by S concerning the tax affairs of the companies between 2000 and 30 April 2010.

4. Insofar as not provided in respect of the above paragraphs:

(l) Copies of all correspondence in relation to tax and/or tax treatment received or given by Directors concerning the tax affairs of the companies between 2000 and 30 April 2010.

(2) All documentation and working schedules supporting the calculations of Directors Remuneration, Termination Payments, Secretarial and Administration Expenses and Group Charges for the period 1 January 2000 to 30 April 2010 for CC, Z, Y, BB and AA.

(3) Any documents relied upon by OO not exhibited to her affidavits.

5. Further, in relation to CC, Z, AA, Y and BB:

(1) Copies of the bank statements from 30 April 2010 going back to 2000;

(2) Copies of the company books, board minutes and resolutions, AGM/

EGM resolutions and details of directors' remuneration from 30 April 2010 going back to 2000."

Preliminary matters

27 Before we consider the parties' contentions, there are three related matters that require consideration. First, as we have already said, RBC surrendered its discretion to the court at the hearing on 9 April 2010 and at previous hearings. The reasons it gave for doing so were what it described as "a hopeless conflict" between its own interests and those of the beneficiaries; its inability to reach any final decision; and the possibility of conflict with and between different groups of beneficiaries. In substance, these reasons amounted to an assertion by RBC that it could not for the foreseeable future perform any of the functions of trustee in relation to the settlements. By accepting the surrender, the Royal Court was putting itself in a position where it would be obliged to occupy the position of trustee, not just in relation to a particular exercise of discretion, but generally. Although we do not go so far as saying that it was wrong to do so, we think that a court should be extremely reluctant to accept a surrender of discretion in such circumstances. Trustees are entitled to expect the assistance of the court in cases of genuine difficulty, but should not ordinarily be permitted to abdicate responsibility for carrying out the functions of trustee. They have accepted office on the terms of the trust instrument, and are not entitled to hand over performance of the trusteeship to the court. A surrender of discretion should be regarded as a last resort, and will normally only be accepted by the court in relation to a specific exercise of discretion where no sensible alternative exists.

28 The second matter concerns the correct test to be adopted by an appellate court on an application for leave to appeal against a decision of a court made following a surrender of discretion. Where the complaint is that the discretion has been wrongly exercised, the question is whether the Court of Appeal should apply the test identified in *UCC v Bender* [2006] JLR 269, namely the requirement to demonstrate ***"a clear case of something having gone wrong"*** in the decision of the court below, notwithstanding that the court may be said to be in the position of a trustee exercising a discretion. In our view, the *UCC v Bender* test should be applied. That is particularly so in the present case, where the Royal Court was exercising the statutory jurisdiction conferred by Article 51 of the 1984 Law; but we consider that it will also be so where the Royal Court is doing no more than exercise a discretion conferred on trustees, since in doing so it is performing a judicial function.

29 The third matter is this. At the hearing before us, there was a dispute between RBC on the one hand and the beneficiaries of the B and C settlements on the other as to which of them, if either, should undertake the task of resisting the appeal. RBC's position was that, having surrendered its discretion to the court, it was inappropriate for it to descend into the arena and deal with the correctness or otherwise of the order made by the Royal Court. According to RBC, that was a matter for the beneficiaries and the court. By contrast, the position of the beneficiaries was that, although they were content to assist the court, they were not protagonists in the litigation and could not be forced to progress an investigation started by

their trustee.

30 Each of these positions was influenced by a fear that unsuccessful opposition to the appeal might be categorised as hostile litigation and result in an adverse order for costs. In the event, however, the advocates for RBC and the beneficiaries addressed us on the issues arising in the appeal, and we derived considerable assistance from their submissions. It nevertheless seems to us that it was in principle for RBC, as trustee, to make to this court such arguments as could properly be made in opposition to the appeal. Although expressed in the context of an application for directions, we consider that the principle is appropriately set out by Birt DB in *Re The Esteem Settlement* [2001] JLR N 8 as follows:-

> ***"The Court is entitled to expect the fullest assistance from a trustee who should ensure that all relevant law is before the Court and that all the arguments for and against the various possible courses of action are rehearsed.*** The Court will usually be assisted by the trustee recommending a ***particular course of action and explaining the reasons for its recommendation.*** It will of course then be for the Court to decide whether it agrees. It would not be in the public interest for trustees to be discouraged from making recommendations for fear of being penalised in costs just because the Court decides against the recommendation."

We consider that that approach applies just as much on an appeal as it does at first instance.

The parties' contentions

31 The contentions for the appellants proceeded, until the very end of Advocate Langlois's reply, on the footing that the Royal Court had applied the correct principle but had erred in the exercise of its discretion. On that basis, the appellants' complaints fell into four main categories: that the appellants had not submitted to the jurisdiction of the Royal Court; that the disclosure order amounted to an order for pre-action disclosure; that disclosure had been ordered of documents that did not exist, were not within the possession, custody or power of the appellants, or had already been disclosed; and that the order was oppressive. Once it became clear to her that we were concerned as a matter of principle about the scope of Article 51, Advocate Langlois additionally contended by way of reply that, whatever the limitations on the scope of the Article, there was no distinction to be made between those of the Irish companies which were wholly owned and those which were partly owned.

32 RBC's written contentions confined themselves to placing relevant material before the court. In oral submissions, however, Advocate Cadin accepted that there must be some limit on the scope of the power contained in Article 51; and he suggested that the relevant criterion should be knowledge of the existence of the trust, so that a person who had no such knowledge could not be regarded as having a connection with the trust.

33 For the beneficiaries of the B and C settlements, Advocate Young contended that none of the appellants' complaints was a sufficient ground for setting aside the Royal Court's order. It was plain that the appellants had submitted to the jurisdiction of the Royal Court; this was not a case of pre-action disclosure; the documents sought were relevant to the question of how the trust assets might properly be divided between the three families; that if documents did not exist or were not within the possession or power of the appellants, or had already been disclosed, the appellants could simply say so; and having regard to the number of documents required to be disclosed the order was not oppressive. On the question of the scope of Article 51, Advocate Young suggested that an acceptable criterion would be the degree of proximity of the connection; but he contended that, in any event, the appellants were within the scope of the Article because they were beneficiaries.

Discussion

34 As we explain below, we consider that this appeal succeeds because the orders made by the Royal Court fell outside the proper scope of Article 51. If we had taken the opposite view, and regarded the appeal as raising questions merely of the propriety of an exercise of discretion, we would not — with one possible exception — have regarded any of the objections made by the appellants as sufficient to justify setting aside the Royal Court's orders. Dealing with them in turn:-

(i) It is plain that the appellants have submitted to the jurisdiction of the courts of Jersey. Not only has one of them, H, made an affidavit in these proceedings which he describes as made on behalf of the appellants in their capacity as directors, but they have themselves also invoked the jurisdiction of the Royal Court by their representation complaining of RBC's conduct in investigating the allegations against them. If it had been appropriate to make an order against them under Article 51, there could have been no objection to it on grounds of jurisdiction.

(ii) It is well-established in the law of Jersey that an order for disclosure will not ordinarily be made under Article 51 if the order would amount to one for pre-action disclosure, that is to say disclosure designed to enable the applicant to see if he has grounds for a hostile action. Authority for that proposition is to be found in this Court in *In the matter of the Internine and Azali Trusts* [2006] JLR 195 at [25], and in the Royal Court in *In re C. A. Settlement* [2002] JLR 312 at [15–16]. However, we do not think it is correct to categorise the order made by the Royal Court as an order for pre-action disclosure. That is for two reasons. First, RBC has already, as a result of the investigations conducted by O & R, ample material on which to base a decision whether or not to promote proceedings against the appellants in Ireland: it does not need the material required by the Royal Court's order for that purpose. Secondly, RBC seeks disclosure not, or not merely, for the purpose of investigating the affairs of the Irish companies, but so that it can divide the assets of the three settlements on a properly informed basis. If the matter had been one of discretion, this ground of complaint would have failed.

(iii) The appellants' objections that the Royal Court's order required them to disclose documents that they did not have, or did not exist, or had already been disclosed, have some substance; but they do not amount to a reason for setting aside the Royal Court's exercise of discretion. At most, the Royal Court's order would have required an amendment designed to make clear that the appellants could take objection to production on such grounds. We incline to the view that such a proviso was already implicit in the order; but, had this been the sole issue on the appeal, we would have been willing to make the appropriate amendment.

(iv) The assertion that the Royal Court's order is oppressive comprehends a number of related individual complaints. It is said that the disclosure is not relevant to the issue whether or not the appellants have improperly benefited from the assets of the Irish companies, and that no other issue is properly identified, so that the order amounts to a roving search for evidence; that the documents ordered to be disclosed are not defined with sufficient clarity; and that the scope of the order was so wide, and so disproportionate to the value of the remaining settled assets, as to be oppressive. We do not think these complaints have substance. The Commissioner clearly identified two issues in paragraph 5 of his judgment of 4 May 2010: the actions of the appellants in relation to the Irish companies, and separation of the interests of the three settlements. The appellants' contentions ignore the relevance of the second of these issues: the affairs of the settlements cannot properly be separated without full knowledge of the benefits directly or indirectly obtained by the beneficiaries, and the only satisfactory method of obtaining full information on that matter currently available is wide-ranging disclosure. The categories of documents appear to us to be adequately defined, and the fact that the exercise may be onerous does not mean that it is oppressive. Again, therefore, we do not think that the Royal Court's exercise of discretion could have been faulted on these grounds.

35 The one possible exception referred to in the previous paragraph is this. One of the appellants' grounds of appeal was that the Royal Court had attached too much weight to the fact that some of the documents were disclosable under the amended Articles of Association of Z and CC. In the terms in which it was expressed, we do not think that the complaint was justified: if the question had been one of discretion, it would have been entirely proper for the Royal Court to take the view, as English leading counsel had done, that since disclosure was inevitable under the Articles of Association it was sensible to shorten matters by making an order under Article 51. However, it seems to us that the point raises the question of whether it would have been a proper exercise of discretion to order disclosure in respect of those of the Irish companies in which RBC did not have a majority interest, since to do so would have had the effect of requiring greater disclosure than the internal constitution of those companies permitted RBC to have. But it is precisely that disparity between what is on the face of it permissible under Article 51 and what is obtainable under the companies' constitutions that raises the question of the proper ambit of Article 51; and it is to that that we now turn.

The scope of Article 51.

36 So far as material, Article 51 in following terms:-

> ***"Applications to and certain powers of the court***
>
> ***(1) A trustee may 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.***
>
> ***(2) 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 contact of the trustee and payments, whether payments into court or otherwise,***
>
> ***(iii) a beneficiary or any person having a connection with the trust, or***
>
> ***(iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;***
>
> ***(b) make a declaration as to the validity or the enforceability of the trust;***
>
> ***(c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration.***
>
> ***(3) An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee, the enforcer or a beneficiary or, with the leave of the court, by any other person."***

37 The jurisdiction exercised by the Royal Court in this case was that conferred by Article 51(2)(a)(iii) to "make an order concerning … a beneficiary or any person having a connection with the trust".

38 This provision is expressed in the widest possible terms. There is no apparent limit on the type of order that can be made, so long as it *"concerns"* a beneficiary or person connected with the trust; and there is no attempt to specify the degree of connection required in the latter case. Nevertheless, it is clear that some limit must be imposed on the width of the jurisdiction conferred by the Article. Thus it would not be permissible to regard the Article as providing a source of jurisdiction to grant relief where no other cause of action existed merely because the defendant happened to be a beneficiary under some trust. Nor could the Article be used, for example, to justify making a disclosure order against an attorney

merely because the attorney had drafted a trust instrument in a wholly unrelated matter and so could be said to be connected to a trust. These examples are more than limitations on exercise of the jurisdiction: they go to the scope of the Article 51 power.

39 The necessity for some limitation was recognised by the Royal Court in *S, L and E v Bedell Cristin Trustees Ltd* [2005] JRC 109. That case concerned a claim by S that she had provided part of the funds held on trust by the defendant trustees. While her claim was still unresolved, she applied to the trustees for an interim payment to enable her to meet legal fees. The trustees declined to make such a payment until her underlying claim had been established. She thereupon applied to the court for a direction that the trustees make the payment. The trustees argued that, since they had exercised their discretion against making the payment, their decision could be challenged only on conventional, limited grounds. S, however, argued that Article 51 (2) gave the court a wholly unqualified power to make an order ***"relating to the exercise of any power"***; with the consequence that the court could exercise its own discretion without regard to the reasonableness or otherwise of the trustees' exercise of discretion. In rejecting that submission, Birt, Deputy Bailiff, said this (at [22]):-

> ***"Although the wording of Article 51(2) is indeed wide and the Court may have a theoretical jurisdiction to make an order as [S's advocate] 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 [S's advocate'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 …".

40 The question, therefore, is how the undoubted limitation on the power is to be identified. The starting point in answering that question is to ascertain the purpose for which the power exists. As the Royal Court stated in *In re C A Settlement* (above, at [16]), the Article "was clearly intended to give a general power to the court to give directions in administrative proceedings". It is a statutory embodiment of what was described by Lord Walker of Gestingthorpe in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at [51] as "the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts", together with its corollary, the entitlement of a trustee to seek directions from the court in case of difficulty. In In the matter of the *Internine and Azali Trusts* (above, at [24]) this court recognised that applications brought under Article 47 (as Article 51 was previously numbered) were applications to the supervisory jurisdiction of the court; and the same recognition appears from the quotation set out above from *S, L and E v Bedell Cristin Trustees Ltd.*

41 This being the purpose of the Article, it is clear that the power to make an order concerning a beneficiary is confined to cases where the order affects the beneficiary in his capacity as

such – that is to say, in his capacity as beneficiary of the trust whose administration the court is supervising. The foundation of the jurisdiction lies in the nexus between trustee and beneficiary arising out of the trust relationship. The fact that a person is a beneficiary is not of itself sufficient to justify the making of an order: the order must be made for the purpose of vindicating, or at least promoting, some right or interest arising directly out of the trust relationship.

42 Similar considerations seem to us to apply to the question of who is a "person having a connection with the trust". Like Gloster JA in *In re Broere Trust* [2003] JLR 509 at [26], we do not propose to attempt any exhaustive definition of those who might fall into that category; and we agree with her that whether a person has a connection with the trust must depend on the factual circumstances relevant to the particular case. It does, however, seem to us that the connection must be a direct connection with the relationship between trustee and beneficiary constituted by the trust instrument. The examples given by Gloster JA in Broere, of a settlor or protector or the potential object of a discretionary power who is not a beneficiary of the relevant time, all have the necessary direct and immediate connection with the trust relationship. So also, we think, did the creditor of the settlor who was convened at the outset of the Esteem litigation to advance any grounds on which it challenged the validity of or gifts to the settlement, since the issue was fundamental to the existence or otherwise of the trust relationship: see *UBS Trustees (Jersey) Limited v Ismail* [2003] JRC 147 at [6]. By contrast, in Broere itself, it was held that the mere fact that there happened to be an identity between persons who were the trustees of one trust and the trustees of a second trust could not result per se in there being a connection between the first trust and the trustees of the second trust or vice versa.

43 We consider that the requirement of a direct connection with the trust relationship provides a principled basis for exercising the jurisdiction conferred by Article 51 against a beneficiary or a person connected with the trust, whilst preserving the wide discretion to do whatever is necessary to further the administration of a trust that the Article was clearly intended to confer on the court. We do not consider that mere knowledge of the existence of the trust suffices, as Advocate Cadin suggested; nor do we think that the test can be satisfactorily framed in terms merely of proximity, as Advocate Young proposed, although proximity is clearly a relevant factor.

Disposition

44 As we have indicated, we consider that the order made by the Royal Court in this case went beyond the proper limits of the jurisdiction conferred by Article 51(2). This is in essence because the order ignored the fact that the appellants owed no duty of disclosure to RBC or the beneficiaries that arose directly out of the trust relationship. In their capacity as beneficiaries, the appellants had no right to the documents of the Irish companies. They did have the ability to procure documents of the Irish companies in their capacity as directors of those companies; but their duties as directors were owed to the companies, not to the trustees or the beneficiaries. The fact that RBC indirectly held an interest in the Irish

companies is not enough, on the test we have identified, to bring the appellants within the description of persons connected to the trust. Trustees who operate through a company structure, whether one they have inherited or one they have themselves put in place, cannot ignore the limitations that the company structure imposes; and they cannot invoke the Article 51(2) jurisdiction to enable them to circumvent that structure.

45 In this connection, we think it useful to refer to the English Court of Appeal decision in *Butt v Kelson* [1952] Ch 197. In that case, trustees held almost all the issued shares of a private limited company, and had appointed themselves directors of the company. One of the beneficiaries, dissatisfied with the way in which the trustees had conducted the company's business, claimed to be entitled to inspect all documents which came into the possession of the trustees by virtue of their position as directors of the company. It was argued on his behalf that, where the settled shares gave control of the company, the beneficiaries had a right to go behind the shares to see documents in the hands of the directors. This argument was rejected, Romer LJ saying the following (at pp 206–7):-

> ***"I am not quite sure to what extent the judge intended the principle that a beneficiary can call upon a trustee director to furnish him with information and inspection to apply … For myself, I think that if one accepts the principle at all, it is difficult to confine it within any properly definable limit and, in my judgment, it is a principle which it is dangerous to accept and which ought not to be accepted at all."***

The outcome of the case was nevertheless that, provided that the plaintiff specified the documents he wished to see, made out a proper case for seeing them, and was not met by any valid objection by the other beneficiaries or by the directors from the point of view of the company, then the directors should give inspection. This was on the express basis that they were doing so "not because they can be compelled to do so as directors, but as a short-circuit, if one may so describe it, to an order compelling them to use their voting powers so as to bring about what the plaintiff desires to achieve" (at p 207). This case appears to us to be an affirmation of the proposition that the formalities imposed by a company structure operated by trustees must be properly observed. Moreover, in the present case RBC has already, by procuring the amendment of the Articles of Association of GI and EI, put itself in a position where it can enforce disclosure from the directors; and no further short-circuit is available or appropriate.

46 In its judgment given on 25 November 2009, the Royal Court identified the four concerns we have set out in paragraph 21 above. Those concerns raised serious questions about the scope of the Article 51(2) jurisdiction in circumstances where the trust operated through a company structure; and it is perhaps unfortunate that they appear to have been lost sight of by the time the court gave its judgment of 4 May 2010. For the reasons we have given, we consider that the existence of the company structure interposed a separate and distinct relationship between RBC and the appellants, so that the relevant nexus between them was not the trust relationship. On that footing, it was not permissible to make an order against them either on the basis that they were beneficiaries or on the basis that they were persons having a connection with the trust.

47 Although we have concluded that the Royal Court was wrong to make the order it did, we recognise the dilemma it faced. Without disclosure, a division of the settled assets on a fully informed basis will not be possible. That does not, however, mean that the Court is powerless to bring about a proper division of the assets. If the appellants persist in their refusal to provide information which the Royal Court considers relevant, there remain weapons in the Court's armoury. If it thought fit to do so, it would be open to it to authorise RBC to pursue further information through the mechanism in the Articles of Association of Z and CC; or to authorise proceedings against the appellants in Ireland to recover sums overpaid, with further disclosure being provided in the course of the litigation; or to draw inferences against them and order a distribution on a basis that makes assumptions about the benefits they have obtained from the Irish companies. These processes are of course more cumbersome and less satisfactory than the order made by the Royal Court; but, despite its obvious attractions, the short cut that the order represents is not one that it could legitimately take.