

# The Trustee v Principal Beneficiary

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	14 September 2020
<b>Neutral Citation:</b>	[2020] JRC 183
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## Text

[2020] JRC 183

ROYAL COURT

(Samedi)

Before:

R. J. MacRae., Deputy Bailiff, and Jurats Thomas and Christensen.

In the Matter of the Arpettaz Settlement

And in the Matter of Articles 51 & 53 of the Trusts (Jersey) Law 1984 (As Amended)

Between  
The Trustee  
Representor  
and  
Principal Beneficiary  
First Respondent

and

[the English Claimants]  
Second to Fifth Respondents

**Advocate R. J. McNulty for the First Representor.**

**Advocate A. Kistler for the Principal Beneficiary.**

**Advocate N. M. Sanders for the English Claimants (Second to the Fifth Respondents).**

## **Authorities**

*In the matter of the Arpettaz Settlement* [\[2020\] JRC 161](#).

*S Settlement* [2001] JLR N37.

*Kahn v HSBC International Trustee Limited, O Poon, K Poon and Franckel*, [2015] (1) Note 31)

*Representation of O Poon Trust* [\[2015\] JCA 109](#)

*Re E, R, O and L Trusts* [\[2008\] JRC 051](#)

Trusts — reasons for the decision.

Bailiff

## **THE DEPUTY**

- 1 On 11<sup>th</sup> August, 2020, the Court heard and determined an application made on behalf of the trustee (“the Trustee”) of the Arpettaz Settlement (“the Trust”).
- 2 We now give reasons for our decision.

## **Background**

- 3 The background to this application is contained in the judgment of the Royal Court in relation to this Trust reported at *In the matter of the Arpettaz Settlement* [\[2020\] JRC 161](#).
- 4 As can be seen from that judgment, on 29<sup>th</sup> June, 2020, the Court made various orders including approving the in principle decision of the Trustee to submit to the jurisdiction of

the English High Court in relation to claims issued by the English Claimants, to consent to being added as a party to the said proceedings and to adopt a neutral stance in relation to allegations made in the English Claimants' draft re-amended particulars of claim.

- 5 In those proceedings the Principal Beneficiary is also a defendant and has adopted an active stance defending the claims made by the English Claimants in respect of the assets which form the corpus of the trust fund.
- 6 On receipt of the order made by the Royal Court the Trustee filed an acknowledgement of service in the English proceedings on 30<sup>th</sup> June, 2020. On 15<sup>th</sup> July, 2020, the Trustee, in accordance with the order made by this Court on 29<sup>th</sup> June, 2020, provided the English Claimants with the identity and whereabouts of the trust assets. The trust assets are divided into two broad categories namely receivables arising from loans made to the Principal Beneficiary personally, as to approximately 70% of the trust fund, and investments held by Quilter Cheviot as to approximately 30% of the trust fund.
- 7 Shortly after the trustee provided this material to the English Claimants the Trustee was informed that settlement discussions between the English Claimants and the Principal Beneficiary were at an advanced stage. Those discussions have resulted in an in principle agreement as to the terms of a potential compromise. On 17<sup>th</sup> July, 2020, the Trustee became involved in tripartite settlement discussions which led to a settlement agreement being negotiated, finalised and executed, subject to order of this Court, on 27<sup>th</sup> July, 2020.
- 8 It is a condition precedent to the implementation of the settlement agreement that this Court issues an Act of Court directing the Trustee to, *inter alia*:
  - (a) make a payment to the English Claimants;
  - (b) give certain releases to the Principal Beneficiary and the English Claimants;  
and
  - (c) be permitted to sign a consent order discontinuing the English proceedings.

### **The Trustee's application**

- 9 The Trustee invited the Court to:
  - (i) approve the Trustee's decision to enter into the settlement agreement;
  - (ii) approve the prospective actions of the Trustee in performing its obligations under the settlement agreement including those referred to at paragraph 8 herein;
  - (iii) approve the decision of the Trustee to write-off various loans made for the

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Principal Beneficiary and thereafter terminate the Trust.

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- 10 The key terms of the settlement agreement are referred to at paragraphs 29 and 30 below.
- 11 As referred to above, initially the Trustee invited the Court to approve the Trustee's in principle decision to write-off the outstanding loans made to the Principal Beneficiary (which he has used to purchase and develop a property in southern Europe) and thereafter terminate the Trust.
- 12 There is no doubt that the terms of the Trust permit the Trustee to enter into these transactions, i.e. enter into the settlement agreement, write-off the outstanding loans made to the Principal Beneficiary (by way of making a notional distribution to him in those sums) and to terminate the Trust. However, the Trustee sought the Court's approval of these matters on the footing that they amounted to "*momentous*" decisions and the Court should sanction them in accordance with the well-known principles in *S Settlement* [2001] JLR N37 which were set out by the Court in the judgment reported at *In the matter of the Arpettaz Settlement*, [\[2020\] JRC 161](#). This gave rise to a procedural question. The Beddoe proceedings were principally concerned with whether or not the Trustee should submit to the jurisdiction of the English High Court. In those proceedings the interests of all the beneficiaries were similar i.e. that the claims of the English Claimants should not succeed. If they did then the trust fund would be lost in its entirety. The beneficiaries under the Trust are the Principal Beneficiary, his parents who are approaching 80 years of age, and his two siblings who are in their 50s. They are not aware of this Trust and not only have they never benefitted from it but the Court accepted that it was unlikely, absent the early death of the Principal Beneficiary, that they would do so. But because their interests in resisting the English proceedings were aligned with the Principal Beneficiary, it was appropriate to convene him alone to the Beddoe proceedings.
- 13 By the same token the beneficiaries as a whole have a similar interest in the outcome of the English proceedings, as provided for in the proposed settlement agreement. The Principal Beneficiary is more directly affected than the other beneficiaries and at greater risk of costs as he is a party to those proceedings; but, again, his interests are aligned with those of his parents and siblings.
- 14 The Trustee chose not to issue a fresh representation so as to bring this application to the Court, and sought to apply to the Court for relief under the provision in the order made on 29<sup>th</sup> June 2020 giving the parties liberty to apply.
- 15 It might have been better for the Trustee to have issued a fresh representation seeking the Court's sanction of the in principle decision of the Trustee to enter into the settlement agreement but it was not essential to do so, particularly having regard to the need for this matter to be resolved reasonably quickly in order to avoid substantial litigation costs which would soon need to be expended in the English proceedings. Accordingly we permitted the

Trustee to proceed under the liberty to apply provision in respect of matters connected with the settlement agreement.

- 16 However, the position is different in relation to the Trustee's request that the Court sanction the in principle decision to write-off the outstanding loans to the Principal Beneficiary and terminate the Trust. Firstly, a fresh representation should have been issued as such matters are not sufficiently connected to the Beddoe proceedings to warrant an application being made under the liberty to apply provision.
- 17 Secondly, the Court expressed the view in the course of argument that all the beneficiaries of the Trust would need to have been convened to such a representation.
- 18 It needs to be borne in mind the reason why a trustee seeks the Court's approval/blessing to an in principle decision which it has reached. One of the reasons is to insulate a trustee from any subsequent claim by a disappointed beneficiary that the decision that it has reached, which must be momentous in order for the Court's discretion to bless it being engaged, was arrived at in breach of trust.
- 19 Clearly the very fact that such an advantage may flow from the Court's approval of a decision made by a trustee makes the point that in most circumstances it is necessary for all the adult beneficiaries of a trust, where they can be identified, to be convened.
- 20 In *Kahn v HSBC International Trustee Limited, O Poon, K Poon and Franckel*, [2015] (1) Note 31) (also at *Representation of O Poon Trust* [2015] JCA 109) the Court of Appeal held at paragraph 14:

***“Where a trustee has made a momentous decision, that is a decision of real importance for the trust, and seeks the court's approval for the decision, the legal test to be applied by the court is well established in this jurisdiction. As explained in *Re S Settlement* [2001] JLR N 37, the court must satisfy itself (i) first, that the trustee's decision has been formed in good faith, (ii) second, that the decision is one which a reasonable trustee properly instructed could have reached, and (iii) third, that the decision has not been vitiated by any actual or potential conflict of interest. A similar approach is taken in England:- see *Public Trustee v Cooper* [2001] WTLR 901.***

...

***That is not to suggest that the court should take a lax approach, or that it should approve any trustee's applications without due consideration.***

There is a threshold that must be crossed: the court is required properly to scrutinise the proposed exercise of the trustees' power on the evidence. As was pointed out in *Re Y Trust* [2011] JLR 464 (citing with approval *Lewin on Trusts (18th ed.)*, at paragraph 29–299) (a similar approach is taken in Guernsey: see *Re The Trusts (Guernsey) Law 2007* and [AAA] *Children's Trust*,

*Royal Court, 8th January 2014 [2015] WTLR 683) the result of the court giving its approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust, or to set it aside as flawed.*

Furthermore, when trustees are seeking approval for a decision they have already reached, the beneficiaries are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in proceedings to challenge the exercise of the power once made." [Our emphasis]

- 21 As to the general approach for convening beneficiaries the Royal Court said at paragraph 21 in *Re E, R, O and L Trusts* [\[2008\] JRC 051](#):

***"When the Court sits in its supervisory capacity to consider directions or rulings it should give in relation to a trust, it has to consider in each case who should be convened to the hearing.*** The starting point is that the trust property is held beneficially for the beneficiaries and accordingly it is normally appropriate that they should be convened (see *Re a Settlement* [1994 JLR 139 at 144 per Bailhache, Bailiff](#)). However, as that case made clear, it is not invariably the case that all the beneficiaries need to be heard. Many of them may have an identical interest; alternatively their interest may be extremely remote. It is ultimately a matter for the discretion of the Court as to which beneficiaries should be convened having regard to the nature of the particular application and the particular circumstances."

- 22 The Court went on to say at paragraph 25:

***"As Bailhache, Bailiff made clear at 168 in Re Abacus, the question is whether it is necessary that a party be convened in order properly to determine the trustee's application (or in this case that of the beneficiaries).*** If that test is satisfied, the Court has a discretion to convene the relevant party. It seems to us that the underlying rationale for convening a beneficiary is essentially two-fold:-

***(i) It is likely that a beneficiary will have something material which the Court ought to be aware of before deciding what directions to give.*** Thus the view of a beneficiary on whether it would be right to take a particular course of action is clearly something relevant for the Court to know .

***(ii) It may also be thought unfair for the Court to make a decision which would affect the trust (and therefore the interests of a beneficiary) without giving that beneficiary an opportunity of putting his observations to the Court."***

- 23 Applying these principles it can be seen that in respect of the Trustee's decision to, in effect, distribute the whole trust fund to the Principal Beneficiary and terminate the Trust, the

interests of the other beneficiaries are not “*identical*”. Neither can their interests be described as “*extremely remote*” in the circumstances where the beneficial class is so small, even if they are unlikely to benefit from this Trust.

24 It was urged upon us, principally by counsel for the Principal Beneficiary, that it was not necessary to convene the other beneficiaries. We were told:

- (i) The Principal Beneficiary was identified as such in the Letter of Wishes;
- (ii) It was expected that the funds would be used to fund his retirement and most likely be exhausted or depleted during his lifetime;
- (iii) The Principal Beneficiary was younger than his siblings;
- (iv) The other beneficiaries were already provided with certain benefits by the Principal Beneficiary and to convene them would result in additional cost;
- (v) The other beneficiaries were not aware of the existence of the Trust and acknowledgement of the same might upset “otherwise happy family relations” and could cause “unnecessary family tensions”;
- (vi) The Principal Beneficiary's parents and siblings were the main beneficiaries of his estate and would stand to benefit from his assets on his death in any event, irrespective of whether he held assets personally or in trust;
- (vii) Other members of the Principal Beneficiary's family might not be in a position to advance any additional points relevant to the Court's consideration of whether to approve the writing off of the loans to him or the termination of the Trust.

25 We know that the Trustee has never had any contact with the four other adult beneficiaries of the Trust. The original trustee also did not contact any of these beneficiaries. The Trustee accordingly has no direct knowledge of their needs or other circumstances. We considered carefully the arguments advanced as to why it was not necessary to convene the beneficiaries. Nonetheless we thought it was appropriate, having regard to the interests of those persons and the general approach to convening beneficiaries that they ought to have been convened to deal with the matters of distribution and termination.

26 Accordingly the Trustee, having heard the Court express its reservations in relation to the in principle decisions referred to at 9(iii) above, quite properly withdrew its application to seek the Court's approval of such matters. If an application is renewed by the Trustee in relation to these decisions then the Court will require the beneficiaries referred to in this judgment to be convened to the hearing. The Court will need to be persuaded when such representation is heard that the decisions to write-off the outstanding loans made to the Principal Beneficiary and to terminate the Trust are “*momentous*” in the context of this Trust and the purpose for which it was set up (i.e. to benefit the Principal Beneficiary). It may be that the Trustee is able to explore other ways of ensuring that it is comfortable to proceed



with its in principle decisions. However, it is not appropriate for the Court to make any further observations in this regard, absent a further representation and full argument in relation to these issues.

### **Approval of the Trustee's decision to enter into the settlement agreement**

- 27 We have referred to the relevant principles at paragraph 12 above. We heard submissions from counsel for the Representor, the Principal Beneficiary and the English Claimants in respect of the principal parts of the settlement agreement and the participation of the Trustee in the same.
- 28 We were also furnished with confidential advice to the Trustee which had been shared with the Principal Beneficiary only, in accordance with our previous decision reported at *In the matter of the Arpettaz Settlement* [\[2020\] JRC 161](#).
- 29 In short, the intention of the settlement agreement is that the English Claimants will receive the valuable liquid assets held in the Trust, currently comprised in the Quilter Cheviot portfolio, less a retained amount, as defined in the settlement agreement, in respect of Trustee fees and a tax liability of £471,312 arising as a consequence of the distribution of the settlement sum to the English Claimants.
- 30 This should result in approximately \$4.1 million being paid to the English Claimants and in order to prevent the English Claimants being prejudiced by any currency variations which may unexpectedly arise in the course of liquidating the portfolio of assets, the English Claimants are guaranteed to receive the sum of \$4 million, such guarantee in effect being given by the Principal Beneficiary pursuant to the settlement agreement. The Trustee will receive a general release under the settlement agreement in relation to the English proceedings. The Principal Beneficiary and the Trustee have warranted to the English Claimants that the Trust has no known assets other than those disclosed.
- 31 It is inappropriate for us to set out the advice given by Leading Counsel in any detail. In summary, Counsel has advised that the proposed settlement was “as good a compromise as is likely to be achieved from the perspective of the Arpettaz Settlement”. Further, Counsel pointed out that there was a real advantage in the dispute being concluded now, owing to the likely incidence of legal and trust administration costs which would be incurred in contesting the English proceedings.
- 32 Accordingly, in the opinion of Counsel the Trustee could properly form a view that it was for the benefit of the Trust to enter into the settlement agreement in compromise of the English proceedings. The Trustee, pursuant to regulation 21 of the regulations appended to the Trust had the power to do so pursuant to its general power to “compromise ... any ... thing whatsoever relating to the Trust Fund or Settlement”.



- 33 The Court agreed with the advice given by Counsel. We found that the decision of the Trustee to enter into the settlement agreement had been formed in good faith; that the decision to do so was a reasonable one which a trustee properly instructed could have reached, and that the decision to do so had not been vitiated by any actual or potential conflict of interest.
- 34 Accordingly, we approved the decision of the Trustee to enter into the settlement agreement, accepting that the decision to do so was a momentous one.