

HSBC International Trustee Ltd v Poon Lok to Otto

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	25 August 2011
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Text

[2011] JRC 167

ROYAL COURT

(Samedi)

Before:

M. C. St. J. Birt, Esq., Bailiff, **and** Jurats Fisher **and** Kerley.

IN THE MATTER OF THE REPRESENTATION OF HSBC INTERNATIONAL TRUSTEE
LIMITED

IN THE MATTER OF THE OTTO POON FAMILY TRUST AND IN THE MATTER OF
ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED)

Between
HSBC International Trustee Limited
Representor
and

Poon Lok To Otto
First Respondent
Madam Kan Lai Kwan Kay
Second Respondent
Poon Wing Yun Karen
Third Respondent

and

Advocate Goulborn representing the unborn and unascertained beneficiaries
Fourth Respondent

Advocate R. J. MacRae for the Representor.

Advocate A. D. Robinson for the Second Respondent.

Advocate M. C. Goulbourn for the Fourth Respondent.

Other parties not represented or in attendance.

Authorities

In Re H Trust [\[2006\] JLR 280](#).

Trusts (Jersey) Law 1984.

Re IMK Family Trust [\[2008\] JLR 250](#).

The Bailiff

- 1 The application before us today is one made by HSBC International Trustee Limited as trustee of the Otto Poon Trust and it seeks directions as to whether the trustee should submit to matrimonial proceedings in Hong Kong between the First Respondent (“the settlor”) and the Second Respondent (“the wife”) and as to the level of disclosure which should be made to the wife.
- 2 The background is as follows. The trust was established by deed dated 25TH July, 1995, between the settlor and the trustee. It is a conventional discretionary trust of which the beneficiaries are the settlor, the wife, their adult daughter and any other living descendant of the settlor, of which there are none at present. An educational establishment was added as a beneficiary in January 1996 under the power to add. The settlor is also the protector of the trust. The trust is governed by the law of Jersey. The trustee is a BVI company with a branch in Jersey. The trustee has delegated the administration of the trust to HSBC Trustee Hong Kong Limited and the administration of the trust is therefore carried out in Hong Kong; indeed the affidavits in this case have been sworn by the senior director of HSBC Trustee

Hong Kong Limited, who resides in Hong Kong.

- 3 The settlor and the wife were married in January 1968. They have recently separated and are now engaged in divorce proceedings before the High Court in Hong Kong. The wife is seeking a lump sum order, but she also seeks an order varying the terms of the trust by directing that most of the shares in the holding company owned by the trust are transferred out of the trust as a distribution to the settlor and the wife in whatever proportions the Hong Kong court says.
- 4 The sole asset of the trust is an 84.6% shareholding in a Bermudan holding company which in turn owns 100% of a number of companies which form a substantial trading group. There appear to be a total of 21 companies of which 20 are incorporated in Hong Kong, Macau or the People's Republic of China and 1 in Canada. We have been given the figures as to the estimated net value of the group, which is substantial, and it is estimated by the accountants advising the trustee that approximately 70% by value of those net assets is owned by companies in Hong Kong.
- 5 The settlor has written a number of letters of wishes, the latest of which is dated May 2010 and was written in the knowledge of the divorce proceedings. The letter expresses his wish that, following his death, the trustee should divide the trust fund into three equal parts, one for the wife, one for the daughter and one for certain of his colleagues in the trading group who are not at present beneficiaries but could be added.
- 6 On 25TH July, 2011, the Hong Kong court granted the wife's application that the trustee be joined to the divorce proceedings. Thus, the trustee now seeks directions as to whether it should submit to the jurisdiction of that court or not. It also seeks directions in relation to disclosure of trust documents. In each case it has reached a decision which it now asks the Court to approve as being reasonable.
- 7 The first issue is whether the trustee should submit to the jurisdiction of the Hong Kong court. It has decided that it should. Mr MacRae, on behalf of the trustee, has reminded us of what this Court said *In Re H Trust* [\[2006\] JLR 280](#) at paragraphs 12–15:-

“12. Significant consequences may flow from a decision by a trustee of a Jersey trust to submit to the jurisdiction of the Family Division of the High Court or indeed any other court considering the matrimonial affairs of beneficiaries of a trust. Any order subsequently made by the Family Division would be made in proceedings to which the trustee had voluntarily submitted and in which therefore it had full opportunity to put forward submissions on the order which the court should make. It follows that the trustee would be in some difficulty in arguing subsequently before this court against the proposition that any order of the Family Division relating to the trust should be enforced without reconsideration of the merits of such order .

13. Conversely, if the trustee has not submitted to the jurisdiction of the Family Division, any order of that court will not be enforceable in Jersey under the rules of private international law. On any subsequent application to this court to vary the trust so as to achieve the effect of any variation or other order made by the Family Division, this court would have complete discretion as to the course it should take .

14. In this respect, it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has, therefore, a very different focus from the Family Division .

15. It follows that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and a wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment of the beneficiaries of a trust when the primary focus of that court is the interests of the two spouses before it. It is more likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases, e.g. where all the trust assets are in England, it may well be in the interests of a trustee to appear before the English court in order to put forward its point of view because, by reason of the location of the assets, that court will be able to enforce its order without regard to the trustee or this court.”

- 8 The position has of course changed since then because of the introduction of the new Article 9 of the Trusts (Jersey) Law 1984. Even if the trustee submits, an order of an overseas matrimonial court varying a trust cannot be enforced in Jersey because that overseas court will be applying its local law to vary the trust rather than Jersey law, and any enforcement of such a variation is prohibited by Article 9(4) of the 1984 Law (see *Re IMK Family Trust* [2008] JLR 250). However, what is sought in this case by the wife is within the powers contained in the trust deed. The husband and wife are both beneficiaries and therefore the trustee could, under the terms of the trust, give effect to an order of the sort requested by the wife without contravening the terms of the trust deed, and this Court could, if asked, approve such action by the trustee in its supervisory role. It follows that the problem of what may happen if an overseas court makes an alteration in the divorce proceedings, using the terminology in *Re IMK Trust*, to a Jersey trust does not arise in this case.

- 9 The trustee has taken advice from solicitors in Hong Kong who have advised that, even if the trustee did not submit and refused to comply with any order of the Hong Kong court varying the trust, the Hong Kong court would have the necessary power to enforce its order against the assets situated in Hong Kong, even if those assets are held in underlying companies. We remind ourselves that some 70% of the assets are held in Hong Kong. The trustee would not be able to prevent such enforcement.
- 10 Thus, on the face of it, this is one of those cases envisaged in paragraph 15 of *Re H Trust* where the interests of the beneficiaries would be better served by the trustee appearing in the matrimonial court. This is because, if it does so appear, it can seek to ensure that, by putting forward arguments and producing evidence, the interests of the other beneficiaries are fully considered by the matrimonial court whereas, if it does not appear, that court may still enforce any order it makes varying the trust, but without the beneficiaries' interests having been put forward by someone representing and looking after those interests.
- 11 These arguments point strongly towards the trustee submitting in this particular case. However, by so doing, it will render itself liable to disclose whatever documents in relation to the trust the Hong Kong court chooses to order, regardless of whether this court might or might not have ordered such disclosure. It also renders the trustee liable to a position of conflict if the Hong Kong court does order it to do something contrary to the terms of the trust deed, although as we have said, that is not what the wife is asking for in this case.
- 12 The trustee has concluded that the balance comes down firmly in favour of submission to the jurisdiction. We agree that this is a reasonable decision.
- 13 To summarise our reasons, which are those of the trustee, it is clear that the Hong Kong court could enforce its decision against the assets of the trust even if the trustee does not submit. It is also clear that the trust is administered in Hong Kong, and therefore the key individuals could be subpoenaed to give information. We agree that it is preferable to allow the trustee to appear in order to put all arguments which can be put in favour of the other beneficiaries of the trust, in order to safeguard their interests. There is in this case little risk of the trustee being put in an impossible position of conflict between its duty to obey an order of the Hong Kong court and its duty to adhere to the trust deed, and the disclosure obligations which it will come under are outweighed by the advantage of it being able to make submissions to protect the interests of the beneficiaries.
- 14 So, in summary for those reasons, we endorse the decision of the trustee to submit.
- 15 Turning to the issue of disclosure, the wife has asked for various categories of documents. The trustee has agreed, at this stage, to provide copies of the trust deed and any relevant supplemental deeds, the most recent trust accounts, including those company accounts which it has, and the various letters of wishes. Some of these are already in the possession of the wife because they were in the possession of the husband and he has disclosed

them; others may not be.

- 16 The Court's approach in relation to disclosure is well settled and because the wife is a beneficiary there is a presumption that the wife should be entitled to those documents unless there is good reason to withhold them. We see no good reason to do so, particularly given the decision of the trustee to submit, so that it will in fact become liable to disclose any additional documents which the Hong Kong court requires; we therefore approve the trustee's decision on disclosure to date.
- 17 We have decided not to become involved at this stage in deciding whether the trustee should supply any of the additional documents which the wife has asked for. The trustee does not say that it will not supply such documents; it simply has not reached a decision yet and therefore does not ask for our approval. It will consider the request and it may make disclosure voluntarily. If it does not then the matter will be resolved by the Hong Kong court to which it will have submitted by then.
- 18 We note that neither the settlor nor the adult beneficiary has any objection either to the submission to the jurisdiction or the disclosure which the trustee proposes to make. Similarly Advocate Goulborn supports both decisions. So, in those circumstances, we make an order in the terms of draft produced to us, to the effect that the trustee's decision to participate and submit to the jurisdiction of the Hong Kong court is approved. The trustee's decision to provide the documents we have listed is also approved. We order that the costs of the trustee and the other parties convened in relation to this application come out of the trust fund on the usual indemnity basis.