C v B

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Marett-Crosby, Blampied
Judgment Date:	06 August 2013
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Text

[2013] JRC 158

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Commissioner, and**Jurats Marett-Crosby**and**Blampied.

IN THE MATTER OF THE C FOUNDATION

Between
C
Representor
and
B
Respondent

Advocate A. J. Clarke **for the Representor**.

Authorities

In the matter of the Representation of WW and XX (Trust) [2013] JRC 070 .

Representation of WW and XX [2011] JRC 231 .

Trust — application by the representor seeking appointment of new trustees to the second and fourth parts of the trust fund of a settlement.

THE COMMISSIONER:

1 By his representation dated 6 th June, 2013, the representor ("C") seeks the appointment of new trustees to the second and fourth parts of the trust fund of a settlement known as the C Foundation dated 10 th July, 1981, (the "Settlement") of which he was the settlor.

2 The representation was supported by a very brief affidavit by C in which he said that funds had been " *removed"* from Parts 2 and 4 of the Settlement (he did not say by whom) and he was unaware of whether the same were held in other trusts in Jersey or elsewhere. The purpose of the application was to appoint trustees to allow them to undertake researches to see whether there may be any possibility of recovering these funds; a simple enough proposition on the face of it.

3 One hour had been set aside for what Advocate Clarke for C clearly felt was a straightforward and non-contentious application; any decision about what, if any, action would be taken by the new trustees was, said Advocate Clarke, for those trustees, not the Court to take, and this application would simply put those trustees in place to enable them to carry out the necessary investigations. However, as the discussion progressed and more and more of the background came out following questions put by the Court and after closer examination of the documents filed, it became clear that the matter was not at all straightforward and the Court reserved its decision.

4 Working from what we were told in Court and from the papers filed with the application, we turn to the background of the matter.

5 The members of the family concerned are C, his sister the respondent B and their late parents, E and F.

6 C is an accountant and he created the settlement with nominal sums on 10 th July, 1981, with D Limited as the first trustee. It is a discretionary settlement in fairly standard form with

the beneficiaries being described as the children and issue of the grandfather, the late H. He had two children, namely the said E and a daughter, the late Q, but her side of the family would appear to have no real involvement in the matter.

7 The slightly unusual aspect of the Settlement was that the trust fund was divided into four parts (all nominal but different sums in US Dollars) and under the provisions relating to the office of protector, the first protector (C) was given the power to appoint separate protectors of each of those parts. Once appointed, they in turn had the power to appoint their successors.

8 Pursuant to that power, on 13 th July, 1981, C appointed his father E as the protector of the first part, his mother F as protector of the second part, himself as protector of the third part and his sister B as protector of the fourth part.

9 It would seem clear that these arrangements were put in place to reflect the interests of the four members of the family in the family business established by the grandfather and which the Settlement acquired in August 1983 from an earlier and similarly structured family settlement. Although letters of wishes are no longer available, it is evident that the first part of the trust fund (37.2%) was “notionally” allocated to E, the second (13.4%) to F, the third (24.7%) to C and the fourth (24.7%) to B, with each of them being the protector of their notional part. No distributions out of each part could be made without the consent of the protector of that part.

10 The shares in the family business held by the settlement were sold in November 1984. The tax and financial adviser to the family was the late L, who in 1985 proposed a scheme to distribute to or for the benefit of each member of the family their notional shares. We suspect that the convoluted nature of the scheme was aimed in part at circumventing the provision in the Settlement, which excluded from benefit anyone who was ordinarily resident in the United Kingdom for Income Tax purposes.

11 Letters from L dated the 5 th August, 1985, in relation to the first, second and fourth shares show that the scheme involved the resignation of the existing respective protector and the appointment of a member of L's family as the new protector, the addition of a Filipino housekeeper employed by L's son in Hong Kong as an additional beneficiary, a revocable appointment of each part to that housekeeper and a release of that power of revocation; thus winding up the trusts of those parts of the trust fund of the Settlement.

12 We know what happened to E's notional share from that point as a result of proceedings brought in April 2011 (which we will refer to as the “2011 proceedings”). It would seem that his notional interest was then acquired from the housekeeper by a company established by L called G Services Inc. for £50 which it then used to create the G Charitable Foundation.

13 The most notable feature of the scheme is that all the documents prepared by L were back-dated, leading the Court inevitably, we think, on the 11 th April, 2013, to declare these transactions invalid in so far as they related to the first part, as a consequence of which the assets of the G Charitable Foundation have now reverted back to the first share of the trust fund of the Settlement (see *In the matter of the Representation of WW and XX (Trust)* [2013] JRC 070).

14 What we do know from the second affidavit filed by B in the 2011 proceedings is that, as one would expect, she received the benefit of her part, we suspect through another trust as with her father's notional share. She says at paragraphs 11 and 12:–

> *"11. …*
>
> *In addition my father E was a dominant personality, and somebody I respected and trusted.* At the time of the sale I was 33 and my main recollection is that, with L (the trust advisor whose affidavit has been produced in Court) and my brother C, he arranged to sell the family business at J Industry distributing the sale proceeds as had already been mentioned, and arranging the trust arrangements for tax efficiency.
>
> *12. I played no part in any of the businesses or trusts at that time other than signing the documents that they may have asked me to sign and whilst this may seem naïve now, it was the reality at the time. Other than general and vague explanations about the situation, including my appointment(s) as Protector, I had little comprehension of the technicalities involved and totally accepted and relied on my father and his advisors' guidance."*

15 She then confirms at paragraph 9:–

> *"9. … Since receiving my 24.7% share of the family company sale in 1984 I have lived off an investment portfolio managed by SC Limited. Other than my current residence in France I have no other house and continue to live off those savings which are over time being depleted."*

16 We can deduce from this that F received the benefit of her notional share at the same time although again we think through another trust. What is also revealed by B's second affidavit is that on her death F left her estate to B, on the basis that C had been well provided for.

17 Tracking through the trusteeships of the Settlement, it appears that GA Ltd became trustee of the Settlement in place of D Limited on 21 st September, 1983. On 14 th August, 1983, GA Inc retired as trustee of the first, second and fourth parts of the trust fund of the Settlement in favour of P Finance SA (we believe an L entity) leaving GA Inc as the trustee of C's notional third part of the trust fund of the Settlement. We could find no provision of the Settlement that contemplated there being different trustees of different parts of the trust fund but no issue in this respect was raised in the 2011 proceedings or before us. On 29 th July,

1985, GA Inc retired as trustee of the third part of the trust fund in favour of PW and MJ.

18 There was nothing in the papers disclosed to us to indicate whether the third part of the trust fund was involved in the scheme put forward by L. Advocate Clarke informed us that the third part of the trust fund is still held within the Settlement and so it looks as if the arrangement between the family members was that the notional shares of E, F and B were appointed out pursuant to this scheme leaving the notional share of C as the only remaining asset within the Settlement.

19 Many years then go by. We were shown an instrument dated 22 nd June, 2006, whereby PW and MJ resigned as trustees of the third part of the trust fund of the Settlement in favour of WW (of Amsterdam) and XX (of London). The trust fund of the third part was then described as nine shares in a company called CH Limited.

20 We then come forward five years to 2011, when C applied to the Court for the appointment of WW and XX as joint trustees of the first part of the trust fund of the Settlement. That appointment was made by the Court on 25 th February, 2011, and subsequently challenged unsuccessfully by A and B (the then trustee of the G Charitable Foundation) and is the subject of the judgment of Bailhache, Deputy Bailiff, dated 6 th December, 2011, (JRC 231).

21 The judgment recites that the new trustees were appointed in order to pursue a chose in action, namely the right to have the transactions entered into in 1985 in relation to the first part of the trust fund set aside. B objected to their appointment in part because they were the trustees of the third part of the trust fund of the Settlement, notionally held for C, and they would therefore not be impartial. The Court clearly felt that B needed some protection in that respect, as it ordered that the protector could not exercise his powers over the first part of the trust fund without the leave of the Court (a restriction that was subsequently lifted), but it upheld the appointment of the new trustees. The Court also commented that the matter cried out for mediation and adjourned the application for that to take place.

22 In the meantime on the 7 th April, 2011, the new trustees had brought the 2011 proceedings the purpose of which was to have the transactions in 1985 in relation to the first part of the trust fund set aside and this finally came before the Court on 27 th February, 2013. The Court was concerned solely with the validity of the transactions in 1985 and heard argument only from Advocate Clarke for the new trustees; the other parties having apparently declined to be heard. Those transactions were declared invalid by the Court's judgment of 11 th April, 2013. Clearly the effect of that judgment would be to revert the funds held by the G Charitable Foundation to the first part of the trust fund of the Settlement. We note that C has been appointed the protector of the first part of the trust fund in place of his late father.

23 That brings us to this application by C which is to have WW and XX appointed as trustees

of the second and fourth parts of the trust fund of the Settlement to investigate funds which have been " *removed*" from those parts of the trust fund and, presumably, to take action to recover the same. A number of points arose out of the hearing:–

(i) There is bad blood between C and his sister B.

(ii) C is personally funding this application (there are no funds within the second and fourth parts) and will be funding the investigation by the new trustees and presumably, any action taken by them.

(iii) WW and XX are friends of C. They are the trustees of the third part of the trust fund, notionally held for his benefit, and as a consequence of the 2011 proceedings they are now the trustees of the first part of the trust fund of which he is the protector.

24 There is evidence of friction between these new trustees and B. In her second affidavit, she complains of the actions of XX, which she described as distressing and vexatious and of her wish to keep her address in France confidential from the new trustees. It is for that reason that C has been unable to provide her address, and therefore sought an order for substituted service upon her through her legal advisers in either Jersey or England. At the invitation of Advocate Clarke the Court ordered service upon her English legal advisor from whom there has apparently been no response. Certainly B did not appear at this application. Further evidence of conflict is evidenced by the contempt proceedings to which we refer below.

25 B makes clear in her second affidavit what she felt lay at the heart of the 2011 proceedings:–

> *"8. I EXHIBIT a copy of my late mother's last Will where she refers to the reason why she left me this inheritance. My brother C trained as a Chartered Accountant and I believe that my mother felt his professional qualifications together with the substantial sum of money (24.7%) he received on the sale of the family company, as I did, left him well-provided for. The remaining 50.6% of my parents' share of the monies is in essence what has been in contention in this matter, and in which my mother wished me to have a life interest in, with trustee discretion to pay over the capital."*

26 The position that emerges is this. In 1985, the family participated in a series of transactions, flawed as they may have been, whereby their notional shares of the trust fund of the Settlement were dealt with in accordance with their wishes. B was 33 at the time. She is now 62 and has been living off her share ever since. She would also appear from what she says in her affidavit to have benefitted from her father and mother's shares using language that implies the use of other trusts (until her father's notional share recently reverted back to the Settlement).

27 Now, some 28 years or so later, C has been instrumental in having new trustees, who are

friends of his, appointed to the first part of the trust fund and by those trustees successfully challenging the 1985 transactions, has been able to have brought back into the first part of the trust fund (of which he is now protector) assets which we presume his father wished to be held on the terms of the G Charitable Foundation.

28 He is now applying to have those same trustees appointed as trustees of the second and fourth parts for the same purpose. Judging by the language used by B in her second affidavit (her having a life interest with trustee discretion over capital of her parents' share) it would seem likely that the assets derived from second and/or fourth parts are currently held in other trusts. C would appear to have reached that conclusion as evidenced by his statement as to the " *removed*" assets being held in other trusts in Jersey or elsewhere. If funds are still held in other trusts then that makes recovery a simpler proposition than if funds had been distributed outright to B and her position changed on the strength of it.

29 If this second round of litigation is successful then the whole of the trust fund of the Settlement will have been reinstated after all these years with friends of C as trustees and he as protector at least of the first and third parts.

30 We were not told by Advocate Clarke who it is proposed should be appointed to the office of protector of the second and fourth parts of the trust fund of the Settlement, if new trustees are appointed. B could still be the protector of the fourth part (assuming the invalidity of the transactions entered into in 1985) but it would not be unreasonable to suppose that C will seek to have himself appointed to that office, in which event he would be the protector of the entire trust fund with no one being able to benefit without his consent.

31 It is true that at this stage all the Court is being asked to do is put new trustees in place and it is they who would administer the trust funds of the second and fourth parts making the necessary decisions. However the underlying reality here is that we have brother pitted against sister. By taking that first step, we fire the starting gun for a further round of litigation with all the costs and distress that will involve. And to what purpose? Even if funds are recovered and based on our current understanding of the background, we think any independent and reasonable trustee of the second and fourth parts would wish to honour the wishes of F and her daughter B in respect of those funds.

32 In trying to understand the background to this application, we have had no choice (given the lack of any adequate explanation) but to engage in an element of guesswork and may therefore have reached conclusions that C feels are unjustified or unfair but that is the danger when an applicant seeking to invoke the Court's discretionary powers fails to make full disclosure. C has manifestly failed to make full disclosure. His affidavit talks in the briefest of terms of the funds in the second and fourth parts having been " *removed*", insinuating misconduct of some kind by unspecified parties and to his not knowing whether those funds are " *held in any other trust in Jersey or elsewhere*". It seems to us that, contrary to the impression he seeks to give, he was likely to have been intimately involved in the 1985 transactions. He may not know precisely how these assets are now held but we think

he knows perfectly well that they are held at least in part for his sister's benefit. We feel that he has not been candid about his involvement in the 1985 transactions, his true intentions in this matter and the potential impact upon his sister. Indeed, we feel that in presenting the application in the way that he has, the Court was almost beguiled into exercising its powers of appointment of new trustees without appreciating the true implications.

33 We happened to become aware through some members of this Court sitting at the Samedi Court hearing on 5 th July, 2013, that WW and XX as trustees of the first part of the trust fund have brought an application before the Royal Court dated 20 th June, 2013, to which B has been convened and in which they are alleging that she is in contempt and breach of certain “cash flow” costs orders made by the Court in the 2011 proceedings. No mention of this was made in the application before us and yet C still puts WW and XX forward as trustees (and they are prepared to act as trustees) of his sister's notional share. Furthermore BoisBois are noted as acting for B in that matter, when at Advocate's Clarke's request service of this application was served not on BoisBois, but on her English legal advisors. There must be some doubt as to whether B is aware of this application, which has such potential repercussions for her. As it transpires and for the reasons set our below nothing now turns on this.

34 We had considered whether we should give Advocate Clarke a further opportunity to address us or for C to adduce further evidence, but we have decided against that for this reason. Notwithstanding the element of guesswork we have been forced to undertake, we are sufficiently confident from the evidence we have received that if new trustees are to be appointed to the second and fourth parts of the trust fund, fairness dictates that they be independent of the family, and in particular of C, and preferably resident in the Island (and thus firmly within the jurisdiction of this Court). We wish no disrespect to WW and XX but their connection to C and their existing role and conduct within the Settlement necessarily excludes them from consideration as trustees of the second and fourth parts. Accordingly we would not, under any circumstances, contemplate appointing them as trustees of the second and fourth parts of the trust fund of the Settlement.

35 We therefore dismiss the representation.

36 If another application is made for the appointment of new independent trustees to the second and fourth parts of the trust fund, the Court will expect those prospective trustees to have carefully considered what it is they are seeking to achieve by their appointment and for whose benefit. In addition the Court will want to be satisfied that B is aware of the application and has had an opportunity to convey her views to the Court.