

The Representation of G

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	21 April 2010
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Text

[2010] JRC 83

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone.**

In the Matter of the Representation of G In Her Capacity as A Beneficiary of the F Trust and the E Trust.

And in the Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984 (as Amended) “the Law”.

Between
G
Representor
and

Advocate P. D. James in his capacity as Representative for the unborn beneficiaries of the
ETrust
First Respondent

and

Volaw Trustee Limited in its capacity as Trustee of the F Trust and the E Trust
Second Respondent

and

The Directors of E Properties Limited
Third Respondents

and

A
Fourth Respondent

and

B
Fifth Respondent

and

C
Sixth Respondent

and

D
Seventh Respondent

and

The International Red Cross, Médecin sans Frontiers, The Salvation Army and the
University of Melbourne
Eighth Respondent

Advocate F. B. Robertson for the Representor.

Advocate A. D. Hoy for the Second Respondent.

Advocate S. J. Young for the Fourth Respondent.

Authorities

Underhill & Hayton, 17th edition.

Trusts (Jersey) Law 1984.

[*Alsop, Wilkinson v Neary & Others* \(1995\) 1 All ER 431](#) .

S, L and E v Bedell Cristin Trustees [\[2005\] JRC 109](#) .

THE COMMISSIONER:

- 1 This representation was scheduled to be heard on 11th and 12th March but was adjourned in order (in part) for the Court to deal with the Representor's application for discovery of certain documents by the second respondent ("Volaw") in its capacity as trustee of the E Trust and the F Trust. That application was heard on 11th March and I reserved my decision.
- 2 The representation was first brought before the Court on 3rd April, 2009. The catalyst for it being issued was the notice received by the Representor to quit a property in London (which I will refer to hereafter as "the property") which she occupied under licence and this by 30th April, 2009. The property is the sole asset (held through a BVI company) of the E Trust established on 18th February, 2005, of which the Representor (together with her children and her remoter issue) was until 26th November, 2008, the only named beneficiary. The representation was also concerned with another trust, the F Trust (although no relief was sought in respect of it), established on 11th June, 1999, the beneficiaries of which comprise the Representor, her two brothers (the fifth and sixth respondents) and their respective children and remoter issue together with certain named charities. The Representor's father, A, holds certain powers under the F Trust (to appoint and remove trustees) and is the protector of the E Trust. The original trustees were Investec Trustees (Jersey) Limited ("Investec").
- 3 The thrust of the Representor's complaint in the original representation was that the licence did not reflect the full or accurate basis of her occupation of the property. It was alleged that representations were made at the time of its purchase that she was intended to have a proprietary interest or a life interest in the property which was not to be brought to an end without her prior approval. She further asserted that A improperly used his position as protector of the E Trust to ensure that the trustee acted in his self interest and contrary to her interest. She sought directions as to her interest in the property, as to whether A should be removed as protector of the E Trust and as to whether the Instrument of addition of the fourth, fifth, sixth and seventh respondents as beneficiaries of the E Trust dated 26th November, 2008, should be set aside. I now set out a brief procedural history of the representation.

Procedural history

- 4 On 3rd April, 2009, the Court appointed Advocate Damian James to represent the unborn beneficiaries of the E Trust and ordered that the second to eighth respondents as set out above be convened and served with a copy of the representation and the supporting affidavit of the Representor.
- 5 On 12th November, 2009, the Master refused an application by A to strike out parts of the representation. In doing so, however, he said this at paragraph 30 and 31 of his judgment:-
- “30. I therefore decline to strike out the elements of the Representation requested by A. Notwithstanding that fact, however, I do accept that some of Advocate Young’s criticisms of the representation are valid and justified. The factual matters pleaded in the Representation are not as clearly stated as they might be nor is there any detail as to what relief is sought nor why it is requested. I accept Advocate Young’s contention that in those circumstances any respondent to the Representation will find itself in great difficulty. Furthermore, I think it wrong to leave the Royal Court in a position of having to discern for itself what directions to give with no indication from the Representor as to what she requests or requires.***
- 31. I think, therefore, that the Representor should take steps at this stage to remedy some of the defects which I have highlighted in the previous paragraph. In order to do so I am going to direct that the Representor spell out the specific and precise directions which she seeks in respect of each of the elements covered in the prayer and also state the facts upon which she relies in support of those requests. I am happy to hear argument from the parties as to whether this should be provided by an amendment to the representation alone or combined with an additional affidavit sworn by the Representor. Once this has been done the respondents will be in a position to consider and respond in detail in an appropriate way. This should ensure that when the matter comes before the Royal Court for trial in January next year it will be in a position to identify clearly both the relief sought and the contentions of the parties on the facts in relation thereto.”***
- 6 On 12th November, 2009, the Master ordered that the parties to the strike out application (the Representor and A) shall endeavour to agree directions as to amendments to the representation and related matters with liberty to apply should they fail to do so. None of the other respondents (including Volaw) were convened to the strike out application.
- 7 The representation was amended on 15th December, 2009, and sent by Mr Robertson acting for the Representor to Mr Young acting for A for confirmation that the amendments were agreed.
- 8 In the meantime, on 26th November, 2009, A brought his own representation in relation to

his purported removal of Volaw and appointment of Asiatic Trust Singapore Pte Ltd as trustee of the F Trust.

- 9 On 18th December, 2009, I sat to give directions principally on whether A's representation should be heard in advance or at the same time as this representation. Following argument, I directed that they should be heard together on 11th and 12th March, 2010. I also approved (subject to certain amendments) directions which counsel had agreed to enable both representations to be heard on those dates. In relation to this representation those directions were as follows:-

"2. The following directions be adhered to by the following dates in relation to the G Representation:-

Date Activity

8th January, 2010 A to file and serve any requests for further and better particulars, or interrogatories upon G;

22nd January, 2010 G to respond to such requests (where proper);

5th February, 2010 A, and any other party, to file and serve an Answer to the Representation;

19th February, 2010 G to serve and file a Reply to the Answer filed above;

2nd March, 2010 Skeletons of the parties to be exchanged;

2nd March, 2010 Witness lists to be provided to the parties and to the Court;

5th March, 2010 Bundles to be served and filed with the Court by 5.00 p.m."

- 10 On 22nd December, 2009, the amended representation was filed by the Representor with the Court and a copy formally served on Mr Young. There was no indication that Mr Young had agreed to its terms as directed by the Master and it was not served on the remaining respondents, although Volaw received a copy.
- 11 On 12th January, 2010, Mr Robertson wrote to Mr Hoy acting for Volaw setting out categories of documents which the Representor required sight of as a matter of urgency including documents evidencing the rationale for the establishment of the two trusts, legal and tax advice obtained in relation to the property and copies of any file notes of meetings with and correspondence from A in relation to the property and the licence to occupy.
- 12 On 14th January, 2010, Mr Young wrote objecting to the disclosure of such information which he said went beyond that ordinarily available to beneficiaries. Furthermore he sought clarification from Mr Robertson as to the activities it was alleged A had undertaken as protector and as power holder in relation to the trusts which had allegedly applied pressure

on the trustees, what self interest A was alleged to be motivated by in relation to both positions and how those interests were contrary to those of the Representor. He also asked Mr Robertson to identify with particularity why the addition of beneficiaries dated 26th November, 2008, should be set aside.

- 13 By letter dated 13th January Mr Young gave notice that A did not intend to proceed with his representation in relation to the appointment of Asiatic Trust Singapore Pte Ltd as trustee of the F Trust.
- 14 On 3rd February, 2010, Volaw filed its affidavit evidence in the form of an affidavit sworn by Mr Simon Perchard, a director of Volaw, in which he stated (in paragraph 4) that he had not disclosed documents that were:-
- (i) irrelevant to the issues raised by the representation or;
 - (ii) concerned with matters that relate to the reasons for the exercise by either Investec or Volaw or their discretion as trustee.
- 15 By his letter of 11th February, 2010, to Mr Hoy, Mr Robertson stated that the purported reliance by Volaw on the limit of a trustee's obligations in relation to documents going to the exercise of their discretion was "inappropriate and ill-founded in the context of hostile litigation".
- 16 Mr Hoy responded by letter dated 12th February, 2010. *"against the background of the trustee's neutrality"* stating that these were not hostile proceedings against Volaw for breach of trust or otherwise and there was thus no obligation to make the disclosure requested. There was no allegation within the representation regarding the quality of the discretion exercised by Volaw or its predecessor Investec.

Amended representation

- 17 It is helpful at this stage to set out the complaints contained within the amended representation.
- 18 There are two complaints, the first (paragraph 22) being in the following terms (without the particulars):-

"The Representor's Complaint

22. It is the position of the Representor that the Property was purchased for her sole and exclusive benefit and interest. It is further contended that the express terms of the Licence do not properly reflect the basis upon which the

Representor is in occupation of the Property. It is further the position of the Representor that representations were made by Investec and by A at the time of the purchase of the Property and subsequent thereto, to the effect that, notwithstanding the terms of the Licence, the Representor was intended to have the sole and exclusive benefit of and interest in the Property amounting to a de facto life interest which would not be brought to an end without the prior agreement of the Representor”.

19 In relation to this complaint, the Representor seeks the following relief:-

“(iv) That directions be given so as to preserve the Representor's interest in the Property, including:-

a. That the Trustees of the E Trust be directed to procure the revocation of the Notice to Quit;

b. That the Trustees of the E Trust be directed not to take any steps to procure or attempt to procure the termination of the Licence without the Representor's consent;

c. That the Trustees of the E Trust be directed henceforth to exercise their discretion in a manner consistent with the Property being held by them for the sole and exclusive interest and benefit of the Representor during her lifetime and for any issue.”

20 The second complaint (paragraph 23) is in the following terms (without the particulars):-

“23. As a result of a dispute that has arisen between the Representor and A it is the case that A has in recent months improperly used his position as Protector of the E Trust and his powers in relation to the F Trust to exert pressure on Investec and subsequently on Volaw to ensure that the Trustees act in accordance with his wishes notwithstanding that his wishes are motivated by self-interest and contrary to the interests of the Representor”.

21 Upon this complaint the Representor seeks the following relief:-

“(v) That A be removed as Protector of the E Trust;

(vi) that the Instrument of Addition of beneficiaries dated 26 November, 2008, be set aside;

(viii) that the Trustees of the F Trust be directed to exercise their discretion properly and in a manner consistent with their duties to act in the interests of all the beneficiaries (including the Representor) of the F Trust and, in particular, that they exercise their discretion immediately after the hearing of this Representation to make distributions to the Representor in relation to the maintenance and running of the Property and the Representor's living

expenses.”

Submissions

- 22 Mr Robertson submitted that the thrust of the Representor's case in relation to Volaw and Investec is to challenge and to have set aside certain decisions made by them on the basis of the improper exercise of their discretion. If this had not been expressly pleaded then it was implicit from the particulars given in respect of each complaint. In view of this, the representation falls within the ambit of hostile trust litigation and the usual rules of discovery apply, namely that the parties should disclose all documents which are or have been in their possession, custody or power relating to any issue in question in the cause or matter. That required disclosure of all of the categories of documents set out in the schedule to the Representor's summons for specific discovery particularly those documents relating to the exercise by either Investec or Volaw of their discretion as trustees.
- 23 Mr Robertson cited the following passage from Underhill & Hayton, 17th edition at paragraph 60.43:-
- “If reasons are not given then the trustees have plenty of leeway because their exercise of a discretion can only be challenged if (which is often difficult) prima facie evidence can be found by claimants to justify alleging their discretion was exercised mala fide capriciously, spitefully, perversely to any sensible expectation of the Settlor, or without any real and genuine consideration, or the trustees would not have done what was done if irrelevant considerations had not been taken into account or if relevant considerations which were not taken into account had been taken into account. Disclosure of documents in such litigation can then lead to the trustee's reasons becoming apparent”. (his emphasis)***
- 24 The Representor's case was not that the trustees had acted *mala fide*, capriciously or spitefully but that in exercising their discretion in relation to the matters outlined, they failed to give any real or genuine consideration to matters and/or that they would not have done what was done if they had not taken into account the wishes of A and they failed to take into account relevant considerations namely the wishes of the Representor.
- 25 Mr Hoy submitted with justification that if this is the Representor's case against Volaw then it is not pleaded. The Representor attacked the motives of A but even if it was established that he had acted improperly in some way, there was no logical converse to the effect that Volaw had therefore acted improperly, unless the same was specifically pleaded. Volaw may have acted in good faith on the mistaken assumption as to the true nature of the Representor's interest in the property or may have been entirely oblivious of the improper motives of A. Crucially there is no allegation of Volaw conniving with A's alleged improper motives.

- 26 Given the nature of the procedural history of the representation, the fact that Volaw had not been made a party to the strike-out application, that its consent to the amended representation had not been sought and that the wording of the directions given on 18th December, 2009, focused on A as the object of the Representor's hostility, Volaw did not regard itself as the object of hostile proceedings to which the ordinary rules of discovery would attach. It was not therefore obliged to make the disclosure sought and in any event was on express notice that A objected to such disclosure. If allegations were going to be made about the quality of the decision making process of Volaw and its predecessor then the same had to be specifically pleaded. If specifically pleaded then discovery would follow in the ordinary way.
- 27 Mr Young went through the history of the case which he submitted had been appallingly managed and was patently still not ready for trial, as the parties still could not agree on the issues before the Court.

Findings

- 28 I agree that the management of this case has gone awry. The directions given by the Master on 12th November, 2009, have not been complied with and the difficulties he had envisaged with the Representor's pleading remain, notwithstanding the amendments that have been made (but not agreed). In particular it is not clear from the amended representation whether these are hostile proceedings in so far as concerns Volaw and its predecessor Investec. Whilst Volaw is aware of the terms of the amended representation, it has not been sent to the remaining respondents who would thus be unaware for example of the relief now being sought in respect of the F Trust.
- 29 I am going to refer the case back to the Master so that further directions can be given but by way of assistance I set out below my observations on the amended representation:-
- (i) I accept Mr Hoy's submission that if allegations are going to be made against a trustee then they should be pleaded expressly and not by implication. The Court's supervisory jurisdiction under Article 51 of the Trusts (Jersey) Law 1984 invoked by way of representation is a very flexible jurisdiction allowing the Court to set out its own procedure freed from the constraints of the Royal Court Rules and designed to meet the requirements of the individual case, the circumstances of which can vary enormously. As noted in [Alsop, Wilkinson v Neary & Others \(1995\) 1 All ER 431](#) at page 434 the line between friendly and hostile litigation is not always easy to draw but fairness dictates that if a party to an Article 51 application seeks to attack the propriety of actions taken by the trustee or seeks to allege a breach of its duties, then the same must be clearly and adequately pleaded. Even if, as here, there is no claim for damages against either Volaw or Investec, a finding that they have acted improperly or in breach of their duties brings with it both reputational issues and a personal exposure to costs.

(ii) Whilst the factual basis upon which the complaint in relation to the property is based is particularised and set out in the Representor's affidavit, I have difficulty in understanding the nature of the claim. Mr Robertson confirmed to the Master at the strike-out application and to me that the Representor was not alleging that she had a legal interest in the property itself nor was she seeking to rectify the licence agreement or the trust deed. It would be open to her to seek to have set aside the decision to remove her from the property on one or more of the grounds summarised in *Lewin* and as cited in *S, L and E v Bedell Cristin Trustees* [2005] JRC 109 at paragraph 19. However, the Representor goes much further than this in that she appears to be seeking a direction that will fetter the trustee's discretionary powers in relation to the trust fund for the whole of her life or until she agrees otherwise. It would assist both the respondents and the Court to understand the basis upon which the Court is being invited to make such an order.

(iii) In my view, paragraph 23 of the amended representation sets out the Representor's complaint against A and forms the basis of her claim that he should be removed as protector of the E Trust. However to the extent that the Representor wishes to challenge and have set aside decisions of Volaw and/or Investec as trustee this should be separately and adequately pleaded. To the extent that such challenges extend to Investec then it should be made a party to answer them.

(iv) The relief sought in respect of the F Trust (paragraph (vii) of the prayer) is unsupported within the pleading. In discussion Mr Robertson accepted that the circumstances in which the Court could interfere in the exercise of a trustee's decision (where there is no surrender) was limited (see again *S, L and E v Bedell Cristin Trustees* at paragraphs 22 and 23) and he confirmed that the Representor was not asking the Court to usurp the powers of Volaw as trustee going forward. However the prayer as currently worded in my view does just that. Judging by Mr Robertson's letter of 9th March, 2010, attached to his skeleton argument, it would appear that the Representor's complaint relates to the failure or refusal of Investec and subsequently Volaw to make distributions to her out of the F Trust in the past, commensurate with those made to her two brothers. The relief the Representor is actually seeking in respect of the F Trust must be clarified and the representation must set out the facts upon which it is based.

30 Anticipating that a further amendment to the representation was in the offing, Mr Robertson asked if I could still indicate that the documents of which the Representor now seeks discovery were relevant to the case and should in due course be discovered. I decline to do so. In my view the pleadings must come first with discovery to follow, based upon the issues as disclosed by those pleadings.

31 I therefore dismiss the Representor's summons for discovery on the basis that it is premature and I refer this case back to the Master so that the Representor can be given time to re-plead her case and so that further directions can be given to ensure that when the matter comes before the Royal Court for trial it will be in a position to identify clearly both the relief sought and the contentions of the parties on the facts in relation thereto.

