

The Chocolate Trust, Topsy Trust and Cable Trust

Jurisdiction:	Jersey
Judge:	Deputy Bailiff, MacRae
Judgment Date:	15 May 2020
Neutral Citation:	[2020] JRC 87
Reported In:	2020 (1) JLR 240
Date:	15 May 2020
Court:	Royal Court

vLex Document Id: VLEX-850641087

Link: <https://justis.vlex.com/vid/the-chocolate-trust-topsy-850641087>

Text

[2020] JRC 87

ROYAL COURT

(MacRae, Deputy Bailiff and Jurats Thomas and Christensen):

In the Matter of the Chocolate Trust, Topsy Trust and Cable Trust

J.M. Dann for the representor.

Cases cited:

(1) *Hansell v. Spink*, [1948] Ch. 396, considered.

(2) *Knapp's Settlement, In re; Cowan v. Knapp*, [\[1952\] 1 All E.R. 458](#), considered.

Legislation construed:

Trusts (Jersey) Law 1984 (Revised Edition, ch.13.875, 2019 ed.), art. 51(2): The relevant terms of this paragraph are set out at para. 26.

Trusts — powers of court — appointment of trustees — where trusts with limited assets need to be wound up but no trustee, financial adviser who had been involved in setting up trusts appointed by court as trustee to distribute assets

The court made orders in respect of three trusts.

The Chocolate, Topsy and Cable Trusts had been set up on the advice of a Mr. Crew, a financial adviser based in England. The trusts had limited assets and needed to be wound up. The trusts either had no trustee or no traceable trustee able and willing to act. The trust instruments of the Chocolate and Cable Trusts could no longer be found. Mr. Crew gave evidence *inter alia* that he had assisted in setting up about 15 or 16 trusts and that all the trust deeds were identical. The company which originally administered the trusts began to experience regulatory difficulties in 2003 and the trusts were transferred to a trust company in Mauritius, which retired in favour of a company incorporated in Dubai. The original trust company was struck off in 2010, the second company was listed as defunct in Mauritius and the third company ceased trading at some time between 2007 and 2011.

The representors, beneficiaries of the trusts, agreed that the only option was for Mr. Crew to be appointed as the new trustee of the trusts. The court was concerned that his appointment might lead to adverse tax consequences in the United Kingdom.

Held, ordering as follows:

(1) In the circumstances and having regard to the evidence given by Mr. Crew as to the drafting of the trusts, the court declared that the Chocolate and Cable Trusts were in the same terms as the Topsy Trust, with the advocate for the representors being directed to file copies of all three trusts on the court (para. 32).

(2) Mr. Crew was appointed as trustee of the trusts solely for the purpose of distributing the assets of the trusts to the representors as soon as possible, subject to UK tax advice. The court also ordered, where necessary, the removal of previous trustees. The court accepted that it was important for any third parties dealing with the trust assets that they could see from a court order that to the extent, if at all, that the former trustees had any continuing corporate existence or might be reinstated in future, they had in any event ceased to be trustees of these trusts (paras. 40–42).

Deputy Bailiff

- 1 MacRae, On February 20th, 2020 we made orders in respect of these three trusts as follows:

“(a) upon the Court receiving written confirmation from a UK tax advisor that the

appointment of Mr. Crew as trustee of the Trust will not give rise to a charge to UK tax or additional adverse taxation consequences for the beneficiaries, or in the alternative; and

(b) upon an indemnity being provided by the Representor to Mr. Crew in respect of the UK tax consequences of his appointment as Trustee;

the Court, for reasons to be set out in a judgment to be delivered by the Deputy Bailiff at a later date:

(1) ordered that Mr. Crew shall be appointed as Trustee of the Trust;

(2) declared that the Trusts of the Chocolate Trust and Cable Trust are on the same terms as the Topsy Trust and directed the advocate for the Representor to file copies of all three Trusts with the Court;

(3) with assistance from Advocate Jared Dann of Messrs Appleby, directed Mr. Crew to take all necessary steps to obtain registration of the following trust assets in his name as Trustee of the Trust;

(4) directed that Mr. Crew's appointment as Trustee shall be solely for the purpose of distributing the assets of the Trust to the Representor as soon as possible subject to UK tax advice;

(5) directed that Mr. Crew shall produce trust accounts to the beneficiaries annually until the completion of the winding up of the Trust;

(6) to the extent necessary, ordered that Hemery Trustees Limited, Dinard Trustees Limited and Management Trustees (Emirates) FZC shall be removed as Trustee of all three of the Chocolate Trust, the Topsy Trust and the Cable Trust;

(7) reserved the right to announce further ancillary orders as part of its reasoned judgment but shall canvass such orders with the Representor's advocate before making any such orders; and

(8) granted liberty to apply, including where appropriate, by way of correspondence only."

- 2 We now give brief reasons for making these orders, particularly the order that we made at (2) above.

The problem

- 3 The Chocolate, Topsy and Cable Trusts were set up on the advice of Michael John Crew, a financial adviser based in the South West of England.

- 4 All three trusts have limited assets and need to be wound up. All three trusts have either no trustee or no traceable trustee able and willing to act. Finally, in the case of the Chocolate and Cable Trusts, neither the trust instrument nor a copy of the same now exists.

Michael Crew

- 5 Mr. Crew gave evidence before us. He also swore two affidavits. He was the person who was, in his words, "principally involved [in] setting up" all three trusts. Mr. Crew was an independent financial adviser in Exeter. He moved to Wellington, Somerset in 1998. Two of the three representors still live in Somerset and Devon. The other lives in Bedfordshire. He was the principal point of contact between the trustees and the beneficiaries and regards himself as the only person who has a comprehensive understanding of the history and affairs of these three trusts. All three trusts were governed by Jersey law. Mr. Crew says "The beneficiaries had relatively little knowledge or understanding of the day to day affairs of the Trust, being dependent on me for advice and information in this regard." The trusts were originally administered by Hemery Trustees Ltd. and the Topsy Trust was created by declaration of Hemery Trustees Ltd. ("Hemery") on March 31st, 2001. We will return to the terms of the Topsy Trust in due course as Mr. Crew told us on oath that the terms of the other two trusts would have been on very similar, if not practically identical, terms.
- 6 Mr. Crew says that "Unfortunately the paperwork available to me and to the beneficiaries is fragmentary at best." Further, the files of the original trustee and successor trustees have disappeared and many of Mr. Crew's own files are on inaccessible computer systems that have been archived or lost. Mr. Crew based his evidence on his recollection together with such documents as survive.
- 7 Mr. Crew's evidence was that he assisted in setting up about 15 or 16 trusts over a five-year period. This was all done through Hemery. Mr. Crew said the purpose of the trusts was "exclusively for succession planning and asset protection rather than tax mitigation." He would complete a standard trust application form, deal with such matters as know your client and anti-money laundering requirements, send a cheque for £100 (by way of initial trust property) and prepare a letter of wishes. He said:

"In response Hemery would send me a trust deed in the standard form. All of the trust deeds sent by Hemery were identical, and they invariably named the Red Cross or the Society of Breton Fisherman as the beneficiary to the trust."

Mr. Crew said that at the same time Hemery would confirm that they had received the letter of wishes and placed it in safe custody. He said:

"So far as I (and I believe they) were concerned, it was the letter of wishes which actually set out the beneficial interest under the trust, and in particular which identified the beneficiaries."

- 8 He said that occasionally he would receive a deed of addition under which the persons specified in the letter of wishes would be formally added as a beneficiary of the trust, but there were many cases including, he says, these three trusts, where he has no recollection of receipt of such documents. Mr. Crew had regular contact with Hemery including telephone contact “almost every day” and also travelled frequently to Jersey to meet the principal of Hemery, Kevin Gollop. However, from about 2003 Hemery began to experience regulatory difficulties and in that year he received a letter from Hemery that the trusts had been transferred to Dinard Trustees Ltd. (“Dinard”) in Mauritius.
- 9 A minute of a board meeting of Dinard Trustees Ltd. as trustees of the Topsy Trust regarding their appointment as trustees was produced, which said that the meeting took place in Mauritius on April 16th, 2003, and a deed of retirement and appointment of new trustee exhibited by Mr. Crew is dated the same date. However, with the advent of administration of the trusts by Dinard, Mr. Crew says, “The situation continued to deteriorate.” Owing to various difficulties he advised his “clients” that they should take steps to “wind down” the trusts as quickly as possible. However, Mr. Crew says that, towards the end of 2005, the trusts were transferred to a new trustee, MTE. The deed of retirement and appointment for the Topsy Trust shows that on December 14th, 2005 Dinard retired as trustee in favour of Management Trustees (Emirates) FSZ (“MTE”) a company incorporated in Dubai. It seems that, notwithstanding the geographic locations of these trustees, MTE and possibly Dinard in fact administered the trusts through what was formerly the Geneva office of Hemery. Mr. Crew said initially the standard of administration improved as the office was largely staffed by ex-Hemery staff and a number of trusts were wound up during this period. Mr. Crew exhibited a letter from MTE dated September 2006 promising a radically improved service for trust clients. It said, *inter alia*, “We are rationalising the whole manner in which client affairs at ‘Hemery’ are dealt with to bring to an end the complaints of clients for poor service and high fees.” Although recipients were told to contact the Geneva office in the first instance, the letter appears to have actually been sent from premises in Southampton. In any event, any improvements were short lived and Mr. Crew says the “MTE operation in Geneva disappeared completely, and they stopped answering emails or phone calls.”
- 10 The affairs of MTE were later reviewed by the Swiss Public Prosecutor. The Swiss Prosecutor’s report revealed that all the Geneva documentation relating to the trusts had apparently disappeared in January 2011 when taken by “unknown persons.” A report reveals a chaotic lack of organization and a conclusion that “the Trust assets have probably been dissipated.” The Swiss Prosecutor had decided in principle to take no further action owing to the “absence of administrative and corporate documentation” and of its belief that requests for assistance from the UAE, Mauritius or Seychelles would be unlikely to bear fruit. The Hemery operation in Southampton closed years ago and the files there have also disappeared. Hemery was struck off as a Jersey company in October 2010. MTE ceased trading at some point between 2007 and 2011. Dinard filed its last company return in Mauritius in 2004 and was subject to a statutory dissolution process in Mauritius between 2006 and 2015 and is listed as “defunct” in Mauritius.

The Topsy Trust

- 11 The settlor of the Topsy Trust was the father of D, the representor. D's father died in September 2003 and in her affidavit D describes herself as the "principal beneficiary of the Trust." The trust was set up to protect D's assets from her ex-husband's creditors. D completed a new letter of wishes at the request of Dinard, the then trustee, in 2004 which in effect describes her as the principal beneficiary and in the event of her death the assets to be divided between her two children. Clearly D should have been appointed a beneficiary of the trust by one of the trustees of the Topsy Trust but the court was content to regard D as the "primary beneficiary of the Trust" as she was described by Mr. Crew. Certain assets remain in the Topsy Trust to this day.
- 12 D has been in correspondence with various third parties for several years to try and resolve matters. Numerous shareholdings are still held in the name of the original trustee, Hemery, or possibly a successor trustee. But in any event they cannot be re-registered in the name of a new trustee (an office to which Mr. Crew is prepared to be appointed) without a court ordered appointment to that effect.
- 13 The shareholdings include shares in Alliance and Leicester Building Society (now Santander plc), Barclays Bank, Bradford and Bingley plc, Lloyds TSB, British Airways, BG Group, Centrica plc, First Pacific, National Grid and United Utilities. As at March 2015, the shares, possibly including dividends, were worth some £87,000. Various dividend payments are also owing to the trust.
- 14 There also appears to be at least one bank account and there may also be a five-year fixed bond which matured in 2012.
- 15 D, in common with the other representors, said in light of the fact that none of Hemery, MTE and Dinard remained extant or in a position to undertake the trusteeship of the trusts, a new trustee ought to be appointed. She had hoped that a professional trust company might be prepared to assume the trusteeship of the Topsy Trust. However this is no longer possible and is unsurprising in view of the uncertainties connected to the three trusts and the low value of the assets held in each.
- 16 She and the other representors agree that the "only remaining option is for Mr Crew to be appointed as the new trustee of the Trust." She goes on to say, "I fully appreciate that it would, in an ideal situation be preferable for a professional qualified and suitably insured trustee to be appointed."
- 17 The court was concerned that the appointment of Mr. Crew might lead to tax problems in the United Kingdom, an issue first raised by the court at the convening hearing.

- 18 The evidence provided to the court on this matter was not unequivocal and, accordingly, the recital to the court order, as set out above, means that the orders made by the court would take effect upon the court receiving confirmation from the UK tax adviser that the appointment of Mr. Crew as trustee of the three trusts would not give rise to a charge to UK tax or additional adverse tax consequences for the beneficiaries (or in the alternative that the representors provide an indemnity to Mr. Crew in respect of any UK tax consequences that may flow from his appointment).

The Chocolate Trust

- 19 C, the principal beneficiary of the Chocolate Trust, as she describes herself, was also the settlor and set the trust up on the advice of Mr. Crew in March 2000. The trust was set up in order to hold some assets distributed to her from a family trust. The assets of the trust were limited to a property in Devon and £25,000 invested in the Legal & General with profits bond. In about 2004, the trust was “wound down.” The advice from Mr. Crew was that the trust assets should be distributed to C. The property was transferred to C's sole name and subsequently sold. It is unlikely that she was ever formally appointed as a beneficiary and accordingly this was a payment in breach of trust on the part of the then trustee, either Hemery or, more likely, Dinard. However the bond was overlooked. There is almost no paperwork remaining for the trust. The trust deed and letter of wishes are nowhere to be found. However, there is other contemporary documentation which the court was shown in relation to the Chocolate Trust proving that it did exist and indeed held the bond as an asset. This included correspondence relating to the setup of the trust and in relation to the letter of wishes which C must have supplied to the trustee.
- 20 The Legal & General policy appears to still be in the name of Hemery. The life assured was Mr. K.J. Gollop of Hemery.
- 21 Mr. Crew raised the question of the bond with MTE but they deny ever being appointed a trustee of the Chocolate Trust. Legal & General apparently have confirmed that it will require instructions from Hemery or a successor trustee in relation to the bond. As new trustee of the Chocolate Trust Mr. Crew understands that he will be able to ensure that the bond or its proceeds are distributed to C. The bond was last valued approximately 10 years ago at £43,000 and Mr. Crew in his second affidavit says it is now worth perhaps closer to £50,000.
- 22 C asks the court to appoint Mr. Crew as trustee of the Chocolate Trust and to make orders investing the assets of the trust in him as new trustee.
- 23 Whilst these are reasonable requests, the difficulty in relation to the trusteeship is upon what trust would Mr. Crew hold the assets in the absence of the trust instrument being available?

- 24 Does the court have the jurisdiction to declare that the terms of the Chocolate and Cable Trusts are on the same terms as the Topsy Trust?
- 25 The trust we do have, the Topsy Trust, is a Jersey law discretionary trust. It is irrevocable. It was declared by the trustee. It has reasonably standard provisions in relation to trusts of income and capital, powers of appointment and advancement, powers of exclusion, addition, change of proper law, delegation, appointment of new or additional trustees, trustee liability, remuneration, amendment, disclosure and a schedule setting out various general powers of the trustee. The third schedule lists the beneficiaries as “La Croix Rouge Francais”; “La Societe des Hospitaliers des Sauveteurs Bretons”; and
- “Such person or persons or class of persons as the Trustees shall add to the Class of Beneficiates in accordance with the powers in that behalf contained in Clause 9 thereof.”
- 26 The power to appoint new or additional trustees pursuant to the fifth schedule resides with the “Trustee for the time being.” Assuming that the Chocolate Trust is in the same terms as the Topsy Trust, such power can no longer be exercised. However, pursuant to art. 51(2) of the Trusts (Jersey) Law 1984:
- “(2) The court may, if it thinks fit—
- (a) make an order concerning—
- i(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 conduct of the trustee and payments, whether payments into court or otherwise ...”
- [Emphasis added.]
- 27 Accordingly the court has the power to appoint a new trustee in circumstances where no trustee can be appointed pursuant to the terms of the trust.
- 28 As to the terms of the Chocolate Trust, there are no Jersey cases or indeed recent cases in any jurisdiction that were drawn to the court’s attention or could be established by the court from its own researches that are on point.
- 29 However, in the case of *Hansell v. Spink* (1), the English High Court considered a case where a marriage settlement had been lost. The son of the widow could prove the events supporting his claim but could not produce the settlement or a copy or a draft of it. However he gave evidence of the searches which had been carried out including the circumstances in which papers had been lost or destroyed and also relied on a note made by a clerk

setting out the terms of the settlement.

30 Morton, J. said ([1948] Ch. at 398–399):

“The applicant bases his claim for payment out on the contention that the full note which the chief clerk made on the occasion in question can be relied on as being, in the proved circumstances of the case, sufficient secondary evidence of the material trusts of the lost settlement. There is no question as to the admissibility of secondary evidence, the substantial question being always as to the weight of such evidence when tendered. There is no doubt, here, that the original settlement was actually produced to the chief clerk, and that his note was made with the settlement before him. I am prepared to accept the terms of the settlement as being in the form outlined in the chief clerk's note.

Does that, however, necessarily entitle me to accede to the application? In this respect I am fortified by the decision of Uthwatt J. earlier in the year in *Perch v. Robertson*. That was a case where a settlement and all papers relating thereto had been destroyed by enemy action, the only known factor being the existence of a tenant for life to whom the dividends of the investments constituting the settlement funds had always been paid. There was, however, no certainty as to the trusts of the settlement beyond a recital of its contents contained in a will which the tenant for life had made ten years previously, the settlement on that occasion having been seen by the solicitors who prepared the will. The tenant for life issued a summons asking for a declaration that the investments were held upon the trusts set out in the summons which correspond to those recited in the will. The learned judge declined to make an order in this form as it would have had the effect of binding all persons interested and so have prejudiced the interests of possible beneficiaries who were not before the court, but (being satisfied as to the facts) made an order that the trustees were to be at liberty, until further order, to hold the said investments on the footing that they were subject to the trusts set out in a schedule to the order, being the trusts specified in the summons as amended by the directions of the judge. This was really applying the well-known principle established by *In re Benjamin*, where the court, without making any positive order declaring rights, protects personal representatives or trustees by giving them liberty to distribute on a particular footing based on probable inferences.

With a fund in court, there is no room for the application of the principle of permissive distribution. The court must take the responsibility of deciding whether to make or to refuse an order for payment out. Here, the court, the custodian of the fund, is asked to make an order for payment of the fund to the applicant out and out. That is going far beyond the principle in *In re Benjamin*, but the evidence in this case is stronger than that in *Perch v. Robertson*. The fund has become distributable by reason of the death of the tenant for life, and as I am satisfied that the applicant has established his title to the relief asked, I see no reason why, on principle or authority, he is not entitled to an order for payment out, which, accordingly, I make.”

- 31 Further, in *Re Knapp's Settlement; Cowan v. Knapp* (2), Danckwerts, J. considered another case of a lost settlement where no copy or memorandum of its provisions existed or could be found, save a brief note in the handwriting of the settlor. This was sufficient for the judge to conclude what the terms of the trust of the marriage settlement were and he held that the trustees were at liberty to hold and deal with the trust fund accordingly.
- 32 In the circumstances of this case and having regard to the evidence given by Mr. Crew as to the drafting of these trusts, the court was prepared to and did declare that the Chocolate and Cable Trusts were in the same terms as the Topsy Trust with the advocate for the representors being directed to file copies of all three trusts on the court.
- 33 As to the possibility of a *Benjamin* order as referred to in the decision of the Chancery Division in *Hansell v. Spink* (1), such an order is not required in this case. There is no evidence of any other persons who may have any claim under these trusts other than those identified by the representors in their affidavits.

The Cable Trust

- 34 In many respects the position of the Cable Trust is very similar to that of the Chocolate Trust. The documentation is very limited and the only asset is a second-hand life insurance policy which was missed when the remainder of the trust assets were distributed in, it seems, 2006. The policy in question is a Norwich Union/Aviva policy. It is anticipated that Norwich Union/Aviva will respond to the appointment of a new trustee pursuant to a court order and ensure that the policy can be assigned so as to benefit E and her siblings. E is the daughter of the settlor and a beneficiary. E's mother settled the Cable Trust in around 1997 and she died in August 2017. E understands from Mr. Crew that Aviva is refusing to transfer the policy into the names of herself and her three siblings without instructions from Hemery or a successor trustee.
- 35 She supports the appointment of Mr. Crew as trustee and an order vesting the assets of the trust into him. In his second affidavit, Mr. Crew says the policy is worth approximately £20,000.

Concluding remarks

- 36 Finally, at the direction of the court, contact was made with Mr. Gollop of Hemery, but he was unable to assist with these applications. He did say in a letter that he was satisfied that there was a transfer of all trusteeships to Dinard.
- 37 As to the UK tax issues which may arise from the appointment of Mr. Crew, the court ordered, at the convening hearing on January 24th, 2020, that the representors file UK tax

advice dealing with the effect that would be had on the trustee and beneficiaries of the trusts if a UK resident trustee was to be appointed.

- 38 The advice, contained in a single email received just before the hearing, was unsatisfactory. The court accepts that Mr. Crew and indeed the representors' advocates are effectively conducting this matter *pro bono* as the assets in the trusts are limited and in any event are illiquid so we do not criticize the absence of comprehensive tax advice.
- 39 In the email, an accountant from a firm called Haines Watts Tax Compliance LLP said "There may be tax consequences of on shoring the trusteeship but it is not possible to say what or if these may be with so little of the history of the Trusts known." The position relayed to us orally by the advocate for the representors was more optimistic but in order to ensure that the beneficiaries, settlors and indeed possibly Mr. Crew were not exposed to tax liability, we made our order conditional upon the recital set out in the above.
- 40 We also ordered, where necessary, the removal of Hemery, Dinard and MTE as trustee of the trusts as it was not clear from the documentation that we have seen whether or not in fact Hemery ceased to be trustee of the Cable and Chocolate Trusts or indeed whether or not all the trust assets were vested in Dinard or MTE as the case may be.
- 41 In any event, it was urged upon us, and we accept, that it was important for any third parties dealing with the trust assets that they could see from a court order that to the extent, if at all, which the former trustees have any continuing corporate existence or might be reinstated in future, they had in any event ceased to be trustees of these three trusts.
- 42 We also ordered that Mr. Crew is appointed as trustee solely for the purpose of distributing the assets of each of the trusts to the representors as soon as possible, subject to UK tax advice.

Order accordingly.