

The F Trust

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	01 November 2012
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Text

[2012] JRC 201

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and** Jurats Clapham **and** Olsen.

IN THE MATTER OF THE F TRUST

E
Representor
and

(1) A

First Respondent

(2) B

Second Respondent

(3) Advocate M. J. O'Connell (guardian of the minor unborn and unascertained

beneficiaries)
Third Respondent

Advocate M. H. D. Taylor for the Representor.

Advocate D. R. Wilson for the Second Respondent.

Advocate M. P. Cushing for the Third Respondent.

Authorities

Trusts (Jersey) Law 1984.

Re the S Settlement [2001] JLR N 37.

Public Trustee -v- Cooper, unreported 20th December 1999.

Trust — application for the court to approve a compromise agreement.

The Deputy Bailiff

- 1 On 17th May, 2012, by consent, the Court, having noted that the advocates acting for the parties had agreed that the representation, claims and counter-claims which had been set down for a two week hearing commencing on 25th June be stayed pending an application to approve a Compromise Agreement, stayed the proceedings, vacated the trial dates listed to commence for two weeks, and fixed 2nd July for the application by the trustee for Court approval of a Compromise Agreement dated 12th May, 2102, (the “Compromise Agreement”). That application was duly made on 2nd July. The Court's decision was given on that day to approve the Compromise Agreement with reasons reserved, and those reasons are now handed down. Some of the delay has been caused by two matters having arisen in relation to the draft judgment and difficulty having been experienced in finding a date when they could be explored.
- 2 With the leave of the Court, Advocate James, who had acted for the first respondent did not appear before us as he had nothing to add to the application, his client having signed the Compromise Agreement.
- 3 The compromise was signed by the respondents named above and also by the first respondent's sister, and her husband (“Mr and Mrs P”) and by the children of the first respondent, all adult beneficiaries of the F Trust. The three minor children of the first respondent's sister are represented by Advocate O'Connell, who is also charged to represent the unborn and unascertained beneficiaries.

- 4 The Compromise Agreement is governed by the law of Jersey. It constitutes the entire agreement between the parties relating to the subject matter of the agreement. The contents are confidential save that they can, inter alia, be disclosed to any court of a competent jurisdiction, which of course includes the Royal Court. It is conditional upon the Court giving approval to the compromise by 1st October, 2012. Each of the parties to the agreement agreed to support the application for Court approval, and each party also agreed inter alia :-
- (i) that the Compromise Agreement would operate as a full and final settlement of all breach of trust claims and any other allegations which might be made against the representor or any associate of the representor, including trust related claims, whether such allegations might be made by the first respondent, the second respondent or any other beneficiary, including for the avoidance of doubt any allegation that the representor was unfit to act as trustee and should be removed as trustee of the Trust; and also of any third party claims which might be brought by the representor or any beneficiary against the second respondent, any associate of the second respondent or Mr and Mrs P.
- (ii) The basis, as set out in the Compromise Agreement, upon which the F Trust could be brought to an end by the appointment of assets to particular adult beneficiaries in unequal proportions and the writing off or extinguishing of loans made to certain beneficiaries as well.
- 5 The intention of the Compromise Agreement was therefore to bring to an end a dispute between the representor, as trustee, and different family members, and indeed a dispute between the family members themselves, which had no doubt been distressing for all parties.
- 6 The representor put the Compromise Agreement before us upon the basis that the representor had power under the terms of the Trust and the law of Jersey to implement the terms of the Compromise Agreement. However it recognised that it was in a position of actual or potential conflict, and thus brought the Compromise Agreement to the Court seeking its approval. It was not proposing to surrender to the Court its discretion as to how the trust fund should be divided, but instead sought the Court's approval of the proposed distributions of the trust fund as set out in the Compromise Agreement as it was a momentous decision involving the Trust. As an alternative, the representor was prepared to offer a limited surrender of its discretion, the limitation being that the Court was faced with a choice of either approving the Compromise Agreement and the dealings with the trust fund as set out therein, or refusing to approve it, and in effect ordering the underlying proceedings to continue as before. It was submitted that the surrender of discretion could not result in the Court's exercising a trustee power to divide up the trust fund in any other proportions than those contained in this Compromise Agreement.
- 7 To the extent that the Compromise Agreement involved the appointment of trust assets out

of the Trust in favour of particular beneficiaries such that the Trust was effectively wound up, the application clearly fell within Article 51 of the Trusts (Jersey) Law 1984 ("the Trust Law"). However the Compromise Agreement went further than that, because it included provision for the waiver of the claims against the trustee and against other beneficiaries, and it also included a provision for the payment of a substantial sum of money by the representor into the trust fund, without admission of any wrongdoing on the representor's part. It was clearly in the interests of the representor trustee, in those circumstances, that a firm line should be drawn under all the potential claims which might be made against it – similarly as far as the second respondent and Mr and Mrs P were concerned. As guardian *ad litem* for the minor unborn and unascertained beneficiaries, Advocate O'Connell's agreement was therefore of considerable importance, and it seems to us that in asking the Court for sanction of the Compromise Agreement, we have to consider closely the matter insofar as the minor unborn and unascertained beneficiaries are concerned as well, because approval will in effect put an end to any potential claims they might have. The current application therefore goes somewhat more widely than a standard application under Article 51, if there is such a thing, not least because it involves the compromise of hostile litigation against the trustee.

- 8 The first application which Advocate Taylor made on behalf of the representor trustee was that the hearing take place in private. It is not at all uncommon for hearings of this kind to be held in private, and the Court so ordered. We however indicated that we would be publishing the judgment and we have agreed we would do so with anonymity insofar as the name of the Trust and the identity of the parties is concerned, given that the Compromise Agreement was stipulated to be confidential, and anonymity meets the justice of the situation in circumstances where the allegations of the parties have not been adjudicated upon.
- 9 The next question which arose was the role of the Court in this particular application. We were referred to the judgment of the Royal Court in *Re the S Settlement* [2001] JLR N 37, which has been applied and followed on numbers of occasions by this Court. The Court there approved the extract from the English case of the *Public Trustee -v- Cooper*, an unreported decision of Hart J of 20th December, 1999, which itself cited from a judgment of Robert Walker J, as he then was, in an unnamed case which took place in chambers in 1995. Robert Walker J identified four distinct situations:-
 - (i) Where an issue was whether or not a proposed action was within the trustee's powers, that ultimately is a question of construction of the trust instrument or of a statute or both, which is decided in open court after hearing argument on both sides.
 - (ii) There are occasions where the issue is whether the proposed course of action is a proper exercise of the trustee's powers. There is no real doubt about the nature of those powers but it is a momentous decision and the trustees wish to obtain the blessing of the court for the action on which they have resolved. The court recognises the trustees are in a much better position than the court to know what is in the best interests of the beneficiaries, and there is no question of the trustees surrendering

their discretion.

(iii) The third category is where the trustees do surrender their discretion. The court will only accept that for good reason, because after all the trust powers are conferred on the trustees, not the court, in the first instance. There may be an honest deadlock between the trustees, or the trustees may be disabled as a result of a conflict of interest. Here, the case is normally heard in chambers, whether there is adversarial argument or not.

(iv) The fourth category is where trustees have taken action and that action is being attacked as being outside their powers or as an improper exercise of power. That is hostile litigation heard and decided upon in open court.

10 In *Re the S Settlement*, Birt DB considered that there were three questions for the Court when fulfilling a role under the second category:-

(i) Is the Court satisfied that the trustee has formed the opinion in good faith?

(ii) Is the Court satisfied that the trustee's opinion is one which a reasonable trustee, properly instructed, could reach?

(iii) Is the Court satisfied that the opinion which the trustee has reached is not invalidated by any actual or potential conflict of interest?

11 Advocate Taylor submitted that the representor trustee was not surrendering its discretion to the Court from which it follows that this case would have to fall within the second category of cases envisaged by Robert Walker J as cited in *Public Trustee -v- Cooper*. The basis for that submission appeared to be the following:-

(i) Proceedings as between the representor and the second respondent have been settled.

(ii) The decision which the representor had made for the distribution of the trust fund in accordance with the Compromise Agreement was much the same as the decision which it had reached in 2009 in that the Trust was being brought to an end and that the trust fund was being divided up between the same three beneficiaries, at least for the main part. It was improbable in his submission that there had been any dramatic change in the exercise of trustee discretion. There was no intention to benefit the ex-husband of the first respondent, nor the two charities that were potential beneficiaries, nor Mrs P's children.

(iii) The Compromise Agreement had been reached after mediation and after lengthy proceedings.

(iv) A conflict did not always leave the trustee hamstrung. The conflict, to the extent there was one, was diminished by the fact that those who stood to gain have agreed

the terms of the compromise.

(v) The only result of not approving the compromise would be to drive the parties back to Court.

- 12 We considered that while these points might well be perfectly good points to make as to why the Court should approve the compromise, they were not at all helpful in deciding the category of application into which this particular case fell. In our judgment, the representor trustee has the clearest possible conflict. That is evidenced by the fact that a very substantial sum of money is being paid into the trust fund by the trustee to compromise the claims being made against it for breach of trust or maladministration. Furthermore the submission that the fund was being divided up between the same three beneficiaries overlooks the fact that there was a very marked difference in the proportions in which the three beneficiaries would share the trust fund. The Court accepts that there has been considerable negotiation of the Compromise Agreement between the parties involved. In the course of that negotiation, the representor trustee was no doubt protecting its own position as far as it possibly could, and not taking the part of the neutral trustee. The division of the trust fund is an integral part of the Compromise Agreement. It is quite clear to us that the trustee is not in a position to say that one part of the Compromise Agreement – the division of the trust fund – can be taken out from the rest of it, and that its exercise of discretion in that context need not be surrendered to the Court.
- 13 Given that the conflict which faces the trustee is such that it must surrender its discretion to the Court, the question for us then is whether that is a limited discretion or one which the court can exercise at large. On this point, we accept the representor trustee's submission that the choice lies between either endorsing the Compromise Agreement or driving the parties back to litigation, and that the Court should not seek to exercise a trustee discretion in any other way. This is because the Compromise Agreement is a settlement of hostile litigation which requires the exercise of a trustee discretion and one cannot take the latter in a vacuum as though the compromise would be unaffected. As a result we concluded that the Court should proceed on the alternative approach, namely to ascertain whether the Court thinks the Compromise Agreement was an appropriate compromise of the various claims. That of course has made our function very much easier. If the only result of not approving the compromise would be to remove the representor trustee's contribution to the trust fund and drive the parties back to litigating with each other their different claims, the Court would in fact be contributing to the dynamics of further family destruction. This is not to say that in appropriate cases the Court would not do so. There may be occasions when a particular member of the family has behaved so badly that one could reach the view the family was already destroyed, and the Court's contribution was simply to ensure that justice was done. Here however, on an examination of the claims and defences, the Court was of the view that there was clearly argument to be had on all sides. There were some instances where the claims against the trustee could be described as highly coherent, albeit defensible; other instances where the claims were very much less coherent, and even if established, where the loss which might have flowed from any breaches of trust were difficult to establish.

- 14 In other words, the litigation called for a sensible negotiation as to where responsibility for particular losses might lie. In the absence of the detail of evidence that would be produced if the matter were going to trial, the Court could only review the paperwork before it, and on this limited basis, we recognise that the parties have independently negotiated a settlement of the different claims which we cannot objectively consider to be inappropriate.
- 15 In reaching this conclusion, we were assisted by the fact that all the principal beneficiaries who are of age have signed the agreement. We have also been assisted by the fact that the guardian *ad litem* has formed a view, we are told by Advocate Cushing, based on the extensive pleadings, on foreign law and on the correspondence, that the settlement figure is appropriate. The guardian too has taken support from the fact that the principal beneficiaries have agreed these terms of settlement, and has concluded that the alternative – hard fought, costly litigation and ugly proceedings inside the family with an uncertain result – makes approval of the compromise sensible.
- 16 In particular insofar as the identified minor beneficiaries are concerned, the guardian has noted that a substantial distribution will be made to Mrs P, their mother, which therefore provides them with an indirect benefit. Secondly, the guardian acknowledges that the trustee cannot make substantial direct provision for the three minor beneficiaries, nor indeed for unascertained and unidentified beneficiaries, given the overall size of the fund and the needs of the first and second respondents. Thirdly, the guardian takes the view that the interests of the family mean that the dispute should be brought to an end as soon as possible.
- 17 The Court is persuaded by these submissions and therefore makes the following orders:-
- (i) The terms of the written Compromise Agreement dated 11th May, 2002, as amended, (“the Compromise Agreement”), a copy of which is scheduled to this order, are approved so as to bind all persons (whether or not ascertained or in existence) who are or may become beneficially interested under the trusts of the F Trust constituted by the Trust Instrument dated 30th May, 1986.
 - (ii) Without prejudice to the generality of paragraph (1) above, the representor is directed to carry into effect the division and distribution of the assets of the Trust provided for in the Compromise Agreement subject to the following qualification. Insofar as the second respondent is concerned, the Court has accepted that the second respondent has legitimate reasons for not seeking any distribution at the present time. As a consequence, the trustee is directed to hold the share of the trust fund which, under the Compromise Agreement, was to have been payable to the second respondent, subject to the terms of the Trust until further order. During that time, the second respondent remains a discretionary object of the F Trust.
 - (iii) In accordance with clause 5.2 of the Compromise Agreement, the trustee shall not be entitled to recover its costs of the summons seeking approval of the Compromise

Agreement from the Trust Fund of the Trust.

(iv) There should be no order as to the costs of the proceedings, including the costs of the summons before us, save that the guardian's reasonable costs of these proceedings, including his costs of the summons seeking approval of the Compromise Agreement, be raised and paid out of the trust fund of the Trust.

(v) Without prejudice to the generality of paragraphs (1) and (2) above, the trustee's rights of indemnity and lien against the assets held on the trust of the Trust, shall persist on the terms set out at clause 5.5 of the Compromise Agreement notwithstanding the distribution of those assets.

(vi) These proceedings be permanently stayed save that the parties be at liberty to apply for the purposes of implementing and enforcing this order and the Compromise Agreement.