

Church Street Trustees Ltd (in place of Titris SA and Nerina Cucchiaro) v A

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Crill, Thomas
Judgment Date:	11 June 2019
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Text

[2019] JRC 109

Royal Court

(Samedi)

Before:

J. A. Clyde-Smith **O.B. E., Commissioner, and** Jurats Crill **and** Thomas

Between
Church Street Trustees Limited (in place of Titris SA and Nerina Cucchiaro)
Representor
and
A
First Respondent

and

B

Second Respondent

and

C

Third Respondent

and

D

Fourth Respondent

and

Alessandro Jelmoni

Fifth Respondent

and

Giulio Sgaria

Sixth Respondent

Advocate D. R. Wilson for the Representor.

Advocate E. L. Jordan for the first Respondent.

Advocate R. D. J. Holden for the Second and Third Respondents.

Authorities

Trusts (Jersey) Law 1984.

In re Curatorship of X [\[2002\] JLR 259](#).

Eckman v Sidem International Limited [\[2010\] JLR 299](#).

Trust — application by the First Respondent

THE COMMISSIONER:

- 1 The first respondent applies by way of summons for declarations as to the power of the former trustee of the G Trust to subscribe for a zero coupon bond.
- 2 The G Trust has already been the subject of Jersey court proceedings and we set out the background in very summary terms:-

- (i) The G Trust was established on 17th July 2002 by the third respondent with a nominal sum on the basis that her father, the late E, would and did settle substantial assets.
- (ii) The trust deed is written in Italian, but it is governed by Jersey law. The first respondent is the widow of the late E, and there are three children of the marriage, namely the second to fourth respondents.
- (iii) The trust deed provides that the trust would terminate on 30th September 2014. At that date, Titris SA, a company incorporated in Luxembourg, was the sole trustee and pursuant to Article 43 of the Trusts (Jersey) Law 1984 ("the Trusts Law") came under an obligation to distribute the trust property to the persons entitled thereto.
- (iv) The beneficiaries of the G Trust, as varied by the Court on 18th May 2009, are described as "*the legitimate heirs (or legitimate heirs of the aforesaid) of E*".
- (v) The G Trust has an indirect minority interest in two Italian companies, firstly, G SPA, an operating company which engineers and manufactures and sells complete heating and cooling systems and sanitary fittings and H Srl which owns substantial real estate. The majority interests are owned by the first to fourth respondents.
- (vi) The G Trust has provided financial assistance to G SPA through a separate company, G Trust SCA (now a partnership) which appears to have been owned as to approximately 48% by the G Trust and 52% by a Mr Alessandro Jelmoni, purportedly for the first to fourth respondents. He had been a protector of the G Trust until removed by the Court on 25th April 2018. As noted by the Court in its judgment of 25th April 2018, Mr Jelmoni appears to have manoeuvred himself into a position of significant influence and control over the operating company G SPA and his interest in G Trust SCA has now been transferred to a Latvian company called J Company, for reasons which have not been explained. We were informed that criminal proceedings have been brought against Mr Jelmoni in Italy.
- (vii) On 26th October, 2015, the protectors of the G Trust purported to exercise their powers under the trust deed (after the G Trust had ended) to appoint Ms Nerina Cucchiaro, who had been involved for some years in the administration of the G Trust, as trustee.
- (viii) At the date of her appointment, Ms Cucchiaro confirmed that the assets of the G Trust included the benefit of a loan of €127,594,534.04 made to the G Trust SCA, monies which had been on-lent to the operating company G SPA.
- (ix) The first respondent deposes that it was not until 12th October, 2018, that the family became aware that purportedly on 22nd September 2015, Ms Cucchiaro had entered into a Bonds Issue and Subscription Agreement ("the Bond Agreement") governed by Luxembourg law on behalf of the G Trust with G Trust SCA, by which the loan of €127,594,534.04 was converted into bonds, non interest bearing and repayable by G Trust SCA in the sum of €150 million on 23rd September, 2030. We

say purportedly entered into because there is some doubt on the part of the first respondent as to whether the Bond Agreement was entered into on that date. The Bond Agreement appears to have been signed on behalf of G Trust SPA by Mr Jelmoni and by Ms Cucchiaro as trustee of the G Trust. The amounts payable under the bonds are limited to the amounts repaid by G SPA to G Trust SA out of the monies on lent. She goes on to aver that Mr Jelmoni then procured G Trust SCA to waive €100 million of the loan owed to it by G SPA.

(x) On 17th October 2014, Titris SA and Ms Cucchiaro, the former and then current trustee of the G Trust, applied by way of representation for directions *inter alia* as to who amongst the family were entitled to have the trust fund paid over to them.

(xi) On 25th April 2018, the Court declined an application by Titris SA and Ms Cucchiaro to bless a decision to enter into what was described as a debt for equity swap in connection with the companies underlying the G Trust. The Court declined to do so, essentially because of the inadequacy of the information that had been provided to the Court in what was clearly a complex matter. No reference was made in that application by Titris SA and Ms Cucchiaro to the conversion of the loan account into these bonds.

(xii) On 25th April 2018, the Court also confirmed that as a result of the G Trust expiring on 30th September 2014, Mr Jelmoni ceased to be a protector.

(xiii) On 14th December 2018, the Court made a number of orders including:-

(a) That Church Street Trustees Limited ("Church Street") be appointed as trustee in the place of Ms Cucchiaro.

(b) That Church Street be substituted as representor in the proceedings in place of Titris SA and Ms Cucchiaro.

(c) That Church Street holds the trust assets on trust to preserve, but with no duty to enhance, their value and to distribute them in accordance with the directions of the Court.

(d) That Church Street continue administering the trust assets in accordance with the provisions of the Trust Law.

Declarations

3 In her summons of 3rd May 2019, the first respondent seeks the following declarations from the Court:-

"1 That Titris SA and Nerina Cucchiaro acting as bare trustee of the G Trust at the relevant times, did not have power to enter into the [bond agreement] whereby a loan of €127,594,534 owed to the G Trust was converted into a zero coupon bond;

2 That Titris SA and Nerina Cucchiaro, acting as bare trustee of the G Trust at the relevant times, did not take any actions to approve and authorise the entering into of the Bond Agreement, with any potential beneficiary of the G Trust prior to entering into the Bond Agreement.”

- 4 The parties served with the summons were Church Street and the second to fourth respondents. The fifth and sixth respondents no longer have any role within the G Trust and were not served. Ms Cucchiaro, represented by Advocate M Renouf, was made aware of the summons on 15th May 2019, some three working days before the hearing. G Trust SCA, the counter party to the Bond Agreement, has not been served.
- 5 The application was issued on an urgent basis, the first respondent deposing at paragraph 7.10:-

“7.10 Accordingly, on an urgent basis, the potential beneficiaries to the G Trust need to try to take steps in Luxembourg to declare the bond invalid. Further submissions will be made on the legal position but as I understand it, the Jersey declaration relating to the trustees authority will then be used in Luxembourg for a claim that misrepresentation was made, meaning that the Bond Agreement is rendered invalid.”

- 6 The declarations sought were supported by the representor and the second to fourth respondents.

Decision

- 7 Much of the half day allocated as a matter of urgency to this application was taken up in Advocate Jordan very skilfully taking the Court through the background and the events which have occurred and with a discussion as to the power of Ms Cucchiaro as a bare trustee to enter into the Bond Agreement without the authority of the beneficiaries of that bare trust or of the Court.
- 8 No authorities were cited in relation to the principles on which the Court should consider the making of a declaratory judgment. It is well established that it is a jurisdiction to be exercised sparingly (see *In re Curatorship of X* [2002] JLR 259) The principles were summarised by Sir William Bailhache, then Deputy Bailiff, in *Eckman v Sidem International Limited* [2010] JLR 299 where it was held:-

“... When considering whether to grant declaratory relief, the Court would adopt a broad and flexible approach, then consider whether there was a live practical question with practical consequences. The Court would only grant a declaration if satisfied that it was appropriate to do so on the evidence. In general, a declaration would not be granted in advance of trial if based on admissions or in default of defence, particularly if the declaration sought was

that the defendant had acted fraudulently. The Court would, however, consider granting a declaration if the applicant could not obtain the fullest justice to which he was entitled without it. If the declaration sought were that a defendant had acted fraudulently, the evidence advanced on affidavit, which was untested, would have to reach a high standard to satisfy the Court, on the balance of probabilities, not only that the defendant had followed a particular course of conduct, but also that he had a fraudulent purpose in so doing, which would require that any other purpose could, on the balance of probabilities, be eschewed by the evidence. The force of the objection to the making of a declaration would be much weakened if the declaration would not affect the rights of third parties.”

9 Quoting from paragraph 30 of the judgment:-

“Advocate Wakeham accepted in his submissions put before us upon March 4th that if the declarations which he seeks are made, he would intend to use these declarations in proceedings against Capita. In that connection, it appears to us that two possible conclusions could be drawn:-

(i) This then is not a case similar to Patten v Burke Publ. Co. Limited (6) where, although the declaration sought was a declaration of legal right, it could not affect the rights of anyone other than the defendants or persons claiming through them. As said by Millett J in that case, the fact that the declaration could not affect anyone else much weakens the force of the objection to the making of the declaration. By contrast, the making of the declarations here is capable of significantly affecting the rights of persons other than the parties to the proceedings .

(ii) Adopting, therefore, the comments of Birt, Deputy Bailiff, in In re Curatorship of X(9), the Court needs to consider the practical consequences of the declaration which it is asked to make. In this case, the declarations which are sought would have the effect that, in the *Capita proceedings*, **a number of issues of fact would no longer need to be established for the purposes of the plaintiff's claim against Capita, and would have been so established notwithstanding that Capita had had no right to be heard in relation thereto in these proceedings today.**

31 These are formidable objections which the plaintiff needs to overcome in order to persuade us to grant the declarations in question....”

10 Clause 13 of the Bond Agreement provides:-

“13 GOVERNING LAW AND JURISDICTION

13.1 The present Terms and Conditions shall be governed by and interpreted in

accordance with the laws of the Grand Duchy of Luxembourg.

13.2 The court of the Grand Duchy of Luxembourg shall have jurisdiction in case of litigation arising out of or in relation with these Terms and Conditions.”

It is proposed therefore that Church Street will take proceedings in Luxembourg to have the Bond Agreement set aside. The Luxembourg Court will be seised of all of the issues surrounding the entering into of the Bond Agreement, one of which will be whether Ms Cucchiaro had the power as a bare trustee to enter into the same. This is an issue of Jersey law upon which expert evidence as to Jersey law would no doubt be adduced on both sides if the proceedings are defended.

- 11 The formidable objection to the declarations now being sought is that, if made, they would be made without opposition and in the absence of the parties affected, namely the counter party to the Bond Agreement G Trust SCA and the trustee who signed the agreement, Ms Cucchiaro, neither of whom have been convened. Church Street, as trustee of the G Trust, intends to come to the Luxembourg Court pre-armed with a material issue having been determined by this Court in the absence of the parties affected.
- 12 Advocate Renouf wrote to the Court on 20th May 2019, explaining that he was not currently on the record as acting for Ms Cucchiaro and passing on her concerns as to the criticisms levelled at her. He said it would be most likely that she would remain neutral if convened. He did not propose to attend the hearing as he did not have instructions from her to do so and would of course have to apply to her to intervene. A finding that she had no power to enter into the Bond Agreement could have serious implications for her; the amounts involved are substantial.
- 13 We decline, therefore, to make the declarations sought and in the circumstances think it would be inappropriate to express any view as to the merits.