

Continental v Deery

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	04 January 2010
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Text

[2010] JRC 1

ROYAL COURT

(Samedi Division)

Before:

W. J. Bailhache, **Esq.**, Deputy Bailiff, **and** Jurats Le Breton **and** Kerley.

In the Matter of an Application Under the Service of Process and Taking of Evidence
(Jersey) Law 1960 as Amended.

In the Matter of the Representation of the C Trust Dated 2nd October, 2009

Between
AD
Applicant
and
The C Trust

First Respondent
PW
Second Respondent

Advocate J. Harvey-Hills for the Respondents.

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

Other parties not present.

Authorities

Wadman v Dick [\[1993\] JLR 52](#).

Trusts (Jersey) Law 1984.

Service of Process (Jersey) Rules 1994.

Deputy Bailiff

THE

- 1 This is an application by AD to have the Royal Court give assistance to the Family Division of the High Court, pursuant to Letters of Request issued on 2nd October, 2009, within matrimonial proceedings taking place in that Court between AD and her husband KD under case file reference FD04D00513 before Mrs Justice Macur.
- 2 The Letter of Request says this:-

“This letter of Request has been issued by Order of Mrs Justice Macur Sitting at the Royal Courts of Justice, Strand, London, WC2A 2LL on 1st October 2009

1. The Royal Courts of Jersey are due to hear an application by the C Trust on 5th October 2009 regarding the R and M Trusts under case number 2009/54.

2. The Respondent is the Settlor and principal beneficiary of the R and M Trusts.

3. The Respondent is involved in a Final Ancillary Relief Hearing which commenced on 30th March 2009.

4. PW the Trustee for the C Trust applied for leave to give oral and documentary evidence on behalf of the Respondent in these Ancillary Relief proceedings. His application was granted by Mrs Justice Macur on 1st April 2009.

5. On 1st April 2009 the aforementioned final ancillary relief hearing was halted, during PW's cross examination, and following discussion between the parties representatives and with input from PW the parties agreed a Memorandum of Understanding, attached, to settle the Applicant's Ancillary Relief claims.

6. The Trustee, PW, confirmed that the C Trust would assist KD to meet his obligations under this Memorandum of Understanding which provided for the Respondent to pay the Applicant the sum of £2,285,000.

7. To date the £2,035,000 remains unpaid and PW, nor any other representative of the C Trust have been able to confirm that this sum will be paid.

8. We hereby request that you assist us in securing the attendance of PW forthwith, before the Royal Courts of Jersey, to produce two Affidavits referred to in the Witness Summons attached and for the two Affidavits to be faxed for the attention of the High Court in England. We attach a copy of the Order of Mrs Justice Macur dated 1st October 2009.”

That is there under the date stamp of 2nd October.

- 3 The Witness Summons seeks production of an Affidavit dated 15th May, 2009, and a further Affidavit dated 24th September, 2009, both sworn by or on behalf of the trustee of the C Trust.
- 4 It is to be noted from the Order which accompanied the Letter of Request that the purpose of the Letter of Request was to assist the Court with enforcement of something, it is slightly unclear what.
- 5 This Court starts from the position that it should, where possible, give assistance under Letters of Request duly received. It is sufficient for this purpose to refer to the case of *Wadman v Dick* [1993] JLR 52 where the Court said this:-

“We conclude that, as a matter of principle, the requested court should always strive to give effect, if it possibly can, to Letters of Request. It should decline to comply with the foreign request only in so far as it is not proper or permissible or practicable under its own law to give effect to it. Observing faithfully the precept of not delivering what the foreign court has not asked for, and restraining any temptation to rewrite the request, the court may amend Letters of Request by excision, or by adding or substituting words in order to clarify what is being sought without altering the substance of the Letters of Request.”

So it is clear from that authority that we are required to review our own law in order to decide whether to give effect to the Letters of Request that have been sent to us.

- 6 In order to ensure that we were fully appraised of the facts we asked the trustee to produce to us copies of the Affidavits; we were also addressed by the trustee in private session in the absence of Advocate Taylor, Counsel for AD, with Advocate Taylor's consent. It is clear from the review of the material put before us, and we are able to draw a number of conclusions that;
- (a) Firstly, the material relates to an application made by the trustee to the Royal Court under Article 51 of the Trusts (Jersey) Law 1984 a provision permitting a trustee to come to Court and to obtain directions.
- (b) Secondly, in the usual way those applications are heard in private and judgment is normally given publicly. For reasons particular to this case the Commissioner on 16th October, 2009, has embargoed the judgment pending appeal. That appeal is due to be heard in the next three weeks, if it fails it is likely that the judgment will be published; if the appeal succeeds it is likely that the case will be remitted to the Royal Court for fresh directions hearings in private under Article 51. I mention that because the outcome of the appeal is obviously quite material to the application which has come before us today.
- (c) Thirdly, the trustee has made full and frank disclosure to the Royal Court in accordance with its duty; the Court would like to be quite clear on this particular point, in the knowledge that this judgment is likely to go back to the Family Division of the English Court, that the trustee is, on the evidence we have seen so far, performing its trustees duties responsibly in the interests of the beneficiaries. We have seen that the trustee is also paying entirely proper regard to the Memorandum of Understanding to which it is not a party, which was signed by or on behalf of the husband and the wife.
- (d) Fourthly it is clear from material we have seen that it is absolutely necessary that a trustee should be able to come to Court under Article 51 to make a candid appraisal of its position and the problems which are to be addressed. If trustees thought that such Affidavits and applications might be provided to those with hostile eyes upon the trust or the trust fund, they would be less likely to be candid and the whole purpose underlying the Article 51 procedure would be liable to be frustrated.
- 7 For this reason alone we regret that, applying our own law, we do not think it is proper to give effect to the Letters of Request. We would also like to add that we have seen that the Affidavits contain a number of exhibits; we assume that the Letter of Request extends to the exhibits as well as to the Affidavits themselves although it does not in terms say so. The exhibits contain material which is legally privileged and also contain material which is confidential. These are claims to privilege and confidence which we would expect an English Court to uphold. It is unsurprising that Mrs Justice Macur did not address herself to this aspect in settling the Letters of Request because she would not have known what the Affidavits contained or what exhibits were annexed. It is not sensibly possible, in our view, from the very brief review we have made to apply a blue pencil to the material as contemplated by the Westinghouse decision.

- 8 The trustee put up some further objections to giving assistance under the Letter of Request which we will comment upon briefly. The first of those objections was that this is not evidence for use at trial and some reliance was placed upon the Order of the English Court that the purpose of securing the attendance of PW was to assist the Court with enforcement and it was therefore assumed that the Letters of Request, which were slightly varied from the Order of 1st October but which I think refer to the Order of 1st October in paragraph 8, that the purpose was to assist with enforcement rather than to provide evidence for use at trial. It is not necessary for us to make a conclusive finding on this objection although, as at present advised, there would appear to be much to be said in favour of it.
- 9 The next objection which was raised by the trustee was that the Order contained a number of inaccuracies and errors and was not in proper form. As to the inaccuracies and errors, it was pointed out that PW was not the trustee for the C Trust but was its managing director and that the trustee would require to take trustee decisions in accordance with its internal procedure. The second error was that PW was not in fact given leave to give oral and documentary evidence on behalf of KD because he made no such application himself. The application was made by the husband KD in the ancillary relief proceedings. The third error which was put to us by Counsel for the trustee, was that PW had never confirmed that the C Trust would assist the husband to meet his obligation, only that they would perform their trustees duties in such a way, subject to the internal regulation of the trustees, to give favourably consideration to assisting if the trustee could do so properly, and this Court has noted and makes no decision on the matter that there may well be an evidential dispute as to the nature of the confirmation which PW gave to the English Court, if indeed he gave any such confirmation at all.
- 10 It was also said to us that the form of the Letter of Request did not contain any of the usual courtesies which one might have expected from a requesting Court. This Court notes with regret that that does appear to be the form of the Order which has been issued but certainly it is not prepared to take that objection as any serious basis for not giving assistance today.
- 11 As to form, the objection was raised that under the Service of Process (Jersey) Rules 1994 there is a requirement that in any civil or commercial matter, and this Counsel were agreed does amount to a civil matter, the process or citation in the matter which contains the Letter of Request should be transmitted to the Royal Court by Her Majesty's Secretary of State for the Home Department with an intimation that it is desirable that effect should be given to the same. The Rules go on to say that service of the process of citation should be in the English language which obviously causes no difficulty coming from English Court and that service of process or citation shall be effected by the Viscount, in this case no such transmission has taken place through the Secretary of State for the Home Department and no service has been effected by the Viscount.
- 12 For AD, Advocate Taylor submitted that these were matters of procedure rather than substance, matters of form that we could overlook in the exercise of our discretion. Once again we do not have to decide that matter because the basis for the decision today is, as I

have set out, that the Court must protect the integrity of applications made to this Court under Article 51 of the Trusts (Jersey) Law 1984 but I mention the procedural objections for two reasons. The first is that it would seem to be desirable that the Superior Number of the Royal Court give consideration to making amended rules in relation to the transmission to this Court of requests by an English Court. I cannot at the moment see any purpose in requiring this to come through the Secretary of State for the Home Department who are not the official channel of communication between the United Kingdom and Jersey in any event at this time, although that department was the official channel in 1994 when these rules were made. Subject to those changes, however, it is also right, and this is the second point I wish to make, that the Royal Court makes rules for a purpose and it is to be expected that the rules therefore will be complied with and there should be at least some explanation given to the Court as to why the rules have not been complied with. In this instance if it is the case that the request has been made by the Family Division of the High Court simply upon the basis of the application by AD, and AD's lawyers have not seen fit to make proper enquiry as to how the request to the Royal Court of Jersey should be formulated, then there is proper criticism to be made, not of the Family Division of the High Court, but of the lawyers who made that application to that Court and that would be a factor which this Court, in any subsequent case, would be entitled to take into account.

- 13 For these reasons the application by AD for the registration of the Letters of Request and action to be taken upon them is refused.
- 14 The trustee will have the entitlement to take its costs from the trust fund and in addition we make an order against AD for the costs of and incidental to today's hearing, and of and incidental to the representation on the first Letter of Request on a standard basis.