Private Capital Trust Company Ltd v C

Jurisdiction:	Jersey
Judge:	Hughes, Sir Michael Birt, Jurats Pitman
Judgment Date:	13 November 2019
Neutral Citation:	[2019] JRC 221B
Date:	13 November 2019
Court:	Royal Court

vLex Document Id: VLEX-841260838

Link: https://justis.vlex.com/vid/private-capital-trust-company-841260838

Text

[2019] JRC 221B

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner, and** Jurats Pitman **and** Hughes

In the Matter of the a Trust and the B Trust

Between
(1) Private Capital Trust Company Limited
(2) Sanne Fiduciary Services Limited
Representors
and
(1) C
(2) D
(3) E
(4) F

(5) G
(6) I
(7) J
(8) K
(9) L
(10) M
(11) N
(12) O
(13) Minor and unborn Beneficiaries of the A and B Trusts
(14) The adult children of the First and Second Respondents.
Respondents

Advocate E Moran **for the Representors**.

Advocate C. B. Austin **for the First and Second Respondents**.

Advocate J. M. Dann **for the Third to Twelfth Respondents**.

Advocate S. A. Franckel **for the Minor and Unborn Beneficiaries**.

Advocate J. Harvey-Hills **for the Fourteenth Respondent**.

Authorities

In the matter of A Trust [2012] JRC 066.

Re M F Global UK Limited (in special administration) [2013] EWHC 1655 (Ch).

Lewin on Trusts 19 th Edition

Trust — reasons for granting the relief sought.

THE COMMISSIONER:

1 This is an application by the Representors as trustees of two settlements known respectively as the A Trust and the B Trust (together "the Trusts"). The main order sought is what has been referred to as a 'Benjamin order', which is explained further below.

2 At the conclusion of the hearing, the Court granted the relief sought. We now give our reasons.

Background

3 Both Trusts were established by Mr and Mrs H as settlors when they were living in Guernsey. They have four children, namely the First to Fourth Respondents ("the siblings").

4 The B Trust was established on 11 th December, 1996, and is governed by the law of Guernsey. It is a discretionary trust in fairly standard form. The class of beneficiaries comprises the children and remoter issue of the settlors together with their spouses. The Representors are the current trustees of the B Trust having been appointed on 1 st June, 2012. The previous trustees were Investec Trustees (Jersey) Limited and Investec Co-Trustees (Jersey) Limited (referred to as "Investec" unless necessary to distinguish between them).

5 The A Trust was established on 12 th December, 1996, and is governed by Jersey law. The settlors were the life tenants. Following the death of the survivor, there are discretionary trusts. These were initially in favour of charities generally but, on 12 th September, 2007, following the death of the last surviving settlor in November 2005, the siblings were added as beneficiaries. The Second Representor is the sole trustee of the A Trust having been appointed on 28 th May 2012. The previous trustee was Investec Co-Trustees (Jersey) Limited.

6 On 26 th March, 2012, following a contested hearing, this Court approved the decision of Investec to add the remoter issue of the settlors as beneficiaries of A Trust (*In the matter of A Trust* [2012] JRC 066). It follows that the beneficiaries of the Trusts are now the same save that the spouses of the siblings and remoter issue of the settlors are not beneficiaries of the A Trust whereas they are beneficiaries of the B Trust.

7 During the course of the application to widen the class of beneficiaries of the A Trust referred to above, the siblings raised the possibility that some of the assets of the A Trust were not validly settled due to Mr H's lack of mental capacity. Following their appointment, the Representors instructed Penelope Reed QC to provide an opinion on the question of mental capacity. Ms Reed produced her opinion in December 2014 and concluded that, on balance, a court would be inclined to find that Mr H did have the necessary capacity to settle the assets into the Trusts.

8 In the absence of confirmation from the siblings that they were waiving their claims, the Representors issued a representation seeking a declaration that all of the assets in the Trusts had been properly settled. In a judgment dated 23 rd June 2015 (unpublished), the Court ordered that any beneficiary who proposed to contend that any transfer to either of the Trusts was invalid must file Particulars of Claim setting out the exact nature and grounds of the challenge within a specified period.

9 The Third and Fourth Respondents (with the support of the Fifth to Twelfth Respondents) being their adult children and spouses, filed Particulars of Claim on 7 th October, 2015, on

behalf of the estates of the settlors. Five specified transfers of assets to one or other of the Trusts were challenged. We do not think it necessary for the purposes of this judgment to go into detail concerning those challenges.

10 On 30 th November, 2015, this Court decided that Advocate Franckel, acting for the minor and unborn beneficiaries, should defend the transfers to the Trusts, and Advocate Franckel filed his Answer to the Particulars of Claim on 16 th March, 2016. Since then pleadings have been completed and discovery has also taken place.

11 However, the proceedings have not come to trial because there have been repeated stays of the proceedings in the hope that the matter could be settled by mediation or otherwise. On the 5 th February, 2019, the day before a directions hearing was due to take place before the Master, Advocate Dann wrote to the Master to say that settlement terms to resolve the proceedings had been agreed and on this basis the Master adjourned the directions hearing for three months, which adjournment has been subsequently extended on various occasions until 29 th November 2019.

The Settlement agreement

12 The broad basis of the proposed settlement was that a sum of £7.5m inclusive of costs would be paid by the Trusts to the estates of the settlors. There was however no agreement at that stage as to how the figure would be divided as between the Trusts or how much would go to each estate. We should add that the executors of both estates appointed by the Royal Court of Guernsey are the siblings, who would also benefit under the estates.

13 It has since been agreed in a draft settlement agreement that the sum of £7.5m will be paid as to £5m from the A Trust and £2.5m from the B Trust. An affidavit sworn for this application by Mr P Le Vesconte on behalf of the Representors discloses that, at the date of his affidavit, there were some six matters where further negotiations were required in order to finalise the settlement. During the hearing, Advocate Moran informed us that further progress had been made following the issue of the Representors' current application and four of those six matters had been resolved or were very close to being resolved. Further time would however be required to resolve the remaining two issues, although it was hoped and expected that this would be achieved.

This application

14 The assets of the A Trust comfortably exceed £5m, and those of the B Trust comfortably exceed £2.5m. It is in those circumstances that the Representors bring the current application seeking an order that the main proceedings be adjourned sine die and that until further order:-

These two orders have been referred to as Benjamin orders.

> (i) save that the trustee of the A Trust will at all times retain within the trust fund a minimum of £5 million in cash or investments that in normal market conditions can be sold within a month, the trustee of the A Trust shall be entitled to administer the assets of the A Trust as if free of claims; and
>
> (ii) save that until further order the trustees of the B Trust will at all times retain within the trust fund a minimum of £2.5 million in cash or investments that in normal market conditions can be sold within a month, the trustees of the B Trust shall be entitled to administer the assets of the B Trust as if free of claims.

15 In summary therefore, the Representors wish to ring fence the sums of £5m and £2.5m which are expected to be payable pursuant to the settlement agreement, but they wish otherwise to be free to deal with and administer the assets of both Trusts in the ordinary way without regard to the existence of the claims brought pursuant to the Particulars of Claim.

The law

16 A Benjamin order enables trustees to administer a trust on a particular assumed factual basis in circumstances where there is a possibility that the true factual basis is different. The relevant jurisprudence is conveniently summarised in the judgment of David Richards J in *Re M F Global UK Limited (in special administration)* [2013] EWHC 1655 (Ch) at paras 26 – 30 as follows:-

> ***"26. The inherent jurisdiction of the court does not enable the court to vary beneficial interests in trust property but, as part of the jurisdiction to supervise and administer trusts, it permits the court to give directions to trustees to distribute trust property on particular bases when the court is satisfied it is just and expedient to do so. A well-established example of the exercise of the jurisdiction in this respect is the making of*** *Re Benjamin* ***orders. In those cases where the trustees are faced with a practical difficulty in establishing the existence of possible beneficiaries or other claimants, the court will give a direction to the trustees enabling them to distribute the trust property on an assumption of fact that there is no such beneficiary or claimant. As Nourse J explained in*** *Re Green's Will Trust* [1985] 3 All ER 455 ***at 462*** , a *Re Benjamin* ***order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. It protects trustees but it equally preserves the right of any person who establishes a beneficial interest to pursue such remedies as may be available to them***.
>
> ***27. In*** *Re Benjamin* [1902] 1 Ch 723, ***the trustees were given liberty to distribute the testator's residuary estate on the basis that one of his sons,***

who had disappeared, had pre-deceased the testator and would on that basis not be entitled to share in the residuary estate. In Re Guess [1942] Ch 37, ***a similar order was made as regards any creditors in Poland of the deceased. Because of the war, it was impossible to advertise in Poland for claims. Moreton J acknowledged that it would be an extension of the decision in*** *Re Benjamin* ***to apply it to creditors, rather than beneficiaries, but it 'would only be following the principle of that decision'. The basis for such orders was 'evidence of the practical impossibility of proof of the fact or event sought to be established'. In*** Re Green's Will Trust, ***a similar order was made as regards the son of the testatrix who had gone missing during a war-time bombing raid and had subsequently been certified by the Air Ministry as presumed dead. Nourse J said at page 462:-***

"I do not think that the question whether such an order should be made depends on whether or not there will be administrative inconveniences caused by the trustees retaining the fund. I think it depends on whether in all the circumstances the trustees ought to be allowed to distribute and the beneficiaries to enjoy their apparent interests now rather than later."

…… .

29. That part of the proposed order which would permit the administrators to distribute the client money held by them, without providing for those claims which are rejected in whole or in part but in respect of which no appeal to the court is made, would not simply be an application of the decision in *Re Benjamin* ***and the subsequent similar cases. Those cases permit the trustee to act on a presumed fact in circumstances where it is impossible or impracticable to establish the fact one way or the other. In the case of rejected claims, there is no doubt that the claimant exists and that they have asserted claims which have not finally been determined by agreement, withdrawal or decision of the court. The basis of the proposed order is that the administrator should be permitted to proceed with the distribution of client money on a presumption that the only good or potentially good claims are those which have been agreed and those whose rejection is the subject of an appeal to the court*** .

30. The fact that the proposed order does not in this respect neatly fit within the *Re Benjamin* ***line of cases does not mean that it falls outside the proper scope of the inherent jurisdiction of the court…."*** .

17 David Richards J then went on to cite from the 18 th edition of Lewin on Trusts at para 27.34. The equivalent passage is now to be found in the 19 th edition in the following terms:-

"26–032 If the claim is being pressed any distribution will generally have to await the resolution of the claim. If the claimant is not pressing his claim, or if no claim has been made but the trustees are aware of ***circumstances which***

> ***may give rise to a claim, the case is more difficult.*** Because trustees run the risk of personal liability under the *Guardian Trust* ***principle if they distribute with notice of a claim to the trust assets, they may therefore apply to the court, either seeking leave to distribute or seeking directions as to whether they should litigate the claim*** .
>
> ***26–033 It is the practice of the court not generally to permit a trustee to distribute without notice to a claimant.*** But the court has jurisdiction to permit or direct a trustee to distribute notwithstanding the existence of claims or potential claims from third parties. That will not have the effect of destroying any proprietary rights of third parties, but may afford protection against personal claims against the trustees from third parties….” .

Application to the present case

18 As can be seen, what was originally a jurisdiction to enable a trustee to proceed on the basis of a specific factual assumption in connection with the existence (or otherwise) of a beneficiary (a Benjamin order) has been expanded to permit trustees to make distributions even when there is a claim against the trust assets. As David Richards J said at [32] in *M F Global* “the purpose of the court's inherent jurisdiction is to enable practical effect to be given to a trust”. The making of such an order does not however destroy any claim. It merely means that, if successful, the claimant will have no personal remedy against the trustees and will have to recover from any beneficiary to whom the trust property has been distributed.

19 We are satisfied from the above authorities that the Court has jurisdiction to make the order requested in this case. The question is whether, in our discretion, we should do so.

20 This is not a typical case where such an order is made. As the extracts quoted above suggest, such an order is normally made either where it is impossible or impracticable to ascertain a fact (e.g. whether a beneficiary is alive or dead) or where a claim to the trust assets has been threatened but not proceeded with.

21 In this case, a claim on behalf of the estates of the settlors has been brought and can be continued to trial if necessary. In such circumstances, any distribution of the trust assets would, in our judgment, normally have to await the outcome of the proceedings so that it can be ascertained which assets belong to the Trusts and which assets belong to the estates.

22 What is said in this case is that the essential terms of a settlement agreement have been agreed and that the maximum amount which will be payable under that agreement is £7.5m. It is submitted that, in these circumstances, it would be prejudicial to the beneficiaries if the Representors as trustees cannot administer the Trusts in the normal

way, whether by reference to investment for the long-term or by way of distributions.

23 If this application were contested, we would have required some persuasion that it would be right to make the order sought. There is nothing to prevent the claim being pursued to trial within a reasonable timescale. Furthermore, if the settlement negotiations were to founder and the claim to be prosecuted to success in full, it would prejudice the estates (as successful plaintiffs) if they had to chase after beneficiaries in order to recover amounts in excess of £7.5m because the Representors had distributed the trust funds in excess of £7.5m to beneficiaries, rather than being able to recover the entire amount of the successful claim directly from the Trusts.

24 However, the matter has not been contested. Advocate Dann has confirmed on behalf of his clients (i.e. those bringing the claim) that they consent to the order sought. Advocate Austin and Advocate Harvey-Hills confirmed to like effect, as did Advocate Franckel. All the advocates confirmed that the parties were determined that the settlement agreement should be brought to conclusion as soon as possible and were content that sums in excess of £5m in the A Trust and £2.5m in the B Trust should be administered as part of the trust assets in the ordinary way.

25 In those circumstances, the Court was content to make the orders as requested together with the various ancillary orders which were also agreed to by all parties.