

# The Velloz Settlement

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Judge:	Bailiff
Judgment Date:	26 May 2021
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Court:	Royal Court

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## Text

[2021] JRC 140

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, Esq., Deputy Bailiff, and Jurats Ronge and Christensen.

In the Matter of the Velloz Settlement  
And in the Matter of the Representation of St PTC Limited

**Advocate S. J. Alexander for the Representor.**

**Advocate M. P. Cushing for the Respondent.**

**Advocate R. O. B. Gardner for the Minors and Unborn Beneficiaries.**

## Authorities

Trust (Jersey) Law 1984.

*Caversham Trustees Limited* [\[2008\] JRC 065](#).

*Z Trusts* [\[2015\] JRC 031](#).

*Meritus Trust Company Limited v Butterfield Trust (Bermuda)* 2017 [207] SC Bda 82 Civ.

Lewin on Trusts 19th Edition.

*Rawlinson and Hunter Trustees SA in the matter of the Discretionary Trust* [\[2018\] JRC 131](#).

Trusts — re: disputes — reasons.

Bailiff

## THE DEPUTY

- 1 On the 27<sup>th</sup> April 2021, we gave various directions in this case in order to resolve the disputes between the current trustees of the Velloz Settlement (“the Trust”). We now give reasons for our decision.
- 2 The Trust is governed by Jersey law, settled by the Settlor on the 25<sup>th</sup> March 2019. The beneficiaries of the Trust are the Settlor, his wife and his four sons aged, in descending order, 47, 22, 19 and 11 and their issue. Two family charitable trusts are default beneficiaries under the Trust. The Attorney General was convened to the proceedings in his capacity as *partie publique* in respect of the default beneficiary and indicated that he did not intend to participate in the proceedings.
- 3 There is only one child of the four sons, namely a daughter aged 13 who has no contact with her father, the eldest son, S.
- 4 The Settlor is also the protector of the Trust and the successor protector, X, was appointed by Instrument dated 14<sup>th</sup> October 2020. The assets of the Trust are held mainly in property in various jurisdictions and exceed £1 billion in value.
- 5 Pursuant to the terms of the Trust, although the protector has the power to appoint additional trustees, he and no person under the terms of the Trust has the power to remove trustees; a trustee desiring to resign may give notice in writing executed by itself and given to each of its trustees.
- 6 There are currently two trustees of the Trust. Velloz (Jersey) Limited (“VT”) is a Jersey

private trust company. Its sole director and beneficial owner is S.

- 7 VT was the sole trustee at the date of the creation of the Trust and it was envisaged by the Settlor and the family that VT would, in due course, relinquish sole control of the Trust or otherwise yield the trusteeship of the Trust to a trustee more widely representative of the family. Accordingly, the initial structure of the Trust, with VT as trustee, was only designed to be in place for a short period.
- 8 On 20<sup>th</sup> November 2020, the protector appointed ST PTC Limited (“ST”) as co-trustee of the Trust. ST is also a Jersey private trust company and is owned by a family purpose trust (a Jersey purpose trust) and its board of directors include the two middle sons.
- 9 Advocate Gardner was appointed to represent the two minor and unborn beneficiaries at the convening hearing on 1<sup>st</sup> April 2021. On that day the Court ‘*adjourned for further consideration*’ the Representation to 27<sup>th</sup> April 2021. It was said by Advocate Cushing, on behalf of S and VT, that his clients were surprised that the hearing on 27<sup>th</sup> April 2021 was going to be a substantive hearing of the Representation and that they understood the hearing on 27<sup>th</sup> April to be a procedural hearing, and that accordingly it was necessary for the hearing of the Representation to be adjourned to a date to be fixed with his clients being given the opportunity to file evidence in relation to various issues.
- 10 We declined to make such orders. We were satisfied that the convened parties knew or ought to have known that the Representation was to be heard on 27<sup>th</sup> April 2021. The letter accompanying the documentation served on the convened parties, including VT and S, said ‘*You will note from the convening orders that the substantive hearing of the Representation will take place on 27 April at 10am before the Royal Court of Jersey*’. Further, we were persuaded that there is a degree of urgency attached to this matter for reasons explored below and that in any event the question of the trusteeship ought to be resolved now. Pursuant to Article 22 of the Trust (Jersey) Law 1984 (“the Law”) any decision made by trustees needs to be unanimous, subject to any provision of the Trust Instrument to the contrary. In this case the trustees were likely to be at an impasse in relation to any specific decision that they needed to make. No such decisions had yet arisen, but the Trust could find itself deadlocked if any such matters arose.
- 11 But we nonetheless accepted that there were certain matters that could not be resolved by the Court at the hearing, and gave directions to assist the parties in attempting to resolve those matters over the next few weeks and months with liberty to either party to bring the matters back to Court if that proved impossible.
- 12 It would be convenient to consider the two issues before the Court separately, namely the trusteeship issue and the fees issue.

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## The trusteeship issue

- 13 Prior to the appointment of ST as trustee, S was requested to make arrangements to transfer the shares in VT to a new family purpose Trust. He neglected to do so quickly but did confirm by email dated 27<sup>th</sup> November 2020 that he would be willing to consider procuring the retirement of VT subject to various provisions including confirmation that it was the unanimous request of the remaining beneficiaries.
- 14 It is not necessary to set out the entirety of the correspondence between the parties. But it was the wish of all adult beneficiaries and the submission of counsel for the minors and unborn that VT cease to be trustee of the Trust.
- 15 After negotiation of the same, by email dated 15<sup>th</sup> March 2021, S and VT agreed to an Instrument of Retirement and Indemnity between VT, ST and S which was to be executed subject to the simultaneous or prior execution of an Instrument of Release and Indemnity executed by the four adult beneficiaries (the Settlor, his wife and the two adult sons) in favour of S and VT. The only matter outstanding was the governing law which, prior to the hearing, was agreed to be Jersey law in respect of these two documents. Accordingly, the documents necessary to procure the swift retirement of VT had been agreed. In an email dated 15<sup>th</sup> April 2021 from VT's English solicitor to ST's English solicitor, it was said:
- “The Jersey Court does not have jurisdiction to order either of my clients to execute a contractual document which is not agreed by them. That is a matter for negotiation, not a matter for the Jersey Court to order. The Jersey Court can of course order that a trustee retire or be removed but that is still subject to appropriate indemnities being agreed and of course subject to the outgoing trustee being given reasonable security for their fees or liabilities incurred as trustee. For the avoidance of doubt, this is not an application for removal to the Jersey Court because (as set out above) my client is willing to retire.”*
- 16 VT was of the view that its retirement could not take effect until the issue of reasonable security for its outstanding trustee fees could be resolved. ST says that there are no outstanding trustee fees as VT assumed the trusteeship on the footing that it would not charge fees. It is not necessary for the purpose of this application for the Court to express a view on this issue, and the Court accepted that VT had not had the opportunity to place all the evidence that it wished before the Court in relation to this particular matter. However, it is clear that a trustee is not permitted to delay its retirement as trustee because of a fee dispute (see *Caversham Trustees Limited* [\[2008\] JRC 065](#)). In *Caversham Trustees* the Royal Court said:

***“9. The key point in determining the Caversham Trustees' duties is that they had accepted in June 2003 that it was in the interests of the beneficiaries of the trusts that they should retire as trustees and transfer administration to a new trustee. Subject only to retaining reasonable***

***security in relation to their fees, their duty was to give effect to this as soon as reasonably possible. The fact that by agreement the mechanism for this process was changed from that of a retirement and appointment of trustees to the appointment out of the assets to a new trust makes no difference in substance to their duties in this respect.”***

- 17 Delay in retirement cannot be used by a trustee as a means of a leverage in respect of its fees. For a trustee to adopt such a stance is putting its own interests above and in conflict with the best interests of the beneficiaries.
- 18 The parties agreed that what might amount to ‘*reasonable security*’ for the purposes of Article 34 of the Trust (Jersey) Law 1984 would depend upon the facts of the case, and where agreement could not be reached was a matter for the Court to determine. Sometimes reasonable security may take the form of monies held in escrow (as in *Caversham* – see paragraph 43 of the judgment); in other cases the contractual promises made by the new trustee, particularly if it was a Jersey trustee with assets in the island, might well be sufficient. It is clear from paragraph 40 of the *Caversham decision* that for a trustee to claim security over the whole of the trust fund for their fees would be ‘*improper*’.
- 19 It was said on behalf of VT and S that as VT was prepared to retire it should not be removed. We disagreed with this submission and accepted that there were circumstances in this case which warrant, if necessary, the removal of VT. It is said that the actions of VT had ‘*paralysed the administration of the Trust to the detriment of the beneficiaries*’. Whether or not there has been paralysis, there is undoubtedly uncertainty created for the bankers to the Trust. The bank has advanced loans to the Trust secured on property owned by the Trust in the United Kingdom. The bank needed to provide its consent to the appointment of ST as new trustee and the retirement of VT. This was conditional upon VT retiring within a certain period. This period has now been extended twice. The director of ST, who has a forty-year business relationship with the Settlor, says in his affidavit that:

*“The delay is potentially damaging the relationship between various companies within the Trust and [its bankers] at a time when it is critical that companies remain on good terms with their lenders.”*

*And:*

*“The Trust and its underlying companies are incurring costs in relation to the process with no obvious end in sight.”*

- 20 It is said on behalf of S and VT that there is no evidence that requesting either an extension to the consent which has already been provided by the bank or seeking a further consent would result in any material adverse impact on the trust or its banking arrangements. But the Court is entitled to accept the evidence of the director of ST and notes that, owing to the effect of the current public health crisis upon the value of commercial and other property (the banking relationship concerns such property), this is a time when it is important for third

party lenders to have confidence in the entities to whom they are lending, and litigation in respect of the trusteeship/ownership structure would be at very least unhelpful.

- 21 The members of the Court were satisfied that it would be proper, if necessary, for the Court to remove VT as trustee, having regard to its repeated expressed willingness to retire and the fact that the document necessary for its retirement has been agreed in principle, on the footing that to do so would be in the best interests of the beneficiaries noting that all the beneficiaries, bar S, agree that VT should retire immediately.
- 22 The first matter for us to consider in regard to the Prayer of the Representation was whether or not the Court should approve the terms of retirement as contained in the Instrument of Retirement and Indemnity. We considered this with care and, notwithstanding the agreement of all counsel that it was sufficient to protect VT in respect of its outstanding claims for costs, took the view that there was some doubt arising from the terms of the draft and that the definition of '*liabilities*' at clause 1.2.3 of the draft Instrument ought to be specifically extended to the retiring trustee's costs, fees and expenses, and we suggested additional wording to this effect to the parties which they accepted. Accordingly, we approved the terms of the draft Instrument.
- 23 The second matter that we were asked to consider was whether or not the Court was entitled to direct VT to enter into the said Instrument of Retirement and Indemnity.
- 24 VT and S argued that the Court had no power to make such an order. They argued that there is no proper basis for ST to seek, or for the Court to order, that VT enter into the proposed Instrument of Retirement and Appointment as such an agreement is a private contractual arrangement between the parties. They argued '*it is typically a matter for negotiation (frequently long and detailed) between the parties as it governs the contractual protections which a retiring trustee will seek by way of security....for liabilities prior to surrendering the trust property*'. They argued that the provisions of the Law do not provide the Court with jurisdiction to direct a trustee to enter into such arrangements. Our attention was drawn to the decision of Clyde-Smith, Commissioner, sitting alone, in the matter of the *Z Trusts* [2015] JRC 031, where the Commissioner said at paragraph 18, obiter, in respect of provisions that were not yet agreed (the case was principally about the trustees equitable lien/rights on retirement) that '*I am not prepared to order Equity to enter into any contractual document which governs its rights personally; apart from doubting the Court's power to make such an order it is unnecessary*'.
- 25 It is clear from paragraph 17 of the judgment that the terms of the relevant deeds of retirement and appointment were unresolved.
- 26 The decision of Commissioner Clyde-Smith was also noted with approval, again obiter, by the Supreme Court of Bermuda in *Meritus Trust Company Limited v Butterfield Trust (Bermuda)* in 2017 [207] SC Bda 82 Civ at paragraph 29 of the judgment of Kawaley CJ. In

that case we noted that the retiring trustee was held to have no rights to retain any assets as security for its various claims under the trusts – the Court finding that the retiring trustee was adequately protected by its equitable lien in respect of the actual and contingent liabilities of which it was aware. Reference was made with approval to paragraph 25 of the judgment to a passage from Lewin on Trusts 19th Edition which said:

***“Further, retention of assets by an outgoing trustee is inconsistent with the statutory provision which requires that on an appointment of new trustees any assurance or thing requisite for vesting the trust property in the new trustees should be executed or done.*** We do not consider that this statutory provision imposes an absolute bar on retention by a former trustee as an incident of his right of indemnity, and indeed there is English, Australia and Cayman authority suggesting that there is a continuing right of retention against new trustees. But normally the trust property will be vested in the new and continuing trustees and the former trustee will be protected either under his continuing rights of reimbursement and exoneration under the general law or, more often, under express indemnity and, where appropriate, express security arrangements.”

27 The Court has repeatedly held that the terms of Article 51 of the Law are wide in respect of the power of the Court to give directions to a trustee. Article 51(2) provides:

***“51. Applications to and certain powers of the court***

... ..

***(2) The court may, if it thinks fit –***

***(a) make an order concerning –***

***(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 ,***

***(iii) a beneficiary or any person having a connection with the trust, or***

***(iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;***

***(b) make a declaration as to the validity or the enforceability of a trust;***

***(c) rescind or vary any order or declaration made under this Law, or***



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***make any new or further order or declaration.”***

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28 In *Rawlinson and Hunter Trustees SA in the matter of the Discretionary Trust* [2018] JRC 131, it is recorded at paragraph 18 of the judgment that the representor ‘sought an order that [the new trustee] execute the [Deeds of Retirement and Appointment] in respect of all the trusts...in the form provided to the Court, and which complied with the STEP Standard Provisions on pain of contempt’. This was ordered. At paragraph 31, the Court noted:

***“This is a case in which the supervisory jurisdiction of the Court over these Jersey trusts had been invoked by R & H and accepted by Fort and Balchan.*** The issue over which the Court's supervisory jurisdiction was engaged was the decision of R & H to retire and specifically the terms upon which it should retire.”

29 At paragraph 39 the Court ordered:

***“39. Accordingly, we directed Fort and Balchan to execute and deliver the DORAs as drafted by Advocate Swart within seven days of engrossed copies being e-mailed to them, and this under pain of contempt. We understand that this order has been complied with.”***

30 This decision would accordingly appear to indicate that in certain circumstances the Court's supervisory jurisdiction under Article 51 does extend to directing a retiring trustee to retire on specific terms.

31 It was argued on behalf of VT and S that the decision in *Rawlinson and Hunter* has no bearing on the matter before us as there is some indication that the order made by the Court was made by consent.

32 However, generally the Court would be slow to make an order, even by consent, that it had no jurisdiction to make.

33 In our view, a distinction needs to be drawn between the Court requiring parties to commence and/or conclude negotiations in relation to an Instrument of Retirement where they may be far apart and a case such as this, where the Instrument of Retirement has, in the words of counsel for the retiring trustee, ‘*been negotiated and agreed*’ (save in relation to the question of VT's fees).

34 In our view, the Court does have jurisdiction on the facts of this case to order ST and VT to execute the Instrument of Retirement and Indemnity within fourteen days of the date of the hearing which we did, on condition that the adult beneficiaries executed the Instrument of Release and Indemnity prior to or simultaneously with the execution of the Instrument of



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## Retirement.

- 35 We went on to order that in the event of VT failing to execute the Instrument of Retirement and Indemnity then it should be removed from the trusteeship and cease to be trustee of the Trust within twenty-one days of the hearing and thereafter surrender all Trust property to ST in its possession or control and do any other necessary acts to assist ST in assuming the trusteeship.
- 36 On the facts of this case, we took the view that VT had reasonable security owing to the following:
- (i) Its equitable lien;
  - (ii) Its contractual indemnity upon retirement as referred to above; and
  - (iii) The undertaking which ST gave to the Court that it would hold in a ringfenced fund within the Trusts the sum of £4 million for the period necessary to resolve VT's claim for its costs, fees and expenses incurred during its trusteeship, which sum would include an additional sum (the claim on account of costs, fees and expenses is £3.5 million) in respect of any costs incurred by VT in pursuing its claims.
- 37 Accordingly, the Court was content to direct VT's retirement, the Court being satisfied that VT had reasonable security for its outstanding liabilities; in particular, its costs, fees and expenses.

### **The retiring trustee's costs and fees**

- 38 We have considered the question of reasonable security for VT's costs fee and expenses above.
- 39 Both parties agreed that any fee dispute should be the subject of a separate Representation in due course.
- 40 VT claims outstanding trustee fees totalling £3.5 million.
- 41 ST stated that no claims for outstanding fees had yet been invoiced to them or the Trust.
- 42 We ordered that VT shall particularise in writing its claims for trustee costs, fees and expenses within six weeks of the hearing; and that ST shall reply to such claims within four weeks of receipt of the same.

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- 43 The Court encouraged both parties to negotiate, if necessary by way of mediation, before issuing further proceedings in respect of this issue. If proceedings were issued by either party in the absence of an attempt to mediate this dispute then it is likely that the Court would stay those proceedings pending mediation.
- 44 We ordered that ST and counsel for the minor and unborn beneficiaries be indemnified in respect of their costs of the proceedings out of the Trust, the same to be taxed on the trustee basis if not agreed.
- 45 All other applications for costs were adjourned with liberty to restore.