

C Trust Company Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Breton, Newcombe
Judgment Date:	12 March 2009
Neutral Citation:	[2009] JRC 48
Reported In:	[2009] JRC 48
Court:	Royal Court
Date:	12 March 2009

vLex Document Id: VLEX-793251353

Link: <https://justis.vlex.com/vid/c-trust-company-ltd-793251353>

Text

[2009] JRC 48

ROYAL COURT

(FamilyDivision)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Le Breton **and** Newcombe

Between
The C Trust Company Limited
Representor
and
Advocate Mark Howard Temple as guardian for LD and ZD
and
MS
KD

JD
MaD
MD
Respondents

Advocate J Harvey—Hills for The C Trust Company Limited.

Advocate M. H. Temple appeared personally.

Advocate L. J. Buckley for MS.

Authorities

In re The H Trust [\[2006\] JLR 280](#).

In re the S Settlement 2001/154.

International Trust and Divorce Litigation by Harper, Goodman and Others.

THE COMMISSIONER

- 1 By its representation dated 5th February 2009, The C Trust Company Limited (“the trustee”) seeks the sanction of the Court to certain decisions made in relation to the R Trust and the M Trust. On 6th February 2009, the Court appointed Mr Temple to represent the minor beneficiaries LD and ZD and ordered that the representation be served upon the other adult beneficiaries, namely MD, JD, MaD and MS. It ordered that notice only of the proceedings should be given to KD. At the hearing of the application on 10th March 2009, Mr Temple appeared on behalf of the minor children and Mr Buckley represented MS. The other convened parties did not appear. This was an administrative application for directions and was therefore held in private.

Background

- 2 KD and AD have three adult children, namely JD, MaD and MD. They separated in 1991. KD commenced a relationship with MS in 1997 and they have two minor children, LD and ZD. It would appear that their relationship has now ended.
- 3 The R Trust was settled in 1995 and the M Trust in 2000, namely some time after KD and AD separated. Both are discretionary trusts and are now governed by Jersey law, the beneficiaries being KD and his three children, MD, JD and MaD, and MS and her two children LD and ZD. KD is the settler of the assets for both trusts. He and AD were not divorced until 2004 and ancillary proceedings were apparently only commenced in 2006. They are due to be heard before the Family Division on 30th March 2009.

- 4 The trustee has provided information in relation to the trusts to KD's English legal advisers when requested from time to time but the trustee has not been convened to the English proceedings by either party.
- 5 The claims being made by AD in the English proceedings have caused MS to be concerned that her own contribution to the trusts was invisible to the English court and that her position and that of her children were very insecure. She consulted Withers and formally applied to the trustee for a distribution of 50% of the assets of the two trusts. Her application for a distribution was supported by a detailed memorandum setting out her contribution.
- 6 The trustee is in a very difficult position. AD, who is not a beneficiary and who did not apparently contribute to the trust funds, makes it clear that to the extent necessary she is looking to the trusts to make good any award made in her favour by the Family Division and she reserves all of her rights in that respect. On the other hand, MS, who is a beneficiary and who has apparently made a substantial contribution to the trust funds, is understandably placing the trustee under pressure to isolate and protect her interests and those of her children, both from the potential claims of AD, but also from the affairs of KD.
- 7 The trustee has taken advice from Mourants and English counsel, namely Dakis Hagen of Serle Court Chambers. Mourants wrote to Withers on 21st November 2008, explaining to them that in the context of the English proceedings it would be inappropriate for the trustee to make a distribution and quoting the guidance given by the Royal Court *In re The H Trust* [2006] JLR 280 at 284:-

“ It is likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this Court to act as appropriate following and taking full account of the decision of the overseas court.”

Being nevertheless conscious of the trustee's duty to protect the beneficiaries as a whole, the trustee proposed, without fettering its discretion, to create a fresh trust for MS and her children, which it intended to settle only following the outcome of the English Family proceedings but it would seek the blessing of its provisional decision by the Royal Court as soon as possible.

- 8 In accordance with the principles set out in *In re the S Settlement 2001/154*, the trustee was not surrendering its discretion to the Court, but seeking the Court's sanction to decisions already taken in respect of which the Court has to ask itself three questions, namely:-

(i) Are we satisfied that the trustee has in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out its decision?

(ii) Are we satisfied that the opinion which the trustee has formed is one at which a reasonable trustee properly instructed could have arrived?

(iii) Are we satisfied that the opinion at which the trustee has arrived has not been vitiated by any actual or potential conflict of interest which might have affected its decision?

- 9 English counsel has advised that the Family Division will be concerned to ascertain the financial resources of KD, and in particular, the extent to which the assets of the trusts should be regarded as financial resources of his. We were advised that essentially the Court will ask itself the question, if KD were to request a distribution to him of some or all of the assets of the trusts, would the trustee agree to make the relevant distribution?
- 10 The position is discussed in International Trust and Divorce Litigation by Harper, Goodman and Others at paragraph 7.3:-

“ the decision in Charman ... demonstrates that no indication by the trustees as to how they might exercise their dispositive powers may risk the court concluding that if asked, they would be prepared to apply all or a substantial part of the assets to the requesting spouse, particularly if the requesting spouse were making the request under pressure of an order providing heavy ‘judicious encouragement’ to the trustee.

Accordingly, careful consideration now needs to be given by trustees as to how to address such a request in the interests of the beneficiaries as a whole, particularly since the other beneficiaries (including minors) will not be convened to the proceedings at which the questions whether the trust assets should be treated as a resource of another beneficiary will be determined .

The response of the trustee will need to be tailored to the individual circumstances of the case and made having taken appropriate advice but may in future provide some indication, as to assets it would not consider available for distribution or as to its attitude towards preservation of assets for other beneficiaries. The trustee will doubtless wish to make it clear that it is not fettering its discretion in any way and, (if this is the case) that any provisional decision it makes will be submitted to the trust's home court for approval.”

We can therefore see that it might well be helpful to the Family Division for the trustee to indicate now the extent to which it would not consider assets of the trusts to be available for distribution to KD.

- 11 The actual wording of the resolutions of the trustee appear to go further than intended by it. To the extent that they may do so, Mr Harvey-Hills submitted that this is attributable to drafting, and that the resolutions should be rectified.

- 12 For our part, we interpret the decision of the trustee in respect of each trust to be as follows, namely that without fettering its discretion it is its intention to appoint 40% of the net assets of the trusts to and for the benefit of MS and her two children (who will then cease to be beneficiaries of the trusts) such appointment not to be made until after the termination of the English proceedings and subject to the further sanction of this Court. In other words, the trustee would not consider that proportion of the assets of the trusts to be available for distribution to KD.
- 13 The trustee cannot fetter its discretion as to any applications that may be made in the future by KD for distribution out of the balance of the trust funds and we make the observation that when considering any application by KD, the trustee will have to consider the circumstances at the relevant time and the interests of his three children.
- 14 In essence, the trustee is notionally ring-fencing assets for the benefit of MS and her children, but fully retaining its freedom and that of the Court to act as appropriate following and taking full account of the decision of the Family Division in the English proceedings.
- 15 We have no reason to doubt the good faith of the trustee in reaching that decision and that the circumstances of the case render it desirable and proper for it to make its position clear to that extent. MS has put forward a substantial case. The trustee has taken extensive advice and made appropriate soundings. We are satisfied that its decision is one at which a reasonable trustee properly instructed could have arrived. The issue of conflict or potential conflict does not arise. Accordingly, applying the tests in *In re S*, we sanction and bless the decision of the trustee in relation to the trusts as we have interpreted that decision. For the avoidance of doubt, if it is argued that the trustee has resolved to go further than intended as above, then to the extent that it has gone further no sanction is given.
- 16 We also sanction and bless the decision of the trustee to provide written evidence for the English court and for its director, Peter Watts, to present himself to speak to that evidence if required by the English court. As made clear in *Re H*, it is important that the Family Division has the fullest information concerning the financial affairs of the trusts.
- 17 The trustee also sought an order from the Court sanctioning and blessing its approach to date in relation to the English proceedings. No criticism has been made by any of the parties to the approach of the trustee and we have no reason to voice any criticism but as a matter of policy we do not think it appropriate to grant trustees such generalised sanction in relation to past conduct, and we decline to do so.
- 18 Finally, we grant the parties liberty to apply.