

Representation of U

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats De Veulle, Kerley
Judgment Date:	17 June 2010
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Text

[2010] JRC 114A

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats De Veulle **and** Kerley.

In the Matter of the Representation of U Limited and in the Matter of the T Trust

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984 (as Amended)

Between

U

Representor

and

(1) Advocate Michael Christopher Goulborn, as Guardian ad litem of A

(2) B

- (3) C
(4) D
(5) E on behalf of herself and her issues and her and their spouses, widows or widowers
(6) F
(7) G
(8) H
(9) J on behalf of herself and her issue including K and L and her and their spouses,
widows or widowers
(10) M on behalf of herself and her issue and her and their spouses, widows or widowers
(11) N
Respondents

Advocate R. J. MacRae for the Representor.

Advocate M. C. Goulborn as Guardian ad litem of A.

Authorities

In re the S Settlement [\[2001\] JRC 154](#).

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

THE COMMISSISONER:

- 1 On 26th May, 2010, the Court gave U (“the trustee”) certain directions in relation to T Trust (the trust”) and we now set out our reasons.
- 2 The trust is a discretionary trust established by the first respondent, B, on 3rd April, 1998, and which is now governed by Jersey law.
- 3 The beneficiaries of the trust now comprise B, his children and remoter issue, the children and remoter issue of B's father, P, any spouse, widow or widower of the aforementioned and any charity. Subject to the exercise of the trustee's discretionary powers B is entitled to the income of the trust for his life.
- 4 We were satisfied that all those interested under the trust had been convened or notified of the application. In particular, B's wife, Q, who had been removed from the class of discretionary beneficiaries in 2006, but who, as his spouse, retained a contingent future limited interest in one half of the income of the trust assets had been notified of the proceedings and given liberty to apply to be joined. Her lawyers, Hughes Fowler Carruthers, had written to the Court on 20th May, 2010, indicating that through lack of funds she was unable to make representations to the Court.

- 5 The principal asset of the trust is a residential property situated in London and known as R, valued between £12M and £14M ("the property"). The property is the former matrimonial home of B and Q and she still resides there. There are three children of the marriage, namely the third and fourth respondents and A (aged 16), represented by Mr Goulborn.
- 6 B and Q are engaged in divorce proceedings before the Family Division of the High Court of England and Wales and Q is seeking both interim maintenance and ancillary relief against B, including an order varying the terms of the trust. The trustee is not a party to those proceedings. Q has registered a notice of pending land action against the title to the property ("the notice") and obtained an injunction against B, preventing him from dealing with the property and the value of its equity and from procuring or encouraging anyone else from doing so. The trustee was served with a copy of Q's application but on advice did not appear. In the event, the High Court did not join the trustee or make an order against the trustee. The High Court also ordered a restriction to be entered against the title to the property ("the restriction").
- 7 There are a number of matters upon which the approval of the Court was sought by the trustee. The trustee did not surrender its discretion and applying the principles set out in the case of *In re the S Settlement* [\[2001\] JRC 154](#), there were three issues which the Court considered when fulfilling its role namely:-
 - (i) Is the court satisfied that the trustee has formed its opinion (or reached its decision) in good faith that the circumstances of the case render it desirable and proper for it to take the proposed steps?
 - (ii) Is the court satisfied that the opinion formed (or decision taken) is one at which a reasonable trustee properly instructed could have arrived?
 - (iii) Is the court satisfied that the opinion arrived at (or decision taken) has not been vitiated by any actual or potential conflict of interest which might have affected its decision?
- 8 The trustee had taken appropriate advice and considered the views of the beneficiaries who had responded to it, and the Court was satisfied on all three issues set out above in respect of the matters upon which the trustee sought its approval and which we take in turn.

English divorce proceedings

- 9 The trustee sought the approval of the Court to its decision not to take part in Q's application to join it to her application for an injunction and any renewal of the same. Ordinarily, applying the principles set out in the case of *In re H Trust* [\[2006\] JLR 280](#) the trustee might have been expected to have taken part in the application for an injunction, in particular in light of the fact that the sole and valuable asset of the trust is situated in

England and therefore vulnerable to direct enforcement through any order that the English court might make.

- 10 However, there was a factor communicated to the Court and not disclosed to Mr Goulborn (and which we will not set out in this judgment) which we agreed led to the conclusion that the wider interests of the beneficiaries were best served by the trustee not taking any substantive part in Q's application. In the event, it appears that the trustee's decision not to take part in the application has been vindicated in that the trustee was not joined as a party and a freezing injunction was not made against it, so the relief sought by Q against the trustee was not in fact granted.

Request for distribution/repayment of loan

- 11 B had requested that the trustee make a substantial distribution to him to enable him to meet certain obligations that he has to Q pursuant to an interim maintenance order made in her favour in respect of her legal costs and living expenses and also to enable him to pay his own legal and living expenses. B suggested that in view of the illiquid nature of the trust assets, the trustee should seek a bank loan secured on the property. Furthermore, substantial sums were spent on improvements to the property after its purchase and on fixtures, fittings and furniture which sums were largely provided by way of loan to the trust, the benefit of which had been assigned to B, with the result that as from 4th April, 2008, the trust had been indebted to him in the sum of £1,197,465.02, such loan being repayable on demand. By e-mail dated 4th March, 2010, B sought repayment of that sum by the trust.
- 12 In the circumstances, the trustee does not believe that it can realistically or should take any steps either to repay the debt owed to B or to make a distribution to him for the following reasons:-
- (i) The trust does not have liquid funds either to repay B or to make a distribution.
 - (ii) The only way in which the trustee could raise funds either to repay B or to make a distribution to him is by borrowing. A commercial lender would require any such lending to be secured on the property. However, the trustee has been advised that the notice and restriction which have been ordered to be registered against the property will prevent a commercial lending against the security of the property.
 - (iii) The trustee has no liquid funds to fund an application in England to remove the notice and restriction over the title to the property. Furthermore, B has already applied to remove the notice and failed and the trustee is advised that there is no reason to think that a different result would be achieved on a fresh application by the trustee.
 - (iv) Even if the trustee did vacate the notice and restriction, it would be concerned that if it did seek a commercial loan using the property as security, it might put B in breach of the English injunction, or it might be accused of aiding and abetting a breach by B

of the English injunction, which prevents him from procuring or encouraging anyone from dealing with the property and the value of its equity.

- 13 We agreed that the trustee was not for these reasons in a position either to repay the indebtedness owed to B or to make any distribution to him.

Request for information

- 14 B had requested the trustee to provide certain information to him about the trust. The trustee had considered the request and complied, supplying B with reasonably detailed information about the trust and its assets. The trustee was aware that the information was sought by B in the context of his divorce proceedings and the disclosures which he is obliged to make in those proceedings. Its provision was consistent with the guidance given by the Royal Court in *Re H*, where the Court said:-

“We should add that a decision that the trustee should not submit to the jurisdiction is separate from the question of provision of information. It seems to us important, in this case, that the husband and wife [both of whom were beneficiaries] should have the fullest information concerning the financial affairs of the trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position.”

- 15 We approved the trustee's decision in this respect and confirmed that it should adopt a similar approach to any future requests for information that may be made by B.

- 16 Thus, the Court made the following orders:-

(i) That the trustee's decision not to take any part in Q's application;

(a) to join it to her application for an injunction; and

(b) to obtain a freezing injunction against it;

And any renewal of the same, is approved

(ii) That the trustee's proposal not to take any further steps in respect of the property (until the property is freed of the notice and the restriction) to enable it either to repay the debt owed to B or to make a distribution to him is approved.

(iii) That the trustee's decision to disclose certain information to the settlor, and to adopt a similar approach to any further requests which may be made by him, is approved.

- 17 Finally, the trustee was granted its costs on the trustee basis (Mr Goulborn already having

the benefit of a pre-emptive costs order) and the Court gave it liberty to apply for further orders should the need arise.