

The Representation of EFG Trust Company Ltd and the R Trust; and Articles 51 and 53 of the Trusts (Jersey) Law 1984, as Amended

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	22 December 2015
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Text

[2015] JRC 267A

ROYAL COURT

(Samedi)

Before:

T. J. Le Cocq, **Esq., Deputy**Bailiff, **and**Jurats Nicolle**and**Thomas

In The Matter of the Representation of EFG Trust Company Limited and In the Matter of the
R Trust

And In The Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984, as Amended

Advocate E. C. P. Mackereth **for the Representer.**

Advocate G. C. Staal for Mrs B.**Authorities**

Matrimonial Causes Act 1973.

Trusts (Jersey) Law 1984.

Re S Settlement [2001] JLR N37 .

The Representation re Otto Poon Trust [\[2015\] JCA 109](#) .

Trust — reasons relating to approval of the court for the addition of beneficiary and other matters.

Bailiff

THE DEPUTY

- 1 On 8th December, 2015, we made an order approving the decision of EFG Trust Company Limited as trustees of the R Trust (“the Representor”) to add Mr B (“Mr B”) as a beneficiary of that trust and to distribute the whole of the trust assets to Mr B in order to enable their onward distribution to Mr B's former wife (“Mrs B”). These are our reasons.

Background

- 2 The R Trust was established by way of a settlement dated 14th June, 2011. Mr B was the settlor of the trust.
- 3 The R Trust is governed by Jersey law and is a discretionary trust. The trust instrument permits the addition of the beneficiaries and also the appointment of a protector although none has been appointed.
- 4 The only beneficiaries of the trust are the two minor children of Mr B and Mrs B namely D and E and the net asset value of the trust is approximately US\$1.8 million.
- 5 Mr and Mrs B are divorced and the divorce proceedings between them, which took place before the Courts of England and Wales, have been somewhat acrimonious. As part of the dispute on matters ancillary to that divorce Mrs B sought *ex parte* and obtained an interim injunction in Jersey against the Representor preventing any dissipation of the assets of the trust.

- 6 There was a hearing in the United Kingdom relating to the matters ancillary to the divorce and on 17th July, 2015, Recorder Frank Feehan QC issued a judgment and made an order (“the English Order”) under which:–
- (i) The disposition of the trust assets by Mr B to the trust was ordered to be set aside pursuant to Section 37(2) of the Matrimonial Causes Act 1973 (“the MCA 73”);
 - (ii) Mr B was ordered to indemnify Mrs B, the children and the Representor in respect of costs incurred in relation to the proceedings and the injunction proceedings in Jersey;
 - (iii) The Representor was ordered to treat the disposition made by Mr B into the trust as being set aside; and
 - (iv) The Representor was ordered to remit the trust fund to Mr B who was then ordered to pay that and other sums to Mrs B.

- 7 It is important to note that neither the Representor nor Mrs B were seeking the enforcement of the English Order by this Court. That is hardly surprising. Article 9 of the Trusts (Jersey) Law 1984 as amended (“TJL”) provides, at Article 9(4), as follows:–

“(4) No –

(a) judgment of a foreign court; or

(b) decision of any foreign tribunal (whether in an arbitration or otherwise),

with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with this Article, irrespective of any applicable law relating to conflict of laws.”

- 8 The English Order and the judgment are those of a foreign court and, under Article 9, the findings of that court would be of no effect.
- 9 That was not, however, the application that the Representor was making. Instead, the Representor asked us to approve the steps that it was proposing to take because, on the basis of the factual findings that Recorder Feehan had made in his judgment, the Representor was of the view that its proposed steps were in the interests of the beneficiaries of the trust. This would not be enforcement by this court or approval of the English Order but rather the approval of the decision of the Representor to take certain steps in the interests of the beneficiaries.

- 10 It is important to note that Recorder Feehan heard evidence in reaching his decision and

made detailed orders concerning the distribution of matrimonial assets. It is clear from a perusal of his judgment that he was of the view that the assets of the family overall were not, having taken debts that were due by Mrs B into account, sufficient for her to maintain the property in England in which she and the two minor children resided. It was in part for that purpose that he determined that access was required to the trust assets to enable Mrs B to keep the property in which she and, importantly for our purposes, the minor children reside.

- 11 The Representor wished to rely upon the determinations of fact and assessment of the interests of the minor beneficiaries made by Recorder Feehan and act in a way that was consistent with those determinations. Judge Feehan, in his judgment, expressly makes it clear that he had to give first consideration to the interests of the children and he then carried out an analysis of the financial circumstances which analysis underpins the English Order. The Representor, after careful consideration, accepts his analysis relating to the needs of the children, the beneficiaries of the trust, and accordingly wishes to give effect to that assessment by making the distribution proposed.
- 12 The Representor observed that it is appropriate to rely on Recorder Feehan's assessment because he had the benefit of hearing detailed evidence. Were the Representor to seek to replicate his enquiries as to the needs of the children it would be time consuming, disproportionately costly, and would be unlikely, in the view of the Representor, to achieve a better result.
- 13 The Representor, accordingly, wished to transfer the substance of the trust fund to Mrs B through Mr B so that she can maintain the home over the children's heads. The Representor accepts that there would be a benefit for Mrs B in this (and she is not of course a beneficiary) and indeed there would be a benefit to Mr B in as much as he would be able to discharge his obligations to the English court. To the Representors' mind, those are ancillary benefits and the main benefit is to the children in having security of accommodation and indeed in bringing an end to the litigation between their parents.
- 14 When the matter was first presented before this Court the Court convened Mr B and Mrs B to the proceedings and appointed Advocate Michael Cushing as guardian to represent the interests of the minor beneficiaries.
- 15 Advocate Cushing has lodged with the Court a skeleton submission in which, after due analysis, he supports the application of the Representor. The Court excused him from appearing before it.
- 16 Advocate Staal for Mrs B appeared to support the application of the Representor. He was able to explain that some of the debts which Mrs B had incurred, which were of concern to the Court in as much as they may have suggested that she was not good at managing financial resources, were in fact all incurred in connection with the matrimonial proceedings

and were *bona fide* debts (and indeed the English Court had so found) and there was no basis for saying (and the Representor agreed with this) that Mrs B would do anything other than act in the best interests of her children.

- 17 Mr B did not attend and nor was he represented. Although some contradictory emails which he sent to the Representor were shown to us, and he does not appear to be objecting in any way to what the Representor proposed, his communications nonetheless fell short of a ringing endorsement. Nor was it clear on the documentation shown to us that he was aware that the mechanism by which the Representor was proposing to give effect to its understanding of the needs of the minor beneficiaries was to appoint him as a beneficiary and to route any payment of monies through him.
- 18 The Court raised concern as to Mr B's position with Advocate Mackereth for the Representor who agreed that it would be appropriate for the Court to put a condition on any approval it might give relating to the receipt of confirmation that Mr B did in fact agree to be made a beneficiary. There was also some discussion with counsel about the mechanism that is to be put in place to ensure that the money does in fact pass from the Representor through Mr B into the hands of Mrs B. It is clear that the Representor is alive to the need to ensure a proper process which is, of course, essential to ensuring that any monies are not diverted for a purpose other than that for which they are intended.
- 19 The Representor is seeking the approval of this Court to a momentous decision, namely the appointment of Mr B as a beneficiary and the distribution of the entirety of the trust fund to him for onward transmission to Mrs B. The test to be applied by this Court was established in *Re S Settlement* [2001] JLR N37 and recently approved in the Court of Appeal in the case of *The Representation re Otto Poon Trust* [2015] JCA 109 in which, at paragraph 14, the Court said:—
- “As explained in the S Settlement [2001] JLR N37 the Court must satisfy itself (1) firstly that the trustees decision has been formed in good faith, (2) second, that the decision is one which a reasonable trustee properly instructed could have reached, and (3) third, that the decision has not been vitiated by any actual or potential conflict of interest.”***
- 20 In considering the application of that test, and in particular the second limb, it is clear that the Court is not concerned with whether or not there may be a different way of dealing with the issue that the trustee wishes to resolve which, in the Court's view, might be more appropriate. Instead, Court considers, in applying this part of the test, whether this is a decision that a reasonable trustee could make.
- 21 In considering how to achieve what it wishes, it is clear that the Representor has given careful consideration to a number of issues. For example the trustee has taken advice from Price Bailey on tax matters and as a result of that advice has identified that it is preferable to appoint Mr B as beneficiary for the purposes of making the transfers than to appoint Mrs

B who is resident in the United Kingdom.

- 22 In our view and in all the circumstances set out in the documentation placed before us and in the submissions of counsel, it is clear to us that the Representor has acted in good faith, that the decision that it is proposing to take is a lawful decision and is a decision that a reasonable trustee could take, and that there is no apparent conflict of interest which might vitiate that decision or affect it in any way.
- 23 In the circumstances we were content to approve the decision of the Representor subject to some refinement of the draft order that Advocate Mackereth put before us to ensure that the purpose of the transfer was to transfer the funds to Mrs B for the benefit of the minor beneficiaries of the trust, that Mrs B's fees of the application before this Court would be met out of the trust fund and that the Court's approval was conditional upon the submission to the Court of the written consent of Mr B to be appointed as a beneficiary and to act in accordance with the intention of the trustees, namely to receive the money and to ensure a mechanism by which it is transferred to Mrs B in the way that the Representor proposes. Mr B's written consent has now been provided.