The Representation of B; and the Y Trust; and Article 51 of the Trusts (Jersey) Law 1984

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	26 June 2013
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Text

[2013] JRC 126

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C., Deputy**Bailiff, **and**Jurats Morgan**and**Liston.

In the Matter of the Representation of B
And in the Matter of the Y Trust
And in the Matter of Article 51 of the Trusts (Jersey) Law 1984

Advocate R. J. MacRae **for B**.

Advocate J. P. Speck **for E Trust and Corporate Services Limited, Trustee**.

Advocate D. R. Wilson **for D**.

Authorities

Trusts (Jersey) Law 1984.

E, R, O and L Trusts [2008] JLR N 17 .

E, R, O and L Trusts [2008] JRC 053 .

Trust — application by a non-party to be convened to proceedings.

Bailiff

THE DEPUTY

1 On 19 th April, 2013, the Representor presented a representation to the Court which, in summary made the following orders:–

There was liberty to apply.

(i) The representation should be heard in private on 13 th June at 10am.

(ii) E Trust Company Limited, as trustee of the Y Trust ("the Trustee"), should be convened to the hearing, but was not at liberty to disclose to any third party, save for the purposes of obtaining legal advice or making a required report to the Jersey regulatory authorities, the affidavit sworn by the Representor in support of the representation or its exhibits.

(iii) The Representor and the Trustee were required to exchange evidence on which they wish to rely by various dates in May as set out in the Order.

(iv) The Representor was to file a skeleton argument by 31 st May, and the Trustee should file a skeleton argument no later than 7 th June.

The Representation

2 In summary, the assertions of the Representor are that she and her children are, with D, beneficiaries of the Y Trust, a trust established under the Law of Jersey in respect of which the trustee is the current trustee. The trust deed, which is not in an entirely customary form, appears to confer various discretions on the trustee, such that the beneficiaries should be described as discretionary objects of the Trust. The Representor asserts that the trust assets were provided by the father of her husband, although she claims that some assets may also have been provided by her husband. The assets of the trust are said to be

substantial, including the entire issued share capital in a Bahamian company called H Investment Holdings Limited, of which the sole director was until recently her husband C the entire issued share capital of a company J Limited, incorporated in Jersey, which owns a flat in London believed to be valued at £4 to £5 million and cash of approximately US$5 million. H Investment Holdings Limited is said to be the holding company of a group which includes companies incorporated in Mauritius, Bahamas, Delaware, Jersey, Hong Kong and India.

3 In her representation, the Representor asserts that despite him not being made a beneficiary of the trust and being excluded from benefit under it, C has in fact received substantial sums from the underlying companies which comprise the majority of trust assets, those benefits having been paid to him by way of directors' remuneration, bonuses, loans or other payments. Furthermore she asserts that the trustee does not have control over nor comprehensive information about the assets and liabilities of the companies within the group of which H Investment Holdings Limited is the head.

4 The Court is informed that C commenced divorce proceedings against the Representor in the Supreme Court of the State of New York, County of New York, on 20 th March, 2012. At issue in those proceedings is the extent and value of the assets of the Y Trust, and whether they should be regarded as assets available to either C or the Representor, to be taken into account in an equitable distribution of marital assets. It appears that there has been some difficulty in the divorce proceedings in the New York Court over the question of giving discovery. It is obviously impossible for us to say whether any culpability attaches to either of the parties before the New York Court for such difficulties, but we do note that it is asserted in Jersey that the trustee has accepted that it has been denied information regarding the underlying investments of the Y Trust for some time.

5 Against that background, the Representor convened the trustee before the Court so that the trustee could be given directions as to the steps it should take both to gain control of the underlying trust investments and for the purposes of any disclosures that ought to be obtained or made in New York.

6 Advocate Wilson appears for D to apply for his client to be convened to these proceedings as a party. If the Court were to make such an order, then he would be seeking an adjournment of the hearing in order that he might obtain the documents which had been provided by the Representor, take instructions from his client and generally put himself in a position whereby he could make submissions to the Court on his client's behalf. This judgment concerns whether or not D should be convened to the proceedings.

7 Where there are courts in different jurisdictions dealing with matters which are related, even if the issues are not directly the same, it is important as far as possible that the process in the other jurisdiction is clearly understood. For that reason, we are giving a slightly more extended judgment on D's application than a procedural request of this kind would normally merit.

8 Article 51(2) of the Trusts (Jersey) Law 1984 provides as follows:

> ***"The Court may, if it thinks fit –***
>
> ***Make an order concerning –***
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> ***(i) the execution or the administration of any trust*** ,
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> ***(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) …"***

9 By Article 51(3) an application to the Court for an order contemplated in paragraph (2) may be made by a beneficiary. That, then, is the nature of the application which is before us. It is a trust application in relation to the administration of a Jersey trust and there is established case law as to how such applications are normally handled.

10 The usual rule is that trust applications of this kind are heard by the Court in private. Frequently, particularly if the judgment contains the Court's view of an issue of law or procedure which might be helpful in the future, the judgment is published albeit the names might be redacted. Such anonymity is necessary because the judgment frequently contains references to private information which the Court needs to be told in order to adjudicate on an application of this kind and it would be undesirable for trustees to hold back on making full and frank disclosure to the Court of their position including all factors which they have taken into account. Some of these factors are frequently sensitive for one reason or another.

11 In this case, it appears that C's New York divorce attorney was told of the prospective application by the Representor's English solicitor, and that the Representor's New York divorce attorney informed the New York Court that steps would be taken to obtain permission from the Royal Court for the court papers to be made available to C who is not, ostensibly at least, a beneficiary. We do not think the giving of that confirmation was appropriate. These proceedings are heard in private, and material which is put before the Court must of necessity be everything which is relevant to the decision which the Court makes. As a matter of policy, this Court does not encourage any practice which might act as a bar or impediment upon the performance of the obligation by parties to trust litigation of this kind to make full and frank disclosure to the Court.

12 It is to be noted in particular in this case that in any event C is not a beneficiary under the terms of the Y Trust. Indeed we understand him to be an excluded person. He therefore has no entitlement to see trust documents. Of course, as a director of some of the companies within the group, he has an entitlement to see company documents, but that is not the same thing at all.

13 Furthermore, in this case, it remains a possibility, and we put it no higher than that, that the arrangements by which C received payments or benefits from those companies might be the subject of further proceedings as between the trustee and C. That is a further reason, therefore, why this Court would not, even if the parties agreed, necessarily approve the passing of information in trust proceedings to C.

14 On the other hand, there is a strong policy reason for ensuring that as far as we can, we provide information to enable the New York court to do justice in the matters before it, namely the divorce between C and B.

The present application

15 Advocate Wilson, making the application for D to be convened, submitted that this was a private trust and trust documents should not usually be disclosed to the wider world. Until he knew precisely what was intended to be disclosed, he was fighting with both hands tied behind his back. He submitted that his client could not rely upon the trustee because it had its own interests at heart and was responding to pressure from the Representor. As a result the trustee has taken steps to interfere in the management of the underlying companies to the prejudice of their value, and thus to the prejudice of the trust. He submitted that C had run and built up this business, a group of trading companies, and on any view, to alienate him would damage the business and therefore the trust property. The *modus operandi* in relation to this trust had changed, suddenly, and all these questions now arose. He added that whether the change in *modus operandi* was a good thing or not was a subject which needed careful consideration. In the circumstances he submitted that the Court ought to hear the other side of the story so as not to reach a decision which was unfair to his client, and there was no chance of the Court hearing both sides of the story if only the Representor and the trustee were parties.

16 Advocate MacRae's answer to these submissions was that D was merely expressing C's concerns. He submitted that D in reality had no concerns of her own. C's own affidavit sworn in the divorce proceedings confirmed that the vast majority of the companies within the group were not trading companies, but rather investment holding companies. Advocate MacRae submitted that there was no question of prejudice to any of the beneficiaries in the steps which he was asking the Court to take. The consequences of joining D to the proceedings would almost inevitably be an adjournment, because there would have to be consideration given to what redactions if any ought to be made to the documents which were before the Court, and then Advocate Wilson would have had to have time to consider these documents. The adjournment would therefore cause real prejudice. He pointed out

that Messrs Taylor Wessing, a firm of English solicitors who acted for C, used almost identical terms to Messrs Baker and Partners, acting for D when they described *"knee jerk reactions"* to the response of the trustee to the pressure brought by the Representor. This showed, he submitted, that there was a common author to the letters sent on behalf of C and of D.

17 For the trustee, Advocate Speck submitted that the complaints from D and from C related to steps which the trustee had already taken — there had been changes in the boards of the three holding companies, but not the main trading company in India; some restrictions had been imposed on operations within the companies to ensure that there was no further risk of monies going outside the trust structures improperly; there had been correspondence with the escrow agent in respect of a large sum of money expected to be payable shortly arising out of the sale of the K business, and the trustee wanted to ensure that these sale proceeds were secured.

18 Advocate Speck went on to submit that there would and should be proper disclosure to the New York court in any event in relation to the divorce. He submitted that it was very hard to see what possible prejudice could be caused to any of the beneficiaries as a result of the orders which the Representor was actually seeking.

19 In reply Advocate Wilson submitted that neither his client nor the Representor knew much about the businesses in question, but the position overall had not been helped by the secrecy engendered by this application. In answer to a question which had been posed in the course of Advocate Speck's submissions, he confirmed to us that initially this firm had been instructed by Messrs Taylor Wessing, who must apparently therefore have been acting for both C and D. In principle he agreed the two courts in New York and Jersey should speak to each other. In general, however, he relied upon the rule that beneficiaries are convened to important applications in order that the court gets the benefit of full argument before making any orders which would provide some protection for a trustee which implements them.

20 We were referred to the decision of the Royal Court in the matter of the *E, R, O and L Trusts* [2008] JLR N 17 [2008] JRC 053 in which the Court was considering the application of JA to be joined to proceedings commenced by BA, SA and HA as representors and to which Verite Trust Company Limited and Appleby Trust (Jersey) Limited were respondents. The applicant J was a brother of one of the representors H, and both of them were children of B and S, the two other representors. Each of the parents had established six discretionary settlements governed by Jersey law, and these trusts between them held approximately 89% of the issued share capital of a company called A Limited, which was the parent of a group of companies which carried on a successful business. J was Chairman and Chief Executive of the company A Limited. The balance of the shares in A Limited was held by individual members of the A family. Apart from modest amounts of cash, the sole asset of each family trust was its shareholding in A Limited.

21 Unfortunately the two brothers were in dispute in relation to the affairs of A Limited and the court proceedings were commenced in relation to the H Family Trusts. J sought to intervene in these proceedings, notwithstanding that he was not a beneficiary of any of these trusts.

22 The judgment of the Royal Court was given by Birt, DB, who said this:–

> ***"21 When the court sits in its supervisory capacity to consider directions or rulings it should give in relation to a trust, it has to consider in each case who should be convened to the hearing.*** The starting point is that the trust property is held beneficially for the beneficiaries and accordingly it is normally appropriate that they should be convened (see *re A Settlement* [1994] JLR 139 ***at 144 per Bailhache, Bailiff).*** However, as that case made clear, it is not invariably the case that all the beneficiaries need to be heard. Many of them have an identical interest; alternatively their interest may be extremely remote. It is ultimately a matter for the discretion of the court as to which beneficiaries should be convened having regard to the nature of the particular application and the particular circumstances.
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> ***22. Even where a beneficiary has an adverse interest (e.g. he would be the opposing party in litigation which the trustee proposes to commence) it is still usually appropriate to convene that beneficiary to the application for directions. However, as is made clear in*** *re Moritz* [1959] 3 ALL ER 767 , ***the court may in such circumstances order that some or all of the written material produced to the court by the trustee or other beneficiaries is not supplied to the adverse party and may also require the adverse party to leave the court whilst it hears the trustee and other beneficiaries about the strength or weaknesses of the course of action which is proposed. Such a procedure is frequently adopted in this court.***
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> ***23. As well as beneficiaries, the court may think it appropriate to hear from others who have a close connection with the trust even if they are not beneficiaries. For example there may be a protector whose views would be material; and sometimes the nature of the issue before the court may mean that it is appropriate to hear from the settlor even if he is not a beneficiary. But again, whether this is appropriate will depend upon the circumstances.***
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> ***24. …***
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> ***25. As Bailhache, Bailiff made clear at 168 in re Abacus, the question is whether it is necessary that a party be convened in order properly to determine the trustees' application (or in this case that of the beneficiaries). If that test is satisfied, the court has a discretion to convene the relevant party. It seems to us that the underlying rationale for convening a beneficiary is essentially two-fold:–***

> ***(i) it is likely that a beneficiary will have something material which the court ought to be aware of before deciding what directions to give.*** Thus ***the view of a beneficiary on whether it would be right to take a particular course of action is clearly something relevant for the court to know.***
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> ***(ii) it may also be thought unfair for the court to make a decision which would affect the trust (and therefore the interests of the beneficiary) without giving that beneficiary an opportunity of putting his observations to the court.***
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> ***Neither of these considerations is likely to have such strength in the case of a person who is not a beneficiary.*** It is for this reason that it is only rarely appropriate to convene a stranger to the trust to an application for directions."

23 We note that in that particular case J was not convened to the proceedings.

24 We agree with the comments of Birt, DB, cited above. We therefore accept the starting point which Advocate Wilson proposed, namely that D would normally be convened to the proceedings because she was a beneficiary whose interest was not remote, and indeed not identical to that of the Representor.

25 However in this case, we have exercised our discretion not to do so, the reasons for which now follow.

26 We think there is a distinction to be drawn on the facts of this case between the different issues which are raised on the papers before us. One of those issues relates to the identification and conservation of trust assets. The other issue is the question of disclosure to the New York court of what is otherwise private information in relation to the Y Trust. We say immediately that in our judgment there is a legitimate interest which D has in the second issue. Accordingly we are not willing to give directions to the trustee on the request of the Representor in relation to disclosure matters without D being convened.

27 Different considerations arise however in relation to the question of identification and conservation of trust assets. It is clear from what Advocate Wilson has told us that there is an obviously close connection between D and her brother in that Messrs Taylor Wessing act for both clients. Advocate Wilson was not clear as to whether he could continue to receive instructions from Taylor Wessing from now on, but we think we should proceed for the time being upon the basis that there is a high degree of risk that information available to D may become or have become available to C. Given that one of the issues which has been raised on the papers put before us is the extent to which there may be some further enquiry of C by the trustee, it seems to us that in relation to conservatory and identification issues, it would not be appropriate at this stage that either the written material produced to

the Court be provided to D or that the intended conservatory measures be notified to her. Indeed, it is in her own interests as a beneficiary that this is so. Advocate Wilson claimed that the goodwill of C was essential for the continued wellbeing of the companies involved in the group structure, but it is plain from the material we have seen that it is not proposed that any steps be taken by the trustee in relation to what we are told is the only trading company in the group, other than such steps as may have been taken already. In those circumstances, the maintenance of C's goodwill within this group of companies (which he ought to be expected to maintain in any event in the interests of his children as beneficiaries) ought to be unaffected by the directions which we have been asked to give.

28 We have also taken note of the position adopted by the trustee, namely that it regards these steps as entirely appropriate for a trustee to take to ensure that the trustee is in control of the trust assets. We consider that all of the relief requested of us in relation to identification and conservatory measure is relief to which no beneficiary could reasonably object.

29 In the circumstances, we do not think that D has anything material of which we ought to be aware before deciding upon these directions, which are in many respects not particularly contentious directions, given the general duties of trustees to have control over trust assets. Furthermore we do not think it is unfair for the court to make a decision on this matter without giving D an opportunity of putting her observations to the court. In these circumstances, although one starts from the position that the beneficiaries ought to be convened, the departure from that position is justified by the requirement, in the interests of conserving the trust property, that C is not put on notice as to the next steps which the trustee is directed to take.

30 Accordingly, the application of D to be convened to these proceedings is dismissed. It is not necessary for her to be a party and to be heard at this stage. It may well be that the court receives subsequently a representation from the Representor concerning disclosure to the New York court, and as at present advised, we are of the view that should it be necessary for such representation to be brought, it would be appropriate to convene D at that stage.