The T Settlement

Jurisdiction:	Jersey
Judge:	F.C. Hamon, O.B.E., Jurats Le Brocq, Bullen
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Text

[2002] JRC 33

ROYAL COURT

(Samedi Division)

Before:

F.C. Hamon, **Esq**., O.B.E., **Commissioner, and** Jurats Le Brocq, **and** Bullen.

In the matter of the T Settlement

Advocate T.J. Le Cocq **for the Trustees**.

Advocate G.R. Robinson **for the minor and unborn beneficiaries**.

Authorities

Trusts (Jersey) Law 1984: Article 43.

In re Osias Settlement (1987–88) JLR 389 at 412.

In re N (1999) JLR 86 at 92.

In re Hampden Settlement Trusts (1977) TR 177.

Inglewood v Inland Revenue Commissioners (1983) 1 WLR 366 at page 372.

In re Pilkington's Will Trusts [1964] A.C. 6122.

In Re CL (1969) Ch. 587 at 589.

In re Tinker's Settlement (1960) 1 WLR 1011.

in Re Clore's Settlement Trusts (1966) 1 WLR 995.

In the matter of the S. Settlement (24th July, 2001) Jersey Unreported; [2001/154].

Representation of the Trustees

Application to vary trust deed under Articles 43 and 47 of the Trusts (Jersey Law, 1984.

THE COMMISSIONER:

1 This is an application by Regent Trust Company and Mr. Peter Lesley Pexton who are joint trustees of the T Settlement. Advocate Le Cocq represents the trustees and Advocate Gillian Robinson (who was appointed by the Court) appears for the minor and unborn beneficiaries of the T Settlement. Although no other beneficiaries are represented all have communicated their acceptance of the proposals put before the Court by the trustees.

2 The settlor of the T Settlement we shall call Mrs. T. She and her husband came to Jersey in 1969 to live. They formed an investment company. It prospered hugely. Her husband died in 1970 and by reason of that fact Mrs. T inherited the company. The company held what were described to us by Advocate Le Cocq as “family investments”. In 1976 Mrs. T settled in a fully discretionary Jersey settlement all the shares in the company. The original beneficiaries were Mrs. T, her children and remoter issue and their spouses. There are four children, a total of seventeen adult beneficiaries and twenty-two minor beneficiaries, all great-grandchildren.

3 The letter of wishes made by Mrs. T on 20th September 1999 expressed the wish that the trustees should consider the settlement as being held in equal parts for her four children and their spouses. The intention could not be clearer. It reads:-

“In this regard I should like you to look upon the trust fund as if it were being

held in four equal shares but each share being held for the benefit of each of my children or if they so wish for their issue. Please consult with my children both now and after my demise as to how they wish their quarter share to be distributed amongst their particular branch of the family".

4 It is clear (and this is supported by the affidavit of Mr. Pexton) that Mrs. T wished her children to have a say as to how each of their quarter shares would be handled. As it happens there is complete unanimity of wishes amongst the four children.

5 In September and October 1980, three sub-settlements were created. The first was for the benefit of the settlor, the other two were for the benefit of two granddaughters who had been born after Mr. T's death and by that reason did not benefit from the provisions made for the grandchildren who were then living.

6 Mrs. T was satisfied that her sub-settlement provided for her income needs. The sub-settlement produced about £17,000 per annum and she had a bank account with £50,000 in it.

7 In 1980 Mrs. T returned to live in the United Kingdom. For that reason she was excluded from the settlement to avoid UK Income Tax liability and for no other reason. The trust remained governed by the law of Jersey.

8 Mrs. T remained in England living happily with one of her children. She was visited regularly by the others. It was a very happy family. Mrs. T grew older.

9 What no one could have foreseen was that the Finance Act 1998 made her, as an English resident, potentially liable for any capital gains realized as a result of sales of the investments in the trust. These assets had, by prudent investment, grown from the modest original assets settled of £77,000 to a figure which now approximates to £3.5 million.

10 Mrs. T cannot now leave the United Kingdom. She is a sprightly 98 years old. The mind is willing, but sadly the flesh is weak.

11 It could be argued that Mrs. T might well have a statutory right of reimbursement from the trustees but we have some doubt that this Court is able to give effect to an English statutory right of reimbursement against a Jersey trust. The problem is (and we are satisfied on this point) that Mrs. T would not be able to repay the tax because of her relatively limited means. Mrs. T in her august age would stand in peril of being bankrupted.

12 It is clear from what Advocate Le Cocq has told us and from what we have seen of the trust deed that were it not for the locked door of clause 22 the directions sought could be achieved within the provisions of the deed.

13 Sadly, the wording of clause 22 could not be clearer. If we pare the wording down, we can read it like this:-

> *"No excluded person should be capable of taking any benefit of any kind by virtue of any consequence of the settlement and in particular but without prejudice to the generality of the foregoing provisions of this clause …..* no power or discretion hereby or by any appointments made hereunder or by law conferred upon the trustees or by any of them shall be capable of being exercised in such manner that any such excluded person will or may become entitled directly or indirectly to any benefit from any manner or in any circumstances whatsoever."

14 Before us, Advocate Le Cocq based his submission to a very great extent on the moral and family basis for making the order. He asks us to add to clause 22 this wording:-

> *"For the avoidance of doubt, no provision herein shall prevent any payment being made to the settlor if she is at any time excluded pursuant to clause 9 of the deed by way of reimbursement or settlement of any tax liabilities that she may incur as a result of the operation of this settlement, including without limitation capital gains liabilities"*.

15 Advocate Le Cocq urges upon us that this amendment to clause 22 would meet the wishes of the adult beneficiaries and would meet the morality of the case. He did, of course, refer us to the law.

16 Article 43 of the Trusts (Jersey) Law 1984 confers powers on this Court to give its approval on behalf of persons unable for one reason or another to consent for themselves to agreements between beneficiaries to vary the terms of the trust.

17 We have here a remarkably close family. Its closeness is epitomized in the affidavit of one of the sons of Mrs. T.:-

> *"We are a very close family, notwithstanding the fact that we are a large family and in some cases rather far flung.* All of my brothers and sisters, nieces, and nephews are aware of these proceedings and all consented to the payment being made on the first occasion when it was to come before the Court (and copies of their letters are exhibited hereto at pages 1 to 19). On this second occasion, they have all confirmed in writing that they view any payment which is made or to be made to my mother as being in their interests and for their benefit. Copies of all these letters are at pages 20 to 37. Speaking for myself (and my own letter to Messrs. Ogier & Le Masurier also signed by my wife at page 20), I believe that I owe a moral duty to my mother not to allow her to be in very substantial debt as a result of her great generosity. My mother is now 98 years

of age and she resides in a cottage owned by my wife and I, which is adjacent to our own home. Whilst in reasonably good health for her age we have not thought it desirable to go into any detail about the threat that hangs over her since I know that it would worry her greatly. My mother has always had a great aversion to debt of any kind". (She has now been informed at her insistence). "I know that she has no resources of her own that would enable her to settle her Capital Gains Tax liability since she settled her entire wealth into the settlement. It is for that reason that I know in my own case and believe it in the case of my brothers, sisters, nieces, and nephews, that we would view any payment being made by the Trustee in settlement of my mother's Capital Gains Tax liabilities as being for our moral benefit, and in our interests. As stated above, we are a close knit family, although quite large and far flung. My mother is very much viewed as "the matriarch" of the family and the whole family sees her as frequently as possible. She has 21 [now 22] great grandchildren, and has met most of them. She has photographs of all of them around her home which are regularly updated by the grandchildren. I therefore believe that if the great grandchildren, who are currently minors, were in a position to speak for themselves then they would also feel a moral obligation to my mother such that would lead them to view the requested payments as being in their own interests and for their moral benefit".

18 We have many letters from various members of Mrs. T's extended family. These letters, all supportive of the application, came from all corners of the globe.

19 In the leading case of *In re Osias Settlement* (1987–88) JLR 389 at 412 the Court said:-

> ***"In exercising its discretion, the function of the Court is to protect those who cannot protect themselves.*** We must do what is truly for ***their benefit.*** We can, in a proper case, give our consent to a scheme to avoid tax" .

20 In the case of *In re N* (1999) JLR 86 at 92 the Court said this:

> ***"In*** *In Re Oasis Settlement* (1987–88) JLR 389 ***at 412 the Court spoke of the "infinite varieties of fact situations which may arise".*** It is clear, however, from that case that there is no need for there to be a financial benefit nor is a financial benefit in itself sufficient. The Court should also consider the educational and social benefit of what is proposed" Earlier the Court referred to the Canadian case of *Re Irving* (1975) 66 DLR (3d) 387 ***which posed this question –***
>
> ***"Is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest after sustained consideration of the expectancies and risk and the proposal made would be likely to accept?"*** .

21 Whilst there were no unborn beneficiaries that needed to be considered in In re N there is a similarity that bears on this case. That trust was set up for tax purposes, the settlor's skill and generosity had created the trust fund, the settlor was excluded and the settlor faced a tax liability that had never been anticipated.

22 *In re Hampden Settlement Trusts* (1977) TR 177 the Court said this at page 180:-

> ***"Such benefit need not consist of a direct financial advantage to the person who is being benefited.*** It may be that he is benefited by benefiting a near relation or by relieving him of moral responsibilities."

23 We are talking of a trust fund that is now in excess of £3 million and of a family that can exist financially outside the terms of the trust fund.

24 In *Inglewood v Inland Revenue Commissioners* (1983) 1 WLR 366 at page 372 the Court said:-

> ***"If property is held upon trust for a beneficiary contingently on his attaining a specified age, the statutory power enables one half of the capital to be applied for the benefit of the person contingently entitled to the property*** . ***The word "benefit" is very widely construed: see*** *In re Pilkington's Will Trusts* [1964] A.C. 6122. ***It will thus be possible, by an exercise of the statutory power, to advance half the fund to the trustees of a new settlement under which the beneficiary's interest is postponed to an age later than 25, or, indeed, under which he took no interest at all: see*** *In re Hampden Settlement Trusts* [1977] T.R. 177. ***The sole criterion is the benefit of the beneficiary.*** If it is for his benefit, for example for fiscal or family reasons, to make such an advance as I have mentioned there would be power to do so. Thus, in *In re Hampden* ***an advance was made on trusts under which the primary beneficiaries were children of the advanced beneficiary."***

25 If we look at the reasoning of the adult beneficiaries the moral reasons for their decisions are pellucid.

26 A 98 year old benefactress is caught by provisions of an English statute. The Trust that she established was designed to benefit her children and all their issue. Had the Settlor and her advisers been omniscient they would have foreseen the Finance Act 1998. They did not and could not. The children and grandchildren do not want to profit at her expense. Does moral ethos alter radically by reason of distance in time? The grandchildren keep closely in touch with Mrs. T. She has updated photographs of them all about her.

27 We entirely agree with Advocate Robinson that any payment by the trustees while clause 22 is in existence would be a breach of trust. Article 41 of the Trusts Law does not, in our

judgment, give this Court the power to authorize a breach of trust in advance.

28 We are therefore having to consider a variation of clause 22. In *Re CL* (1969) Ch. 587 at 589 Cross J. said on this question of unborn beneficiaries:-

> ***"Obviously one could not say that a daughter's children if they had been in existence and of full age would in all probability have consented to the proposed change in the settlement.*** The most one could say would be that it would be the fair thing to do and that one hoped that they would see their way to doing it. For the Court to force this act of generosity on them before their birth and say it was for their benefit would be absurd" .

29 We must remind ourselves that Re CL was an application for a variation of a trust on behalf of a beneficiary under interdiction under the U.K. Mental Health Acts and that Cross J made his comments obiter concerning the decision made in the case of *In re Tinker's Settlement* (1960) 1 WLR 1011. That case was a blunder of drafting and in the context of that blunder of drafting the remarks of Cross J are entirely appropriate. They do not, in our view, adversely affect the decision that we have to make.

30 Advocate Robinson rightly put the provisions of Article 43 of the Trusts (Jersey) Law 1984 (as amended) in the spotlight and in particular reminds us that:-

> ***"The Court shall not approve an arrangement ....*** unless the carrying out thereof appears to be for the benefit of that person" .

31 A helpful indication of the meaning of the word "benefit" is found in *re Clore's Settlement Trusts* (1966) 1 WLR 995:-

> ***"The improvement of the material situation of a beneficiary is not confined to his direct material advantage ....*** It includes the discharge of certain moral or social obligations on the part of the beneficiary, for example, towards dependants."

32 It is here that Advocate Robinson draws her distinction. It is not possible to argue, in her view, that Mrs. T is "dependent" on children not yet born and there is no benefit whatsoever to those unborn children to discharge a moral obligation towards their great-grandmother.

33 We are not able to support that argument in this case. If seventeen or so adults of the same family are unanimous in their moral obligation to Mrs. T and do not wish her to be jeopardized or put in fear of jeopardy as a result of her generosity then we agree with Advocate Le Cocq that the ethos is morally right no matter to what generation the ethos applies.

34 Advocate Robinson questioned the relatively long delay (from November 2000) in bringing this application in its present from but as we understand it, the original thinking of the trustees was to seek the Court's permission to reimburse Mrs. T. We cannot see that that permission would have been forthcoming even if it were a practical solution.

35 The proposal now comes in a slightly amended form. We note that one of the trustees says:-

> *"In the light of the present stock market wholesale investment changes are unlikely"*.

36 It appears that when the application first came before Court there was an element of urgency as the trustees rushed to realize capital gains. Some 85% of the investments are in equities. The market has subsequently fallen considerably. There is no immediate urgency but the equity market might change and this is a large trust fund which requires the flexibility which it had before the present deadlock came to a head. It is right that the trustees should not be confronted by urgency? In our view, if the variation is right on a moral and family basis why should it be necessary to wait until an element of urgency confronts the trustees before they can make the application. As Mr. Pexton says:-

> *"I should perhaps explain that the investment advisor's current strategy has been to favour holding stocks for long term capital appreciation.* However, circumstances may change and the Trustees would wish to be able to pursue as active an investment policy as the advisors advise was appropriate to achieve sustained growth of the overall Trust Fund. The investment advisors believe that the investment strategy would be more likely to achieve success if investment transactions can be effected for the growth of the Trust Fund as a whole, without having to consider external factors such as adverse tax consequences for the Settlor or for specific individual beneficiaries. I and the other Trustee believe that this approach is likely to result in a larger fund being available for the minor and unborn beneficiaries in subsequent years. Indeed, although we cannot be positive about this since it is not yet appropriate to formulate a new investment strategy, the Trustees are advised that it is likely that greater flexibility in the investments will lead to more additional funds being available in the long term (whether in terms of income or capital, as appropriate) than are likely to be paid to the Settlor by way of reimbursement."

37 We grant the variation. We are very grateful to Advocate Robinson for the measured and very helpful way that she put the contrary argument to us.

38 Advocate Le Cocq submits that it is a momentous decision for the trustees (even when authorized) to pay a substantial payment to a non-beneficiary. There is power for the trustees to make the payment but we are asked to look at the directions given by the learned Deputy Bailiff in *in the matter of the S. Settlement* (24th July, 2001) Jersey Unreported; [2001/154]. We adopt those directions. The Trustees are not surrendering their

discretion and their decision is made in good faith. In any event, Advocate Robinson has no argument with the proposed directions which the Court has power to order under Article 47 of the Trusts (Jersey) Law 1984 (as amended) and under powers conferred by Article 47 and Article 43 of the Law we direct that the trustees may vary the provisions of the deed as submitted and to pay whatever sum may be necessary to the settlor in order to enable her to meet any future Capital Gains Tax liabilities.