

Representation of Conrad Edwin Coutanche, Trustee of the X Trust

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	13 June 2002
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Text

[2002] JRC 119B

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Rumfitt, **and** Georgelin.

In the Matter of Articles 47 and 49 of the Trusts Jersey Law 1984.

And in the Matter of the X Trust.

Representation of Conrad Edwin Coutanche, Trustee of the X Trust.

M

First Party Convened

Advocate Kerry Joy Lawrence, Guardian ad Litem of the minor, unborn, and unascertained

beneficiaries of the X Trust
Second Party Convened

Advocate A.D. Robinson **for the Representor.**

Advocate M. St.J. O'Connell **for the First Party Convened.**

Advocate K. J. Lawrence, **for the Second Party Convened.**

Authorities

Matrimonial Causes (Jersey) Law 1949: Article 27(1).

J v M (22nd May, 2002) Jersey Unreported; [2002/102].

Re: S Settlement (2001) JLR N. 37; (24th July, 2001) Jersey Unreported; [2001/154].

Netherton v Netherton [2000] WTLR 1171

Re Esteem Settlement [\(2001\) JLR 7](#).

Application by the Representor for directions concerning the extent to which assets of the X Trust should be transferred to the former wife of the First Party Convened.

Deputy Bailiff

THE

- 1 The application before us this morning is made by the Trustee of the X Trust. The background is as follows. The Trust is a discretionary Settlement. It was established on 1st August, 1995, by X. The beneficiaries are M (to whom we shall refer as the husband) who is the sole son of X, the three daughters of the husband, any other issue of the husband and any charity.
- 2 The settlor died in December, 1995. The three daughters are the children of the husband and his former wife. The husband and the wife have recently been divorced, and the wife made application to the Family Division of this Court for financial provision. That Court held that the Trust was not a post-nuptial settlement and it therefore had no power to vary the Trust under Article 27(1) of the Matrimonial Causes (Jersey) Law 1949. However, the Court took into account the existence of the Trust, which has very substantial assets, when considering the financial provision which the husband should be ordered to make for his wife.

- 3 In its Judgment in *J v M* (22nd May, 2002) Jersey Unreported; [2002/102], the Family Division ordered the husband to make the following provision for the wife:
- (i) He was ordered to seek to procure the transfer of the former matrimonial home, which we shall refer to as “the property”, to the wife. The property had been left by the Will of X to a company which is wholly owned by the Trust. It was the matrimonial home and remains the home of the wife and the daughters. The husband now lives in the United States of America.
 - (ii) A lump sum of £1.8 million.
 - (iii) The transfer of a half interest in a company called “J.H Limited”.
 - (iv) The transfer of the contents of the property subject to the reservation of certain items as set out in paragraph 33 of the Judgment.
- 4 The husband does not have sufficient funds to make the lump sum payment ordered by the Court. Furthermore, the property and the contents belong to the Trust. In order to fulfil the Order of the Royal Court the Trustee is minded to make the following distributions, and it applies to this Court for approval of those distributions:
- (i) A distribution of £1.8 million to the husband in order to enable him to comply with the Order of the Royal Court for a lump sum payment in that sum.
 - (ii) Cancellation of any loan accounts owed to the Trust by J H Limited or *vice versa*, so as to enable the 50% shareholding to be transferred to the wife by the husband at the value attributed to it by the Royal Court.
 - (iii) To transfer ownership of the property to the wife.
 - (iv) To transfer ownership of the contents of the property to the wife subject to the reservation referred to earlier.
 - (v) In the event that the Family Division orders the husband to pay the costs of the matrimonial proceedings a distribution to the husband of such sum as will enable him to meet any such order for costs.
- 5 As well as counsel for the Trustee, the Court has heard from Advocate O'Connell on behalf of the husband and Advocate Lawrence on behalf of the minor and unborn beneficiaries.
- 6 The first point to note is the nature of this hearing. The Trustee has not surrendered its discretion to the Court. It wishes to make these distributions but is seeking the Court's approval. The application, therefore, falls within the second category of case listed in *Re: S Settlement*, (2001) JLR N. 37; (24th July, 2001) Jersey Unreported; [2001/154]. We must, therefore, consider whether the Trustee's decision has been formed in good faith, whether it

is a reasonable decision and whether it is vitiated by any conflict of interest.

- 7 However, the case also falls within the first category of application referred to in *Re S Settlement*, namely whether the proposed distributions are within the powers of the Trustee. That issue arises in this way: the wife is not a beneficiary of the Trust, yet she will be the ultimate recipient and beneficiary of the distributions to be made. The question, therefore, arises as to whether such distributions would constitute a fraud on a power, i.e. whether they are being made for the impermissible purpose of benefiting a non-beneficiary.
- 8 A similar issue has been considered in England in the case of *Netherton v Netherton* [2000] WTLR 1171. We agree with the views expressed by Charles J in that case.
- 9 Dealing first with the distribution of £1.8 million to fund the lump sum payment, the order of the Family Division has created a legal obligation on the part of the husband in favour of the wife. He owes her £1.8 million. She is effectively his creditor for that sum. He cannot pay it from his own resources. If he does not pay it she will presumably take civil action to enforce the award against him.
- 10 In those circumstances it is clearly for his benefit that the Trust should make a distribution to him so that he may meet his legal obligation. There is long-standing authority to the effect that a distribution to a beneficiary in order to enable him to pay his creditor may, depending on the circumstances, be for his benefit. On this point we would simply cite the passage in *Re Esteem Settlement* (2001) JLR 7 at paragraph 45, and the cases referred to therein.
- 11 We are in no doubt that on the particular facts of this case a payment to the husband, in order to enable him to meet his legal obligation to pay the £1.8 million, would be for his benefit and would therefore not amount to a fraud on a power. For the same reason the forgiveness of any loan account owed by J H Limited and any distribution to enable the husband to settle any order for costs would be distributions made to him in order to enable him to comply with his legal obligations created by the Order of the Royal Court in the matrimonial proceedings.
- 12 More difficult is the transfer of the property and the contents. The Royal Court did not order the husband to transfer these assets because they do not belong to him. It merely ordered him to seek to procure that the Trust transfers them to the wife. He has so requested the Trustee and the Trustee wishes to make the appointment. The husband in so acting has now complied with the Order of the Family Division.
- 13 The Trustee submits that even though the property and contents will be transferred to the wife the distribution would be for the benefit of the husband and the daughters as beneficiaries and would not therefore amount to a fraud on a power. In this they are supported by the husband and by Advocate Lawrence as representative of the minor and unborn beneficiaries.

14 The reasons given in support can be summarised as follows:

- (i) It is in the financial interests of the husband. It is said that if the Court refuses to approve the distribution the matter will have to be taken back before the Family Division because its Order will not have been fully complied with. That will inevitably re-open the matter and it seems highly likely that the Family Division would simply make a further order for lump sum payments in order to try to achieve the overall financial provision which it had deemed appropriate. Accordingly, if we refuse to approve the Order the likely consequence is that the husband will find himself facing a new legal obligation to pay a substantial capital sum.
- (ii) It is said to be in the interests of the husband generally that the litigation should be brought to an end. It is clear from the information before us that this has been hostile and bitterly contested litigation. It has affected the health of the husband. It is strongly submitted that, if the litigation is not brought to a close, his health will be further affected.
- (iii) It is said to be in the interests of the children that this litigation should be brought to an end as soon as possible. Inevitably hostility between parties can often affect children. It is submitted by Advocate Lawrence that it must be in their interests to bring matters to an end so that the parties can get on with their lives in the absence of continuing adversarial litigation over financial provision. This would therefore benefit the children.
- (iv) It is also said to be in the interests of the children that there be a clean break. In particular, if the property were to continue in the ownership of the Trust and to be occupied by the wife and children, there would be the risk of continuing differences between wife and the Trust, and this in turn would not be helpful to the children in seeking to overcome the effect of the divorce and putting matters behind them.

15 We accept those reasons. In our judgment they amount to proper reasons for the Trustee wishing to make the distribution of the property and the contents. It can properly be said that the primary purpose in making the distributions is for the benefit of the husband and the children in the way we have described.

16 It could also be said that there is a strong moral obligation on the husband to ensure that his former wife and children can continue to live in the former matrimonial home with all the stability which that brings. The husband wishes the Trustee to make this appointment in support of that moral obligation, and again, as was made clear in *Esteem* (*supra* at paragraph 42), it is proper for trustees to consider that an appointment made to comply with a moral obligation on a beneficiary — with the consent of that beneficiary, — is for his benefit. For all these reasons we conclude that this would not be a fraud on a power and would therefore be lawful.

17 We turn finally, therefore, to consider the matters identified at the beginning of this judgment. We are quite satisfied that the Trustee has reached his decision in good faith and that there is no conflict of interest which might vitiate it. For the reasons which we have given, we consider that the decision of the Trustee is perfectly reasonable and we therefore give our approval.