Representation of WW and XX (Trust) 22-Jan-2013 22-Jan-13

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	22 January 2013
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Court:	Royal Court
Date:	22 January 2013

Text

[2013] JRC 13

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C., Deputy**Bailiff, **sitting alone.**

IN THE MATTER OF THE REPRESENTATION OF WW AND XX

AND IN THE MATTER OF THE C FOUNDATION

Between
XX
Representor
and

A as trustees of the G Trust
First Respondent
B
Second Respondent
K
Third Respondent
L
Fourth Respondent
M
Fifth Respondent
N
Sixth Respondent

Advocate A. J. Clarke **for the Representors.**

Advocate M. J. Thompson **for the First Respondent.**

Authorities

Trusts (Jersey) Law 1984.

Representation of N re the Y Trust [2011] JRC 155A .

Lewin on Trusts (18th Edition).

In the matter of the Esteem Settlement [2001] JLR Note 8 .

Trust — application for a reversal of a cash flow order and costs.

Bailiff

THE DEPUTY

1 This judgment is given in relation to the application by the Representors for the following relief:–

(i) That the cash flow order first made in favour of the First Respondent on 24 th May, 2011, be reversed or amended;

(ii) That the First Respondent pay 75% of the total costs incurred by the Representors in the course of these proceedings. Argument was heard on 15 th and 28 th November, 2012, and judgment was then reserved.

2 The Representors were appointed as joint trustees of the first part of the trust fund of the C Foundation, a settlement made by C on 10 th July, 1981, with D Trustees (Jersey) Limited as the original trustees by Act of the Court dated 25 th February, 2011. The First Respondent was not a party to the application for the appointment of new trustees, and although the Court had ordered that the Second Respondent be served with the application, she did not appear on 25 th February, C informing the Court through Advocate Clarke that it had not been possible to serve her as her current address was unknown.

3 On 8 th April, 2011, the Representors brought the current proceedings. The Court ordered that the representation be served on the First Respondent at its registered address in Jersey, and upon the Second Respondent out of the jurisdiction by service on her English solicitor at an address in Gloucestershire. The other Respondents ordered to be served did not appear, but the First and Second Respondents did appear through counsel on the return date of 24 th May, 2011, which was fixed by the Court on 6 th May. The Court gave certain directions on 24 th May to which I will refer later in this judgment.

4 The Representors bring their representation pursuant to Article 51 of the Trusts (Jersey) Law 1984. In it, the Representors claim declarations that a deed of appointment of new protector dated 15 th August, 1984, of the first part of the trust fund of the C Foundation, the declaration of additional beneficiary of the same date, and a revocable appointment dated 16 th August, 1984, revocably appointing the whole of the first part of the trust fund to the Fifth Respondent be declared invalid; and furthermore that a sale contract dated 30 th September, 1984, whereby a company G Services Inc. (“G Services”) purchased from the Fifth Respondent the whole of her contingent reversionary interest in the first part of the trust fund of the C Foundation, and a subsequent release of the power of revocation making the appointment to the Fifth Respondent irrevocable, declared invalid as a result. The representation does not seek any order for costs against any of the Respondents.

5 The basis upon which these declarations were sought is that the Third Respondent signed the relevant documents as protector of the first part of the trust fund of the C Foundation when in fact she was not protector, because the former protector E had not in fact resigned at that date; accordingly that the appointment to the Fifth Respondent of a contingent reversionary interest in the first part of the trust fund of the C Foundation was invalid since the Third Respondent was not protector at the time of the appointment; that the contract of sale by the Fifth Respondent to G Services was invalid because the Fifth Respondent did not have any interest in the first part of the trust fund of the C Foundation which she could sell; and that all this arose from a knowing falsification of the relevant documents by the then trustee of the first part of the trust fund of the C Foundation namely P Finance SA, and/or by the Third Respondent and Fourth Respondent. It is to be noted that the Representors do not claim in the representation that there has been any wrong doing by the First Respondent. The knowing falsification has allegedly taken place by their predecessors in title as trustees of the first part of the trust fund of the C Foundation and/or by the Third and Fourth Respondents and the late E.

6 E was director and treasurer of G Services. On 14 th June, 1985, the directors of G Services made a declaration of trust to be known as the G Charitable Foundation (the "G Trust") and transferred all the shares held in G Services to the G Trust. The First Respondent as the present trustee of the G Trust was convened on the basis that it was in fact a trustee *de son tort*. The G Trust is now known as the E Family and Charitable Foundation.

7 On 24 th May, 2011, in the presence of counsel for the Representors and for the First and Second Respondents, the Court gave directions for the filing of answers and serving of evidence — the First and Second Respondents were required to file and serve their evidence and any answer by close of business on 8 th July, 2011, and the Representors had until 5 th August, 2011, to file any evidence in response. Such procedural orders are not at all uncommon in the context of Article 51 applications.

8 The Court also ordered as follows:–

> ***"Subject to any future order the Court may make as to costs:–***
>
> > ***(a) The Representors and the Second Respondent shall be entitled to their costs of and incidental to this hearing, including any work carried out to comply with the directions contained in this order, capped at £25,000 each, out of the E Charitable and Family Foundation Fund; and***
> >
> > ***(b) The First Respondent shall be entitled to its costs of and incidental to this hearing, including any work carried out to comply with the directions contained in this order, capped at £30,000, out of the E Charitable and Family Foundation Fund."***

9 In May 2011, the intention was that the substantive hearing would take place in the autumn, and a hearing date was subsequently set for 22 nd November, 2011. On that day, the Court heard limited argument and then adjourned the proceedings of its own motion until 15 th March, 2012, in order to allow time for the parties to seek to resolve all issues which remained outstanding through a mediation process. On 15 th March, 2012, the Court sat to give further directions in relation to the filing of evidence and specifically an order to the Representors to file a skeleton argument setting out whether they considered that the C Foundation or C had a liability under United Kingdom inheritance tax rules, and if not, stating why not. The Court noted that the requirement to engage in a mediation process had been frustrated by the approach of the Representors and ordered them to pay personally the costs incurred by the First Respondent on 14 th and 15 th March on a standard basis, all other costs being ordered to be costs of the proceedings.

10 Paragraph 8 of the order of 25 th March, 2012, directed the parties to use all reasonable efforts to resolve all issues between them through a mediation process. The order that day

also increased the quantum which could be paid under the cash flow costs order, which was extended to provide for a costs cap of £90,000 per party, payable out of the E Charitable and Family Foundation Fund. The matter was then generally adjourned for further directions before me, the hearing to take place on 18 th June, 2012.

The Defences Filed

11 The First Respondent filed an answer to the representation on 3 rd June, 2011. No admissions were made in that answer as to the validity of the appointment of the Representors as joint trustees of the first part of the C Foundation, in the light of what was asserted to be a lack of full and frank disclosure made by C in his representation in February 2011. The First Respondent pleaded a number of facts upon which it would rely for the purposes of asserting that there was at least a potential liability to inheritance tax in the United Kingdom. The First Respondent asserted that given the various factual circumstances pleaded, the Court may wish to consider whether other directions should be given as to who should act as a trustee of the first part of the trust fund of the C Foundation, and who should be its protector, and indeed whose wishes should be taken into account in relation to that trust fund. The answer filed concludes with a prayer that the Court consider what provision should be made in respect of any liabilities that the First Respondent might continue to face as a result of holding the assets within the G Trust, and also contended that the First Respondent had at all material times acted reasonably.

12 The Second Respondent filed her answer on the same day. The relief which she sought was a declaration that the appointment of the Representors as trustees of the C Foundation be void, coupled with an order appointing new trustees of the C Foundation. She sought the approval of a form of distribution in respect of the assets of the G Trust, and an appropriate order for costs.

Replies

13 The Representors filed replies to both answers on 23 rd June, 2011. The reply to the First Respondent was a full one. The Representors claimed that the First Respondent had escalated the costs involved in the matter, for the purposes of bringing a series of arguments of their own unrelated to the substance of the representation.

14 It was noteworthy from the answers filed that neither the First nor the Second Respondent contended that the prayers for relief in the representation ought not to be granted. The two primary objections raised in the defences filed were that the representors had not established that they had been properly appointed, and therefore had *locus standi* to bring the representation at all; and secondly that before sanctioning any distributions, the Court should have a long and hard look at any potential inheritance tax liabilities, which needed to be tackled as a priority before any trust funds could be released from the G Trust to the C Foundation. On 11 th April, 2012, the Representors filed a skeleton supplemental argument

dealing specifically with an alleged inheritance tax liability, with a draft affidavit from C. The executed version of the affidavit was provided on or about 25 th April.

15 On 22 nd May, 2012, the First Respondent filed a supplemental skeleton argument, in which it accepted that the sole issue directly affecting the First Respondent related to the question of a potential inheritance tax liability in respect of the assets under its control which might revert to the C Foundation. Reference was made to tax advice by the First Respondent from Q LLP, contained in a letter dated 15 th May, 2012. The First Respondent proposed that the representation be adjourned to enable joint disclosures to be made to Her Majesty's Revenue and Customs through Q LLP, and both C and the Second Respondent were invited to join into such disclosure by jointly instructing Q LLP.

16 In her supplemental skeleton argument dated 10 th May, 2012, the Second Respondent made similar submissions, but made a supplemental submission that the representors should provide some evidence to the Court that they were suitable persons to act as trustees.

The developments

17 On 15 th May, 2012, Q LLP had provided the First Respondent with further detailed advice. The accountants had been asked for advice as to whom Her Majesty's Revenue and Customs might regard as the Settlor in relation to the G and the C Foundation, for the purposes of capital transfer tax and inheritance tax. The advice given to the First Respondent was that there continued to be a problem in relation to potential liabilities for which the First Respondent might be accountable.

18 An unsuccessful mediation took place on 29 th May, 2012.

19 In the months between March and May, C had taken up the question of outstanding tax with Her Majesty's Revenue and Customs. By a letter dated 4 th April, 2012, regarding R Settlement dated 26 th April, 1977, HMRC said that they had no inheritance tax record of any settlement under the name of R nor anything under the date 10/07/1981.

20 On 23 rd April, C wrote to HMRC to ask for a clearance that the matter was closed. He provided further information on 10 th May. On 15 th May, HMRC wrote to him to say this:–

> " *Re RSettlement dated 26/04/1977 further to my telephone call to you today in connection with your letter of 10th May, 2012.*
>
> *I confirm that there is nothing further to be said about this matter.* As I previously advised, we do not have a file for this settlement, if indeed a file ever existed for capital transfer tax purposes.

So far as HMRC is concerned, the matter is closed."

21 On 6 th June, 2012, Advocate Clarke wrote to Advocate Thompson, with a copy to Advocate Goulborn on behalf of the Second Respondent, concerning disclosure to HMRC. Attached to that letter was the copy correspondence between C and HMRC. As a result, Mr Thompson referred the correspondence to Q LLP and sought further advice. That advice came back promptly to the effect that "from the correspondence with HMRC now provided, it seems clear that HMRC have no further interest in these arrangements and will not be raising any assessments. Although the risk we previously identified still exists the chances that HMRC would have any interest in taking it further are minimal given their correspondence with C."

Procedural difficulties

22 As a result of this advice, it became clear that all substantive matters other than costs had fallen away, and this was confirmed at the directions hearing which took place on 18 th June. What was left outstanding was the possibility of argument over the terms of any indemnity to outgoing trustees, the question of costs, the question of the cash flow allowance, and the matters raised by the Second Respondent's skeleton. The procedure which was then adopted was with hindsight unfortunate. Advocate Clarke proposed that a half day be fixed for any argument over the question of indemnities, in case that should be necessary, and also the question of costs as between the Representors and the First Respondent. He proposed exchange of skeleton arguments 14 days ahead of the hearing. In response, Advocate Thompson suggested sequential delivery of skeleton arguments. He confirmed his client would do its best to assist if needed on any other points. He then withdrew from the hearing with a view to saving costs.

23 Argument continued as between Advocate Clarke and Advocate Goulborn on behalf of the Second Respondent, whose main complaint related to the appointment of the Representors in the first place. It was pointed out that they were not regulated, and there was no guarantee they would ever come back to this jurisdiction if challenged.

24 In his response, Advocate Clarke asserted that a line should be drawn under these matters — the Court had already decided the Representors should be appointed. He indicated that there would be an argument with the Second Respondent over the nature of her participation and date would need to be fixed in the absence of agreement on the issue of costs. He agreed that the cash flow order should be increased by a further £20,000 in respect of the Representors and the First Respondent, but that the cash flow order in favour of the Second Respondent should cease forthwith.

25 The Court, having considered the matter, adjourned the issue of costs as against the Second Respondent, and did cancel the cash flow order as regards the Second

Respondent with immediate effect. It ordered that the issue of costs as against the Second Respondent should be dealt with prior to the question of indemnity and costs for the First Respondent. It is unclear whether that order came about at the request of the Representors, but that is unimportant for present purposes.

26 The Representors and Second Respondent duly fixed a date for argument on the question of costs. The submissions made by the Representors were that the Second Respondent had by her actions caused a substantial diminution in the value of the trust. The cash flow orders that had been made had facilitated her participation but they were always subject to a contrary order by the Court at a later stage. It was contended by the Representors that the Second Respondent should reimburse the fund with the costs which she had incurred and been paid out of the fund, and that furthermore she should pay 25% of the costs incurred by the Representors. It was said she had contributed nothing of substance and caused merely time and expense.

27 In reaching my decision, which was delivered by a reasoned judgment on 2 nd November, I indicated that the starting point was that the Second Respondent had been properly convened to the representation and had a legitimate interest in making submissions to the Court which were properly made to defend the interest of the trust of which she was a protector. Nonetheless I considered that she had gone outside the parameters of an ordinary administration action when she contended that the Representors did not have *locus standi* to bring the proceedings and had been incorrectly appointed, and that should be reflected in a costs order.

28 In relation to her participation on tax matters, I said this:–

> ***"I do not consider that the First Respondent was wrong to raise the question of potential inheritance tax liabilities.*** It was for just the reason that such liabilities might arise that the Court placed some pressure on the parties to seek a mediation of their difficulties. The mediation was unsuccessful at the first attempt and on the second occasion was unsuccessful because the Representors were only prepared to discuss whether disclosure should be made to HMRC in relation to possible taxation liabilities; and in fact at a later stage HMRC confirmed that it had no further interest in the J family arrangements. Had this information been made known at an earlier stage, a good deal of costs could have been avoided, whether in relation to the mediation or otherwise. Because I do not see the First Respondent as having raised a matter which ought not to have been raised, I do not consider that the Second Respondent was wrong to endorse the concerns which the First Respondent advanced.
>
> ***Similarly I do not think that the fact that she was convened as protector of the G Trust made it inappropriate to raise these concerns.*** The possible inheritance tax liabilities could have had an impact on more than one branch of the family. Although she was convened as protector of the G Trust, I do not

consider it would be right to penalise her for making clear her concerns about potential inheritance tax liabilities."

29 In the event, the application that the Second Respondent paid 25% of the Representors' costs was rejected, and an order was made in relation to reimbursement by the Second Respondent of a proportion of her costs which had been paid on the cash flow order.

Decision on present application

30 It is unfortunate that the Representors chose or agreed to the bifurcation of the costs applications against the First Respondent and the Second Respondent. The fact is that I have already adjudicated on the application for costs against the Second Respondent where the basis for the application was that the Second Respondent ought not to have supported the First Respondent in raising the tax issues which were raised. I have already therefore adjudicated on the issue, albeit indirectly, as to whether the First Respondent should have raised these tax issues, and I have found that it was not unreasonable to do so. That finding was an important part of the rationale for the exercise of discretion in relation to the costs application against the Second Respondent. In my judgment, an issue estoppel has now arisen in relation to the propriety or otherwise of the First Respondent having raised the potential inheritance tax liabilities. The Court has found that it was not incorrect or wrong for the First Respondent to have done so, and it is impossible to reopen that issue now.

31 However, given the extensive argument which I have heard, I think it is right to go on to consider what the position would be if there were no issue estoppel, and I were required to exercise my discretion on the matter of costs untrammelled by the decision already given in relation to the Second Respondent.

32 I note that there is no issue of law as between the Representors and the First Respondent insofar as this is concerned. The Representors accept that a trustee is normally entitled to full indemnity out of the trust for reasonable legal costs if incurred in a neutral position in litigation. In the matter of the *Representation of N re the Y Trust* [2011] JRC 155A, the Court confirmed that a trustee could be denied an indemnity for its costs if it were found to have acted unreasonably. The extract from Lewin on Trusts (18th Edition) in these terms was approved:–

> ***"A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increase costs by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others not the trustees or which ought not to be contested at all…"***

33 The Representors therefore agree that if the Court is satisfied that the trustee has not acted unreasonably, then it ought to have its costs reimbursed out of the trust.

34 For the First Respondent, Advocate Thompson submitted that the right test was summarised *In the matter of the Esteem Settlement* [2001] JLR Note 8 which summarises the Court's judgment as follows:–

> ***"In an application for directions regarding a trust, the court is entitled to expect the fullest assistance from the trustee, who should ensure that all the relevant law is before the court and that all arguments for and against the possible causes of action are rehearsed.*** Although there will be some cases where the trustee should remain neutral and leave the other parties to fight it out, it should usually assist the court by recommending a particular course of action and explaining the reasons for its recommendation. It would not be in the public interest for trustees to be penalised in costs simply because the court did not agree with their recommendations and they will therefore only be deprived of their costs out of the trust fund if they are found to have acted unreasonably."

35 I have applied these principles to the claim for costs made by the Representors.

36 The paperwork for considering this present application has not been put forward in a way which was helpful to the Court. Instead of having files which were prepared for the Court's use in accordance with the relevant practice directions, I have had before me 12 different files containing an amount of material which has been put before the Court at different times since March 2012. Documents are not found consistently where they should be, and in many cases there are several copies of the same document emerging out of different files. This has made the exercise of assessing what is fair more difficult, but nonetheless I think I have read all the material, documents and correspondence. I am in no doubt at all that the Representors have not discharged the burden of showing that the First Respondent has acted unreasonably. Indeed, quite the reverse. If the burden were on the First Respondent, it has in my judgment more than satisfied the task of establishing that it has acted reasonably in the present proceedings. My reasons are as follows:–

> (i) There is no doubt that the First Respondent did take tax advice over a prolonged period in relation to the possibility of inheritance tax being due, arising out of the various trust arrangements which were made. By letter dated 8 th June, 2007, the chartered accountants QA Limited, subsequently Q LLP, advised Mr James Muir, then of T Limited and subsequently of the First Respondent, in some detail on various UK tax aspects in connection with the G Trust. It is probably enough for the these purposes to look at the second paragraph of his letter:–
>
> > *"Tax overview. The original approach to this firm by the trustees was to*

obtain advice relating to the termination of the trust but I did indicate that the trustees could have a UK inheritance tax ("IHT") issue which may require resolution prior to termination. This letter will provide more detail on this and other subjects although my comments are primarily directed to those aspects that effect the trustees."

(ii) Detailed advice indicated that there were two possible approaches to the question of inheritance tax — one scenario produced an overall liability of approximately £345,000, whereas the second had a lower exposure of approximately £60,500.

(iii) Advice was subsequently taken from counsel regarding the possibility of criminal liability on the part of the trustees. Counsel's opening remarks make plain what the difficulties were:–

"4. As I understand the position the historical facts of the case are not as clear as they might be due to the deaths of E and F, the putative appointees' parents, a paucity of contemporaneous documents and the passage of time. However, certain facts do seem to me to be clear. For the proposes of what follows I have relied predominately on the description of what is revealed by the available documentation in Mr Seedhouse's draft affidavit.

5. The trust was originally made the G Charitable Foundation and was created on 14 th June, 1985, and the original trustee was recorded in the trust deed as being "G Services, formerly V Consultants SA". It was in a form once common in which the identity of the settlor was not recorded and the only express beneficiaries were charitable institutions, although the trustee was given a power to add beneficiaries in their own discretion. The trust did not permit the trustee to add discretionary beneficiaries who were resident or ordinarily resident in the UK. It was plainly, as Mr Seedhouse describes it, part of an "aggressive" tax efficiency arrangement.

6. The background to the trust was that a successful family business appears to have been in place built up by E's father (I will refer to this as the "J Family Business"). The ownership of that company vested in three offshore holding companies (to which I will refer collectively as "J Holdings"). It would appear that the shares in these holding companies (1,000 shares in each) were held by the C Foundation, C being the son of E and the grandson of the founder of the company.

7. In the early 1980s it appears that the J Family Business experienced difficulties and eventually C took over the running of the business. C also became estranged from the other members of the family.

8. G Services Inc was a bearer share company, the 20 shares in which were issued in the form of certificates for eight, six and six respectively, all held by D Trustees (Jersey) Limited. On 10 th February, 1984, the two

certificates for six shares each were notified as being held by Le Gallais and Luce (Jersey advocates) for W Holdings Inc and S SA. The eight share certificate was to be cancelled and two new certificates for four shares each were to be issued to Le Gal (sic) and Luce to hold for the benefit of W Holdings Inc and S SA, so that each company now held 50% of the shares in G Services. I have no information as to the beneficial owner(s) of W Holdings Inc and S SA.

9. On 30 th September, 1984, X, about whom I have no information but who appears to have been granted a contingent reversionary interest in the "first part" of the C Foundation, contracted to sell that contingent reversionary interest to G Trust for a nominal sum of HK$500. The "first part" of the C Foundation fund consisted of 378 shares in each of the three companies making up J Holdings, an amount which Mr Seedhouse considers likely corresponds to E's holding in the family business. The effect of the terms of the contingent reversionary interest and its sale to G Trust was that on 31 st May, 1985, assuming that X survived until then, G Trust became absolutely entitled to the "first part" of the C Foundation Fund, i.e. stopped the shares in J Holdings. The purpose of this arrangement was plainly to enable the value of the shares to be transferred to G Trust without a direct transfer by either E or the trustees of C Foundation, and Mr Seedhouse infers that similar arrangements were put in place in relation to the shareholding of F (E's wife) and B.

10. On 22 nd November, 1984, P Finance SA, the trustees of C Foundation, received the sum of £2,259,000 from a company named Y Limited in return for 75.3% of the shares in J Holdings. The purchase letter was signed on behalf of Y Limited by a man named "Mr Z" who C has described as a "colleague". C himself retained 24.7% of J Holdings, which holding was retained by C Foundation. C has consistently referred to this transaction as a "management buyout", saying that £2,259,000 was provided by venture capitalists.

11. The result was that on 31 st May, 1985, G Trust became absolutely entitled to the proceeds of sale of the "first part" of the C Foundation Fund, amounting to £1.1m. I have no instructions as to what became of the balance, although I note that F had her own trust."

37 It may well be that C and/or the Representors would challenge many of the facts upon which counsel proceeded to advise. That does not seem to me to be material for present purposes. All I am required to consider is whether the First Respondent acted reasonably in approaching the question as to any inheritance tax liabilities might arise, and if so against whom they might be enforced. In this context it is right to lay some emphasis upon the fact that the First Respondent was not in any way responsible for or involved in the arrangements that were made in the mid-1980s or earlier, which might have given rise to an inheritance tax liability. It was not a trustee of the G Trust at the relevant time. It is clear that

the trust records have not been maintained as completely as any incoming trustee would wish. In my judgment, it was not unreasonable for the First Respondent to proceed on the basis that everything said to it by C was not necessary correct. The papers I have seen show that there was not always a consistent approach taken by C to these issues over the last 15 years.

38 Q LLP gave further advice to the First Respondent in December 2009, January 2010, February 2010, October 2010, July 2011 and a long letter of advice on 15 th May, 2012. I do not accept the criticisms made by Advocate Clarke that the First Respondent did not follow the Q LLP advice. For my part, I accept that the First Respondent, as a trustee, was entitled to take reasonable steps to ensure that it did not face personally a liability for inheritance tax which in fairness ought not to have been imposed upon it. The First Respondent was entitled to have regard to any such potential liability for the purposes of framing its request for an appropriate indemnity on passing over the assets to the C Foundation. Even if that were not so, and in my judgment that is the position, I would not be willing to exercise a discretion over costs against a trustee which acted in that way because to do so would place a Jersey trustee at the mercy of draconian liability provisions which might be contained in foreign taxation statutes.

39 I have not heard evidence on all the relevant facts as to whether there was or was not any inheritance tax liability. What I have seen is entirely convincing, as far as I am concerned, that there was a risk of such liability. I note that in the email advice dated 14 th June, 2012, Q LLP, having received a copy of the correspondence between C and HMRC in April/May 2012, advised Advocate Thompson as follows:–

> *"As discussed on the phone I believe that this gives us a good way forward.* From the correspondence with HMRC now provided it seems clear that HMRC have no further interest in these arrangements and will not be raising any assessments. Although the risk we previously identified still exists the chance that HMRC would have any interest in taking it further are minimal given their correspondence with C." (emphasis added)

40 In other words the accountants are advising there is a still a potential risk in relation to inheritance tax liability. It was not unreasonable for the First Respondent to put matters before the Court which raise this issue and I accept that they have acted pragmatically by withdrawing their objections once the April/May correspondence with HMRC became available.

41 The second reason I consider that the First Respondent has acted reasonably is that the Representors are in my judgment wrong to assert that the principles of *Re Esteem Settlement* do not apply. The Representors plead a considerable amount of detail in their representation. They complain now that the First Respondent has answered that material. They contend that because the First Respondent has not defended their claims, it was not necessary to answer the detail which was contained in their own representation. I do not

accept that contention. First of all, it does not lie in the mouth of the Representors to say that the material they pleaded is not relevant and should not have been answered. Secondly, a trustee is, on the application of *Re Esteem*, required to assist the Court with facts which are known to it. Indeed *Re Esteem* suggests that the trustee could usefully make submissions to the Court as to what is the right course to follow — the fact that the First Respondent in this case chose not to follow that course is not be held against it. The First Respondent was in my view, on all the correspondence and on the pleadings, justified in bringing to the attention of the Court the other relevant material.

42 It was said by Advocate Clarke that events prior to the issue of the representation are not relevant to the question of costs incurred since the representation. I reject that contention as well. In my judgment, the events prior to the representation are the context which provides the basis of the approach taken by all the parties in the litigation. Furthermore, although Advocate Clarke suggested that it would not be right to hold against the Representors any conduct on the part of C which was considered inappropriate, I am quite satisfied that there is a sufficient connection between the Representors and C to take such matters into account, in the margins of the exercise of discretion. In that context, I note that correspondence between C and the First Respondent had taken place for a considerable period of time prior to the issue of his representation in February 2011 seeking the appointment of the Representors as trustees of the first part of the trust fund of the C Foundation. At the time of bringing that representation, he must have been aware that the First Respondent was considering taking out its own application to Court in relation to the G Trust seeking directions in relation to the same assets which the Representors have now successfully asserted, should be returned to the C Foundation. C was also aware that the Second Respondent, his sister, was a protector to the G Trust, and therefore must have been aware that the First Respondent would be able to contact her if he were unable to do so. Nonetheless, he chose not to bring any of this material to the attention of the Court when asking the Court to make the orders for the appointment of the Representors as trustees of the first part of the trust fund of the C Foundation. That was not the full and frank disclosure that one would have expected of a settlor asking the Court to exercise its discretion to appoint new trustees. It does not follow that the Court would necessarily have pursued any different course had it been made aware of the information. The criticism is that the information was not disclosed.

43 C's failure to disclose information at that time has been mirrored by his failure to inform the First Respondent of the approach that was made to HMRC in April 2012. At that time work was being done on preparations for mediation of the issues between the Representors and the First Respondent, and obviously one of the major areas for preparation was question of potential inheritance tax liabilities. It seems to be to be highly likely that the Representors were aware of C's approach to HMRC. If they were aware of that information and did not share it, that goes against any application for an award of costs in their favour. If they were not aware of that information, then that is a circumstance they may wish to take into account in the exercise of any trustee discretion to appoint a benefit to C, who should have told them.

44 An award of costs is often made with a broad brush in circumstances where the substantive issues have not been fought out to a conclusion. In this case, I note that the representation itself does not even seek costs against the First Respondent. It is simply an Article 51 application, in ostensibly non-contentious litigation, where one might expect costs to come out of the fund which is the subject of dispute.

45 For all these reasons I exercise my discretion to refuse the Representors' application for costs against the First Respondent.